

**THE
LAWS OF ENGLAND**



VOLUME XXV.

THE LAWS OF ENGLAND

BEING

A COMPLETE STATEMENT OF THE WHOLE
LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE, THE
EARL OF HALSBURY
LORD HIGH CHANCELLOR OF GREAT BRITAIN,
1885-86, 1886-92, and 1895-1905,

AND OTHER LAWYERS.

VOLUME XXV.

*ROYAL FORCES.
SALE OF GOODS.
SALE OF LAND.
SET-OFF AND COUNTERCLAIM.
SETTLEMENTS.
SEWERS AND DRAINS.
SHERIFFS AND BAILIFFS.*

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TITLE.	CONTRIBUTED BY
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SALE OF LAND .	J. M. LIGHTWOOD, Esq., M.A., formerly Fellow of Trinity Hall, Cambridge; in conjunction with HUMPHREY H. KING, Esq., B.A., LL.B. (Parts I. V., and VI.); F. W. PEARSON, Esq., M.A., B.C.L., LL.B. (Parts II., III., and IV.); CECIL A. HUNT, Esq., M.A., LL.B. (Parts VII. and VIII.); and R. LEIGH RAMSBOTHAM, Esq., M.A. (Part IX.) Barristers-at-Law.
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<i>Estate Duty</i> - - - - -	ESTATE AND OTHER DEATH DUTIES.
<i>Estates and Interests in Real Property</i> - - - - -	REAL PROPERTY AND CHATTELS REAL.
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<i>Family Arrangements</i> - - - - -	FAMILY ARRANGEMENTS.
<i>Fraudulent Conveyances</i> - - - - -	BANKRUPTCY AND INSOLVENCY ; FRAUDULENT AND VOIDABLE CONVEYANCES.
<i>Gifts</i> - - - - -	GIFTS.
<i>Husband and Wife</i> - - - - -	HUSBAND AND WIFE.
<i>Independent Advice</i> - - - - -	FAMILY ARRANGEMENTS ; FRAUDULENT AND VOIDABLE CONVEYANCES ; SOLICITORS.
<i>Land Improvement</i> - - - - -	LAND IMPROVEMENT.
<i>Landlord and Tenant</i> - - - - -	LANDLORD AND TENANT.
<i>Perpetuities</i> - - - - -	PERPETUITIES.
<i>Powers</i> - - - - -	POWERS.
<i>Protector of Settlement</i> - - - - -	REAL PROPERTY AND CHATTELS REAL.
<i>Rectification and Rescission</i> - - - - -	MISREPRESENTATION AND FRAUD ; MISTAKE.
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<i>Voidable Conveyances</i> - - - - -	FRAUDULENT AND VOIDABLE CONVEYANCES.
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SETTLING DAY.

See STOCK EXCHANGE.

SEVERANCE.

See PARTITION ; POWERS ; REAL PROPERTY AND CHATTELS
REAL.

SEWAGE.

See PUBLIC HEALTH AND LOCAL ADMINISTRATION ; SEWERS AND DRAINS ; WATERS AND WATERCOURSES.

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<i>Damages</i>	- - - "	DAMAGES.
<i>Easements</i>	- - - "	EASEMENTS AND PROFITS A PRENDRE.
<i>Factories</i>	- - - "	FACTORIES AND SHOPS; PUBLIC HEALTH AND LOCAL ADMINISTRATION.
<i>Highways</i>	- - - "	HIGHWAYS, STREETS, AND BRIDGES.
<i>Negligence</i>	- - - "	NEGLECT.
<i>Nuisance</i>	- - - "	NUISANCE.
<i>Pollution of Watercourses</i>	- - - "	WATERS AND WATERCOURSES.
<i>Private Drainage</i>	- - - "	LAND IMPROVEMENT.
<i>Private Street Works</i>	- - - "	HIGHWAYS, STREETS, AND BRIDGES.
<i>Public Health</i>	- - - "	PUBLIC HEALTH AND LOCAL ADMINISTRATION.
<i>Railways</i>	- - - "	RAILWAYS AND CANALS.
<i>Rating</i>	- - - "	RATES AND RATING.
<i>Sanitary Accommodation</i>	- - - "	PUBLIC HEALTH AND LOCAL ADMINISTRATION.
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<i>County Court Bailiffs</i>	-	"	COUNTY COURTS.
<i>Crown Process</i>	-	"	CROWN PRACTICE.
<i>Distress Bailiffs</i>	-	"	DISTRESS.
<i>Duties of Sheriffs at Elections</i>	-	"	ELECTIONS.
<i>Duties of Sheriffs as to Juries</i>	-	"	JURIES.
<i>Execution</i>	-	"	EXECUTION.
<i>Interpleader by Sheriffs</i>	-	"	INTERPLEADER.
<i>Public Authorities Protection</i>	-	"	PUBLIC AUTHORITIES AND PUBLIC OFFICERS.
<i>Writs of Inquiry</i>	-	"	COURTS.

SHIFTING USE.

See PERPETUITIES ; REAL PROPERTY AND CHATTELS REAL ;
SETTLEMENTS ; WILLS.

SHIP-BREAKER.

See SHIPPING AND NAVIGATION ; TRADE AND TRADE UNIONS.

SHIP-BROKER.

See SHIPPING AND NAVIGATION.

ABBREVIATIONS

USED IN THIS WORK.

A. C. (preceded by date) . .	Law Reports, Appeal Cases, House of Lords, since 1890 (<i>e.g.</i> [1891] A. C.)
A.-G.	Attorney-General
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1841
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826
Adv.-Gen.	Advocate-General
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649
Amb.	Ambler's Reports, Chancery, 2 vols., 1725—1783
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740
Anon.	Anonymous
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)
Ashb.	Ashburner's Principles of Equity, 1902
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani
B. & Ad...	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870
Bac. Abr.	Bacon's Abridgment
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854
Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814
Bankr. & Ins. R.	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855

Bar. & Arn.	..	..	Barron & Arnold's Election Cases, 1 vol., 1843—1846
Bar. & Aust.	..	..	Barron & Austin's Election Cases, 1 vol., 1842
Barn. (OH.)	..	..	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741
Barn. (K. B.)	..	..	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734
Barnes	..	..	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760
Batt.	..	..	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826
Beat.	..	..	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830
Beav.	..	..	Beavan's Reports, Rolls Court, 36 vols., 1838—1866
Beav. & Wal.	..	..	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846
Beaw.	..	..	Beawes's Lex Mercatoria
Bellewe	..	..	Bellewe's Cases temp. Richard II., King's Bench, 1 vol.
Bell, C. C.	..	..	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860
Bell, Ct. of Sess.	..	..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792
Bell, Ct. of Sess. fol.	..	..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795
Bell, Dict. Dec.	..	..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833
Bell, Sc. App.	..	..	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850
Belt's Sup.	..	..	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756
Benl.	..	..	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627
Ben. & D.	..	..	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579
Bing.	..	..	Bingham's Reports, Common Pleas, 10 vols., 1822—1834
Bing. (N. C.)	..	..	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840
Bitt. Prac. Cas.	..	..	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876
Bitt. Rep. in Ch.	..	..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884
Bl. Com.	..	..	Blackstone's Commentaries
Bl. D. & Osb.	..	..	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848
Bli.	..	..	Bligh's Reports, House of Lords, 4 vols., 1819—1821
Bli. (N. S.)	..	..	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837
Bos. & P.	..	..	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804
Bos. & P. (N. R.)	..	..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807
Bract.	..	..	Bracton De Legibus et Consuetudinibus Angliæ
Bro. Abr.	..	..	Sir J. Brooke's Abridgment
Bro. C. C.	..	..	W. Brown's Chancery Reports, 4 vols., 1778—1794
Bro. Ecc. Rep.	..	..	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872
Bro. (N. C.)	..	..	Sir R. Brooke's New Cases, 1 vol., 1515—1558
Bro. Parl. Cas.	..	..	J. Brown's Cases in Parliament, 8 vols., 1702—1800
Bro. Supp. to Mor.	..	..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.
Bro. Synop.	..	..	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827
Brod. & Bing.	..	..	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822

Brod. & F.	..	..	Brodrick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864
Broun	..	..	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845
Brown. & Lush.	..	..	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866
Brownl.	..	..	Brownlow and Geldesborough's Reports, Common Pleas, 2 parts, 1669—1624
Bruce	..	..	Bruce's Decisions, Court of Session (Scotland), 1714—1715
Buchan.	..	..	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813
Buck	..	..	Buck's Cases in Bankruptcy, 1 vol., 1816—1820
Bulst.	..	..	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626
Bunb.	..	..	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741
Burr.	..	..	Burrow's Reports, King's Bench, 5 vols., 1756—1772
Burr. S. C.	..	..	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776
Burrell	..	..	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840
C. A.	..	..	Court of Appeal
C. B.	..	..	Common Bench Reports, 18 vols., 1845—1856
C. B. (N. S.)	..	..	Common Bench Reports, New Series, 20 vols., 1856—1865
C. C. A.	..	..	Court of Criminal Appeal
C. C. Ct. Cas.	..	..	Central Criminal Court Cases (Sessions Papers), 1834—(current)
C. L. R.	..	..	Common Law Reports, 3 vols., 1853—1855
C. P. D.	..	..	Law Reports, Common Pleas Division, 5 vols., 1875—1880
C. & P.	..	..	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841
Cab. & El.	..	..	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885
Cald. Mag. Cas.	..	..	Caldecott's Magistrates Cases, 1 vol., 1777—1786
Calth.	..	..	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618
Camp.	..	..	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816
Carp. Pat. Cas.	..	..	Carpmael's Patent Cases, 2 vols., 1602—1842
Car. & Kir.	..	..	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853
Car. & M.	..	..	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1843
Cart.	..	..	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673
Carth.	..	..	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700
Cary	..	..	Cary's Reports, Chancery, 1 vol.
Cas. in Ch.	..	..	Cases in Chancery, fol., 3 parts, 1660—1697
Cas. Pract. K. B.	..	..	Cases of Practice, King's Bench, 1 vol., 1655—1775
Cas. Sett.	..	..	Cases of Settlements and Removals, 1 vol., 1689—1727
Cas. temp. Finch	..	..	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680
Cas. temp. King	..	..	Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733
Cas. temp. Talb.	..	..	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737
Ch. (preceded by date)	..	..	Law Reports, Chancery Division, since 1890 (e.g., [1891] 1 Ch.)
Ch. App.	..	..	Law Reports, Chancery Appeals, 10 vols., 1865—1875
Ch. D.	..	..	Law Reports, Chancery Division, 45 vols., 1875—1890
Ch. Rob.	..	..	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808

Char. Pr. Cas. . . . .	..	Charley's New Practice Reports, 3 vols., 1875—1876
Char. Cham. Cas. . . . .	..	Charley's Chamber Cases, 1 vol., 1875—1876
Chit. . . . .	..	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822
Cl. & Fin. . . . .	..	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846
Clay. . . . .	..	Clayton's Reports and Pleas of Assises at Yorke, 1 vol., 1631—1650
Clif. & Rick. . . . .	..	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884
Clif. & Steph. . . . .	..	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872
Cockb. & Rowe . . . . .	..	Cockburn and Rowe's Election Cases, 1 vol., 1833
Co. Ent. . . . .	..	Coke's Entries
Co. Inst. . . . .	..	Coke's Institutes
Co. Litt. . . . .	..	Coke on Littleton (1 Inst.)
Co. Rep. . . . .	..	Coke's Reports, 13 parts, 1572—1616
Coll. . . . .	..	Collyer's Reports, Chancery, 2 vols., 1844—1846
Coll. Jurid. . . . .	..	Collectanea Juridica, 2 vols.
Colles . . . . .	..	Colles' Cases in Parliament, 1 vol., 1697—1713
Colt. . . . .	..	Coltman's Registration Cases, 1 vol., 1879—1885
Com. . . . .	..	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740
Com. Cas. . . . .	..	Commercial Cases, 1895—(current)
Com. Dig. . . . .	..	Comyns' Digest
Comb. . . . .	..	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698
Con. & Law. . . . .	..	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843
Cooke & Al. . . . .	..	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834
Cooke, Pr. Cas. . . . .	..	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747
Cooke, Pr. Reg. . . . .	..	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742
Coop. G. . . . .	..	G. Cooper's Reports, Chancery, 1 vol., 1792—1815
Coop. Pr. Cas. . . . .	..	O. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838
Coop. temp. Brough. . . . .	..	O. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834
Coop. temp. Cott. . . . .	..	O. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)
Corb. & D. . . . .	..	Corbett and Daniell's Election Cases, 1 vol., 1819
Couper . . . . .	..	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885
Cowp. . . . .	..	Cowper's Reports, King's Bench, 2 vols., 1774—1778
Cox, C. C. . . . .	..	E. W. Cox's Criminal Law Cases, 1843—(current)
Cox & Atk. . . . .	..	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846
Cox, Eq. Cas. . . . .	..	S. C. Cox's Equity Cases, 2 vols., 1745—1797
Cox, M. & H. . . . .	..	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, Vol. I., 1846—1852
Cr. & J. . . . .	..	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832
Cr. & M. . . . .	..	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834
Cr. M. & B. . . . .	..	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835
Cr. & Ph. . . . .	..	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841
Cr. App. Rep. . . . .	..	Cohen's Criminal Appeal Reports, 1909—(current)
Craw. & D.	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846

Crav. & D. Abr. C.	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838
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Cripps' Church Cas.	Cripps' Church and Clergy Cases, 2 parts, 1847—1850
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Cro. Eliz.	Croke's Reports <i>temp.</i> Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603
Cro. Jac.	Croke's Reports <i>temp.</i> James I., King's Bench and Common Pleas, 1 vol., 1603—1625
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Cunn.	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735
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Mer.	Merivale's Reports, Chancery, 3 vols., 1815—1817
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Mod. Rep.	..	Modern Reports, 12 vols., 1669—1755
Mol.	Molloy's Reports, Chancery (Ireland), 3 vols., 1808—1831
Mont.	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832
Mont. & A.	..	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838
Mont. & B.	..	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833
Mont. & Ch.	..	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840
Mont. D. & De G.	..	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844
Mont. & M.	..	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830
Moo. P. C. C.	..	Moore's Privy Council Cases, 15 vols., 1836—1863
Moo. P. C. C. (N. S.)	..	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873
Moo. Ind. App.	..	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872
Moo. & P.	..	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831
Moo. & S.	..	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834
Mood. & M.	..	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830
Mood. & R.	..	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844
Mood. C. C.	..	Moody's Crown Cases Reserved, 2 vols., 1824—1844
Moore (κ. B.)	..	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620
Moore (C. P.)	..	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827
Mor. Dict.	..	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808
Morr.	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893
Mos.	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730
Murp. & H.	..	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837
Murr.	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830
My. & Cr.	..	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841
My. & K.	..	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835

Nels. . . . .	..	Nelson's Reports, Chancery, 1 vol., 1625—1692
Nev. & M. (K. B.)	..	Neville and Manning's Reports, King's Bench, 6 vols., 1832—1836
Nev. & M. (M. C.)	..	Neville and Manning's Magistrates' Cases, 3 vols., 1832—1836
Nev. & P. (K. B.)	..	Neville and Perry's Reports, King's Bench, 3 vols., 1836—1838
Nev. & P. (M. C.)	..	Neville and Perry's Magistrates' Cases, 1 vol., 1836—1837
New Mag. Cas. . .	..	New Magistrates' Cases (Bittleston, Wise and Parnell), 2 vols., 1844—1848
New Pract. Cas.	..	New Practice Cases (Bittleston and Wise), 3 vols., 1844—1848
New Rep. . . . .	..	New Reports, 6 vols., 1862—1865
New Sess. Cas. . .	..	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851
Nolan . . . . .	..	Nolan's Magistrates' Cases, 1 vol., 1791—1793
Notes of Cases . .	..	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850
Noy . . . . .	..	Noy's Reports, King's Bench, fol., 1 vol., 1558—1649
O. Bridg. . . . .	..	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—1666
O'M. & H. . . . .	..	O'Malley and Hardcastle's Election Cases, 1869—(current)
Owen . . . . .	..	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614
P. (preceded by date)	..	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 (e.g., [1891] P.)
P. D. . . . .	..	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890
P. Wms. . . . .	..	Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735
Palm. . . . .	..	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629
Park. . . . .	..	Parker's Reports, Exchequer, fol., 1 vol., 1743—1766
Pat. App. . . . .	..	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822
Pater. App. . . .	..	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873
Peake . . . . .	..	Peake's Reports, Nisi Prius, 1 vol., 1790—1794
Peake, Add. Cas.	..	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812
Peck. . . . .	..	Peckwell's Election Cases, 2 vols., 1803—1804
Per. & Dav. . . .	..	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841
Per. & Kn. . . . .	..	Perry and Knapp's Election Cases, 1 vol., 1833
Ph. . . . .	..	Phillips' Reports, Chancery, 2 vols., 1841—1849
Phil. El. Cas. . .	..	Phillips' Election Cases, 1 vol., 1780
Phillim. . . . .	..	J. Phillimore's Ecclesiastical Reports, 3 vols., 1754—1821
Phillim. Eccl. Jud.	..	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875
Pig. & B. . . . .	..	Pigott and Rodwell's Registration Cases 1 vol., 1843—1845
Pite. . . . .	..	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624
Plowd. . . . .	..	Plowden's Reports, fol., 2 vols., 1550—1579
Poll. . . . .	..	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682
Poph. . . . .	..	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627

ABBREVIATIONS.

Pow. R. & D.	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856
Prec. Ch... ..	Precedents in Chancery, fol., 1 vol., 1689—1722
Price	Price's Reports, Exchequer, 13 vols., 1814—1824
Q. B.	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852
Q. B. (preceded by date)	Law Reports, Queen's Bench Division, 1891—1901 (e.g., [1891] 1 Q. B.)
Q. B. D.	Law Reports, Queen's Bench Division, 25 vols., 1875—1890
R.	The Reports, 15 vols., 1893—1895
R. (Ct. of Sess.) ..	Bettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898
R. P. C.	Reports of Patent Cases, 1884—(current)
R. R.	Revised Reports
R. S. C.	Rules of the Supreme Court
Rast.	Rastell's Entries
Rayn.	Rayner's Tithe Cases, 3 vols., 1575—1782
Real Prop. Cas... ..	Real Property Cases, 2 vols., 1813—1847
Rep. Ch... ..	Reports in Chancery, fol., 3 vols., 1615—1710
Rick. & M.	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889
Rick. & S.	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894
Ridg. temp. H.	Ridgeway's Reports, temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746.
Ridg. L. & S.	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795
Ridg. Parl. Rep. ..	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796
Rob. Eccl.	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853
Rob. L. & W.	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851
Robert. App.	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727
Robin. App.	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841
Roll. Abr.	Rolle's Abridgment of the Common Law, fol., 2 vols.
Roll. Rep.	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625
Rom.	Romilly's Notes of Cases in Equity, 1 part, 1772—1787
Rose	Rose's Reports, Bankruptcy, 2 vols., 1810—1816
Ross, L. O.	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols.
Rowe	Rowe's Reports (England and Ireland), 1 vol., 1798—1823
Rul. Cas.	Campbell's Ruling Cases, 25 vols.
Russ.	Russell's Reports, Chancery, 5 vols., 1824—1829
Russ. & M.	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833
Russ. & Ry.	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823
Ry. & Can. Cas. ..	Railway and Canal Cases, 7 vols., 1835—1854
Ry. & Can. Tr. Cas.	Railway and Canal Traffic Cases, 1855—(current)
Ry. & M.	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1238—1826
S. C.	Same Case
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 (e.g., [1906] S. C.)
S.-G.	Solicitor-General
Saint	Saint's Digest of Registration Cases, 1843—1906, 1 vol.

Salk.	..	..	Salkeld's Reports, King's Bench, 3 vols., 1689—1712
Sau. & Sc.	..	..	Sausse and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840
Saund.	..	..	Saunders's Reports, King's Bench, 2 vols., 1666—1672
Saund. & A.	..	..	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904
Saund. & B.	..	..	Saunders and Bidder's Locus Standi Reports, 1905—(current)
Saund. & O.	..	..	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848
Saund. & M.	..	..	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858
Sav.	..	..	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591
Say.	..	..	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756
Sc. Jur.	..	..	Scottish Jurist, 46 vols., 1829—1873
Sc. L. R.	..	..	Scottish Law Reporter, 1865—(current)
Sch. & Lof.	..	..	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806
Sc. R. R.	..	..	Scots Revised Reports
Scott	..	..	Scott's Reports, Common Pleas, 8 vols., 1834—1840
Scott (N. R.)	..	..	Scott's New Reports, Common Pleas, 8 vols., 1840—1845
Sea. & Sm.	..	..	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860
Sel. Cas. Ch.	..	..	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.)
Sess. Cas. (K. B.)	..	..	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747
Sh. & MacI.	..	..	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838
Sh. (Ct. of Sess.)	..	..	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838
Sh. Dig.	..	..	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868
Sh. Just.	..	..	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831
Sh. Sc. App.	..	..	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824
Sh. Teind Ct.	..	..	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831
Shep. Touch.	..	..	Sheppard's Touchstone of Common Assurances
Show.	..	..	Shower's Reports, King's Bench, 2 vols., 1678—1695
Show. Parl. Cas.	..	..	Shower's Cases in Parliament, fol., 1 vol., 1694—1699
Sid.	..	..	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670
Sim.	..	..	Simons' Reports, Chancery, 17 vols., 1826—1852
Sim. (N. S.)	..	..	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852
Sim. & St.	..	..	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826
Skin.	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697
Sm. & Bat.	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825
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Smith, K. B.	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806
Smith, L. C.	Smith's Leading Cases, 2 vols.
Smith, Reg. Cas.	..	..	C. L. Smith's Registration Cases, 1895—(current)

Smythe	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840
Sol. Jo.	Solicitors' Journal, 1856—(current)
Spence	Spence's Equitable Jurisdiction of the Court of Chancery
Spinks	Spinks' Prize Court Cases, 2 parts, 1854—1856
Stair Rep.	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681
Stark.	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823
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State Tr.	State Trials, 34 vols., 1163—1820
State Tr. (N. S.)	State Trials, New Series, 8 vols., 1820—1858
Story	Story's Commentaries on Equity Jurisprudence
Stra.	Strange's Reports, 2 vols., 1716—1747
Stu. M. & P.	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853
Sty.	Style's Reports, King's Bench, fol., 1 vol., 1646—1655
Sw.	Swabey's Reports, Admiralty, 1 vol., 1855—1859
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T. L. R.	The Times Law Reports, 1884—(current)
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Taml.	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830
Taunt.	Taunton's Reports, Common Pleas, 8 vols., 1807—1819
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Toth.	Tothill's Transactions in Chancery, 1 vol., 1559—1646
Trist.	Tristram's Consistory Judgments, 1 vol., 1873—1892
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Tudor, L. C. Real Prop.	Tudor's Leading Cases on Real Property
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Tyr. & Gr.	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836
Vaugh.	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673
Vent.	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691
Vern.	Vernon's Reports, Chancery, 2 vols., 1680—1719
Vern. & Scr.	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788
Ves.	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817
Ves. & B.	Vesey and Beagles's Reports, Chancery, 3 vols., 1812—1814
Ves. Sen.	Vesey Sen.'s Reports, 2 vols., 1747—1756
Vin. Abr.	Viner's Abridgment of Law and Equity, fol., 22 vols.
Vin. Supp.	Supplement to Viner's Abridgment of Law and Equity, 6 vols.

W. Jo.	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640
W. N. (preceded by date)		Law Reports, Weekly Notes, 1866—(current (<i>e.g.</i> , [1866] W. N.))
W. R.	Weekly Reporter, 54 vols., 1852—1906
Wallis	Wallis's Reports, Chancery (Ireland), 1 vol., 1766—1791
Web. Pat. Cas.	Webster's Patent Cases, 2 vols., 1602—1855
Welsh, Reg. Cas.	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840
Went. Off. Ex.	Wentworth's Office and Duty of Executors
West	West's Reports, House of Lords, 1 vol., 1839—1841
West <i>temp.</i> Hard.	..	West's Reports <i>temp.</i> Hardwicke, Chancery, 1 vol., 1736—1740
West. Tithe Cas.	Western's London Tithe Cases, 1 vol., 1592—1822
White	White's Justiciary Reports (Scotland), 3 vols., 1886—1893
White & Tud. L. C.	White and Tudor's Leading Cases in Equity, 2 vols.
Wight.	Wightwick's Reports, Exchequer, 1 vol., 1810—1811
Will. Woll. & Dav.	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837
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Wms. Saund.	Williams' Notes to Saunders' Reports, 2 vols.
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Wolf. & D.	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858
Woll.	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841
Wood	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798
Y. & C. Ch. Cas.	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843
Y. & C. (EX.)	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1834—1842
Y. & J.	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830
Y. B.	Year Books
Yelv.	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613
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<i>Dockyards and Arsenals</i> - - -	"	CRIMINAL LAW AND PROCEDURE; POLICE; SHIPPING AND NAVIGATION; WATERS AND WATERCOURSES.
<i>Executive Government</i> - - -	"	CONSTITUTIONAL LAW.
<i>Exemption from Execution</i> - - -	"	EXECUTION.
<i>Exemption from Rates</i> - - -	"	RATES AND RATING.
<i>Expenditure, Imperial</i> - - -	"	PARLIAMENT; REVENUE.
<i>Harbours</i> - - -	"	SHIPPING AND NAVIGATION; WATERS AND WATERCOURSES.
<i>India</i> - - -	"	DEPENDENCIES AND COLONIES.
<i>Inspector-General of the Forces</i> - - -	"	CONSTITUTIONAL LAW.
<i>National Insurance</i> - - -	"	WORK AND LABOUR.
<i>Naval Chaplains</i> - - -	"	ECCLESIASTICAL LAW.
<i>Naval Courts</i> - - -	"	ADMIRALTY; COURTS; PRIZE LAW AND JURISDICTION; SHIPPING AND NAVIGATION.
<i>Nuncupative Wills</i> - - -	"	EXECUTORS AND ADMINISTRATORS; WILLS.

<i>For Pilotage</i> - - -	<i>See title</i>	ADMIRALTY; SHIPPING AND NAVIGATION.
<i>Prize</i> - - -	"	PRIZE LAW AND JURISDICTION.
<i>Public Officers</i> - - -	"	PUBLIC AUTHORITIES AND PUBLIC OFFICERS.
<i>Riot</i> - - -	"	CRIMINAL LAW AND PROCEDURE; MAGISTRATES.
<i>Royal Prerogative</i> - -	"	CONSTITUTIONAL LAW.
<i>Salvage</i> - - -	"	ADMIRALTY; SHIPPING AND NAVIGATION.
<i>Supreme Command of the Sovereign</i> - - -	"	CONSTITUTIONAL LAW.
<i>Territorial Chaplains</i> -	"	ECCLESIASTICAL LAW.
<i>Tidal Waters</i> - - -	"	WATERS AND WATERCOURSES.
<i>Tolls, Exemption from</i> -	"	HIGHWAYS, STREETS, AND BRIDGES.
<i>Tort, Liability for</i> - -	"	PUBLIC AUTHORITIES AND PUBLIC OFFICERS; TORT.
<i>Towage</i> - - -	"	ADMIRALTY; SHIPPING AND NAVIGATION.
<i>War Office</i> - - -	"	CONSTITUTIONAL LAW.
<i>War, Prerogatives of Crown relating to</i> - - -	"	CONSTITUTIONAL LAW.
<i>Wreck</i> - - -	"	ADMIRALTY; CONSTITUTIONAL LAW; SHIPPING AND NAVIGATION.

Part I.—The Royal Navy (a).

SECT. 1.—Introductory.

1. The naval forces of the Crown fall into two broad categories, the matériel and the personnel. Naval forces.

The matériel, apart from guns and equipment, consists of ships. Of these there are two classes, differing in legal status, the property in both of which is vested in the Crown.

2. The first and more important class comprises the ships of war, those armed vessels which fly the white ensign and pennant, are commanded by commissioned officers, and everywhere enjoy all the rights and privileges attached to the ships of a sovereign state by international law (b). Matériel
(1) ships
of war;

3. The other class comprises what are known as "fleet auxiliaries," and other ships necessary for the proper conduct of a (2) fleet
auxiliaries.

(a) As to the precedence of traffic on railways for naval purposes in time of emergency, see titles CONSTITUTIONAL LAW, Vol. VII., p. 69, note (1); RAILWAYS AND CANALS, Vol. XXIII., pp. 699, 700; as to the Admiralty control over ports and harbours, see titles CONSTITUTIONAL LAW, Vol. VI., pp. 458, 459; SHIPPING AND NAVIGATION; as to blockade, see titles CONSTITUTIONAL LAW, Vol. VI., p. 447; SHIPPING AND NAVIGATION; as to explosives, see title EXPLOSIVES, Vol. XIV., p. 363; as to the Admiralty Coroner, see title CORONERS, Vol. VIII., pp. 231 *et seq.*; as to prize law and jurisdiction, see title PRIZE LAW AND JURISDICTION, Vol. XXIII., pp. 275 *et seq.*

(b) *E.g.*, extritoriality and exemption from search; see title SHIPPING AND NAVIGATION; Halleck, International Law, 4th ed., Vol. I., pp. 229 *et seq.*; Hall, International Law, 6th ed., pp. 184 *et seq.* As to the rights and duties of captors of prize, see title PRIZE LAW AND JURISDICTION, Vol. XXIII., p. 283. As to the right to fly ensigns, see titles ADMIRALTY, Vol. I., p. 77; CONSTITUTIONAL LAW, Vol. VI., pp. 361 *et seq.*; SHIPPING AND NAVIGATION.

SECT. 1.
Intro-
ductory.

fighting fleet (c). These ships are not included in the term "His Majesty's ships in commission" used in the Naval Discipline Acts (d); they carry no guns, do not fly the pennant or white ensign, are not commanded by commissioned officers, and occupy no position of privilege under international law. Prior to 1906 the legal status of these ships and their crews was very uncertain. They belonged to the Crown, and therefore could not be registered (e) as British ships under the Merchant Shipping Acts (f); they were not "His Majesty's ships in commission," and therefore were exempt from ordinary naval discipline. In consequence, for the maintenance of discipline upon them there existed no legal sanction whatever, nor could they lawfully be given proper ship's papers. In 1906 power was given to register Government ships for the purposes of the Merchant Shipping Acts (f) under such regulations, and subject to such modification of the Acts, as might be provided by Order in Council (g).

* Personnel.

4. The personnel may be divided into the following classes: (1) the Royal Navy proper; (2) the Reserves; (3) the Volunteer Forces; (4) the Indian Marine; (5) the naval forces provided and maintained by the self-governing dominions, which may become an integral part of the Royal Navy in time of war; and (6) the Coastguard, which, though not usually a part of the fighting force of the Navy, may in certain circumstances be called into active service afloat: to these may be added the Royal Marines when on board ship (h).

The persons composing the personnel of the Navy enjoy certain privileges and suffer certain disabilities in consequence of their membership of the forces of the Crown (i).

Salvage
services.

5. Salvage services rendered by His Majesty's ships are, as regards remuneration, in exactly the same position as services rendered by ships privately owned (k), subject to the following limitations:—

(1) No claim is allowed for any loss, damage, or risk caused to the

(c) *E.g.*, hospital, repairing, and distilling ships, coal-carrying vessels, tugs, and other small dockyard vessels.

(d) Naval Discipline Act (29 & 30 Vict. c. 109); Naval Discipline Acts, 1884 (47 & 48 Vict. c. 39) and 1909 (9 Edw. 7, c. 41); see p. 9, *post*.

(e) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 741. They enjoyed, therefore, certain exemptions, *e.g.*, exemption from pilotage dues imposed by bye-laws under *ibid.*, s. 582; see *Symons v. Baker*, [1905] 2 K. B. 723; compare the cases cited in note (l), p. 5, *post*.

(f) See title SHIPPING AND NAVIGATION.

(g) Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 80 (1). Government ships are defined as being ships not forming part of the Navy, but belonging to or held by any person on behalf of the Crown, and, therefore, not registerable under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60) (Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 80 (3)). The Order in Council, 22nd March, 1911 (Stat. R. & O. 1911, p. 238), by which Government ships may be registered, excludes them from the purview of many of the sections of the Merchant Shipping Acts. Provision is made for the exercise and performance by the Admiralty of the powers conferred and duties imposed on owners by any section of the Acts so made applicable.

(h) For the law applicable to each of these classes, see pp. 7 *et seq.*, *post*.

(i) As to these privileges and exemptions, see, generally, pp. 91 *et seq.*, *post*.

(k) As to salvage generally, see titles ADMIRALTY, Vol. I., pp. 73 *et seq.*; INSURANCE, Vol. XVII., pp. 456, 457, 471, 490, 496; SHIPPING AND NAVIGATION; as to prize salvage, see title PRIZE LAW AND JURISDICTION, Vol. XXIII., p. 293.

PART I.—THE ROYAL NAVY.

SECT. 1. Intro- ductory.

ship, or her equipment, or stores, or for the use of any stores or other articles belonging to the Crown supplied in rendering these services, or for any other expense or loss sustained by the Crown by reason thereof (*l*).

(2) No claim for salvage services by one of His Majesty's ships may be finally adjudicated upon unless the consent of the Admiralty to its prosecution be proved. If it be not proved the claim stands dismissed with costs (*m*).

(3) Provision is made for the steps to be taken where salvage services are rendered outside the limits of the United Kingdom and the four adjoining seas by the commander or crew of one of His Majesty's ships (*n*).

(4) Money received either as salvage or as a gift in lieu thereof or in any other shape is distributable by the Accountant-General alone in accordance with the prize proclamation, or in such other manner as the Admiralty may direct. No such money may be accepted without the consent of the Admiralty (*o*).

(5) No claim for salvage remuneration can be made *in rem* against His Majesty's ships or stores salvaged (*p*).

In practice, however, the Admiralty always allows salvage remuneration. Sometimes the judge of the Admiralty Court has acted as arbitrator in such cases (*a*). But the present practice appears to be to allow *ex gratiâ* salvage remuneration fixed by an independent arbitrator.

6. No commanding officer is allowed to receive on board any merchandise for conveyance (*b*). This rule is subject to an exception in the case of specie and jewels (*c*).

Conveyance
of merchan-
dise.

(*l*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 557 (1). The expression "His Majesty's ships" includes a vessel belonging to the Bombay Government with a hired commander and crew (*Cargo ex Woosung* (1876), 1 P. D. 260, C. A.; *The Dalhousie* (1875), 1 P. D. 271, n.), but not a transport under charter to the Admiralty (*The Nile* (1875), L. R. 4 A. & E. 449; *The Bertie* (1886), 55 L. T. 520; 6 Asp. M. L. C. 26), nor a tug boat owned by the Board of Trade as trustees of Ramsgate Harbour (*The Cybele* (1878), 3 P. D. 8).

(*m*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 557 (1), (3). Leave of the Admiralty to claim salvage in respect of goods covers services to passengers (*The Alma* (1861), Lush. 378).

(*n*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 558—563; see title SHIPPING AND NAVIGATION.

(*o*) King's Regulations and Admiralty Instructions, 1906, as amended 1911 (hereinafter in Parts I. and II. of this title referred to as King's Regulations), art. 1885. The proclamation at present in force is dated the 17th September, 1900, and is to be found in the Quarterly Navy List.

(*p*) See *The Parlement Belge* (1880), 5 P. D. 197, C. A., in which the earlier cases are reviewed; see also title ADMIRALTY, Vol. I., pp. 19, 71. No action lies *in personam*, as it does against a private person (*Five Steel Barges* (1890), L. R. 15 P. D. 142, *per* HANNEN, P., at p. 146), for the property belongs to His Majesty.

(*a*) Compare *The Constitution* (1879), 4 P. D. 39, 45.

(*b*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 32.

(*c*) The apportionment of the gratuity for the carriage of public and of the freight money for the carriage of private treasure caused considerable friction; see the cases collected in Prendergast, *Navy Law*, 1852 ed., Vol. II., p. 361. The rate of freight and its distribution, in all cases, is now regulated by proclamation under the Freight for Treasure Act, 1819 (59 Geo. 3, c. 26). The proclamation at present in force is dated the 17th September, 1900, and is to be found in the Quarterly Navy List. An officer undertaking

SECT. 2.

Adminis-
tration.Board of
Admiralty.

SECT. 2.—Administration.

7. Before 1832 (*d*) the Navy was administered by three distinct departments, namely, the Admiralty Office, the Navy Board, and the Victualling Board. In 1832 the two latter departments were abolished and their duties transferred to what is now known as the Board of Admiralty (*e*).

The Board is composed of the Commissioners for executing the office of Lord High Admiral appointed by letters patent under the Great Seal. Its constitution has varied from time to time, and rests now on an Order in Council of the 10th August, 1904 (*f*). It consists of the First Lord of the Admiralty, who is invariably a member of the Cabinet, the First Sea Lord, the Second Sea Lord, the Third Sea Lord and Controller, the Fourth Sea Lord, the Civil Lord, the Additional Civil Lord (*f*), the Parliamentary and Financial Secretary, and the Permanent Secretary.

Distribution
of business.

The distribution of business is throughout under the control of the First Lord. Subject to his control, the First Sea Lord is responsible for the distribution of the Navy and its organisation for war, the Second Sea Lord for the personnel and discipline, the Third Sea Lord for the matériel and the military construction of the fleet, the Fourth Sea Lord for stores and transport, the Civil Lord for works and buildings, the civil staff for naval establishments, Greenwich Hospital and Marine Schools, the Additional Civil Lord for contracts and dockyard business (*g*), the Parliamentary Secretary for finance, and the Permanent Secretary for the management and discipline of the office, recommendations for appointments, correspondence, and the like secretarial duties (*h*).

the carriage of private treasure is liable at law for its loss (*Hodgson v. Fullarton* (1813), 4 Taunt. 787; *Hatchwell v. Cooke* (1816), 6 Taunt. 576).

(*d*) Report of the Commissioners, 1890, Parliamentary Paper [Cd. 5979], Appendix I.; Anson, *Law and Custom of the Constitution*, Vol. II.; *The Crown*, Part I., p. 190; Part II., p. 211; Stubbs, *Constitutional History*, Vol. II., pp. 311 *et seq.*; and see, generally, title CONSTITUTIONAL LAW, Vol. VII., pp. 88 *et seq.*

(*e*) The Navy Board was first constituted in 1512; in the following reign, that of Edward VI., the constitution was revised, and the civil management of the Navy entrusted to a board of principal officers, subordinate to the Lord High Admiral. At the Restoration, the Duke of York, being appointed Lord High Admiral, reconstituted the Navy Board, appointing three Commissioners to act with the Treasurer of the Navy, namely, the Comptroller, the Surveyor, and the Clerk of the Acts. The number of Commissioners varied from time to time, and a separate Victualling Board was established. The Treasurer of the Navy was a member of the Navy Board, and obtained from the Treasury the sums which the Navy Board directed him to pay. The office was abolished in 1835, and its duties assigned to the office of Paymaster-General as finally constituted in 1848.

(*f*) As varied by the Admiralty Minute of the 1st January, 1912 (*Times*, 8th January, 1912), reviving the office of Additional Civil Lord. The powers of the Commissioners may be exercised by any two or more of their number (Admiralty Act, 1690, 2 Will. & Mar. Sess. 2, c. 2; Admiralty Act, 1827 (7 & 8 Geo. 4, c. 65); see Admiralty Act, 1832 (2 & 3 Will. 4, c. 40); and see, generally, title CONSTITUTIONAL LAW, Vol. VI., p. 419.

(*g*) His duties were formerly part of those of the Third Sea Lord, who is now the advisory expert in matters of construction (Minute of the First Lord, 1st January, 1912).

(*h*) Parliamentary Paper, 1905 [Cd. 2417]; Minute of 20th October, 1904, and Minutes of the First Lord, 1st January and 9th September, 1912 (*Times*,

SECT. 3.—*Entry and Service.*SECT. 3.
**Entry and
Service.**Raising and
maintenance.

8. There is no statutory restriction of the prerogative of the Crown to raise and maintain a naval force (*i*), though the conditions of entry and service in the Navy are to some extent regulated by statute (*k*). The discretion of the Crown, whether restricted by statute or otherwise, is in practice exercised in accordance with rules laid down by the Board of Admiralty.

The personnel of the Navy is divided into two grades, officers and men.

9. Officers may be commissioned, subordinate, or warrant officers; petty officers are included in the term "men" (*l*). The granting or the depriving of a commission is a prerogative of the Crown, and is exercised at the present time by the Admiralty under the general powers conferred by the patent appointing the Commissioners (*m*). Officers of the military branch receive a commission on being confirmed in the rank of sub-lieutenant, and again on promotion to Flag-rank. All other officers receive commissions on their first appointment to commissioned rank (*n*):

Officers.

The commissioned officers of the Navy are divided into four branches—a military branch, an engineer branch, a medical branch, and a civil branch, which includes all other naval officers' (*o*). Chaplains, though they are commissioned officers, hold no naval rank, but retain when afloat the position to which their office would entitle them on shore. The Chaplain of the Fleet is considered the head of the chaplains (*p*). Subdivisions.

Admission to commissioned rank is obtained by examination after a period of training, in the case of the military and engineering branches, as naval cadet; in the case of the medical branch, as acting surgeon; or in the case of the civil branch, as assistant clerk (*q*). Chaplains are appointed in the first instance for four

Admission.

8th January and 9th September, 1912). The First Sea Lord, as the executive officer in control of the daily movements of the Fleet, is now advised by a Naval War Staff; see Memorandum of the First Lord of the Admiralty, 1st January, 1912 (*Times*, 8th January, 1912); as to the Committee of Imperial Defence, see title CONSTITUTIONAL LAW, Vol. VII., p. 98.

(*i*) Compare stat. (1662) 14 Car. 2, c. 3, preamble; see title CONSTITUTIONAL LAW, Vol. VI., p. 420; and preamble to annual Army Act.

(*k*) Naval Enlistment Acts, 1835 (5 & 6 Will. 4, c. 24), 1853 (16 & 17 Vict. c. 69), and 1884 (47 & 48 Vict. c. 46). An indirect control is exercised by Parliament in the granting of supplies necessary to meet the annual expenses. As to the effect of entry on domicile, see title CONFLICT OF LAWS, Vol. VI., p. 189.

(*l*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 86; King's Regulations, p. xii. Subordinate officers are acting mates, midshipmen, clerks, naval cadets, and assistant clerks; see King's Regulations, art. 1913A.

(*m*) For the terms of the patent see Report of the Commissioners, 1890, Parliamentary Paper [Cd. 5979], p. ix.; and see title CONSTITUTIONAL LAW, Vol. VI., pp. 417—419.

(*n*) King's Regulations, art. 226.

(*o*) *Ibid.*, art. 170.

(*p*) *Ibid.*, art. 217. As to naval chaplains, see further title ECCLESIASTICAL LAW, Vol. XI., p. 649; and see also *ibid.*, p. 483, note (*f*).

(*q*) King's Regulations, ch. 7. The regulations as to entry to all branches for the time being in force are to be found in the Quarterly Navy List; and as to medical qualification, see title MEDICINE AND PHARMACY, Vol. XX., p. 338.

- SECT. 3.** years, and may afterwards be placed on the established list of chaplains (a).
- Entry and Service.** An officer cannot resign his appointment at his own will and pleasure (b). It is submitted, however, that the mere acceptance of a commission would not of itself and in all circumstances suffice to bring an officer within the jurisdiction of a court-martial for refusing to enter upon any particular office, at all events unless he is actually borne on the books of one of His Majesty's ships in commission (c).
- Discipline.**
- Men.** 10. The service of men in the Navy has, since early times, been partially regulated by statute (d). Two methods have been employed, that of forcible impressment (e) and that of voluntary enlistment. The former method is now in abeyance, and entry into the Navy is on a purely voluntary basis.
- Service.** It would appear that there is no limit to the prerogative of the Crown in fixing the duration of the service of seamen in the Navy, however they may have entered. On the other hand, the service of a seaman naturally determines on the arrival of his ship at a port in the United Kingdom after the completion of the employment for which she was commissioned (f). To meet the difficulties occasioned by this condition of things, it has been provided that no person should be detained against his consent in the naval service of the Crown for a longer period than five years unless he had voluntarily entered for a longer period (g); but men may enter or re-enter for continuous or general service for longer periods, if and as the Admiralty regulations allow (h). In the case of boys the period must not exceed twelve years, or if he entered under the age of eighteen, must not extend beyond his reaching the age of thirty (h).
- Re-engagement.**
- How calculated.** The period for which a seaman can be compelled to serve is reckoned from the date upon which he entered into the engagement under which he is serving without regard to any breach in its
-
- (a) King's Regulations, arts. 272. 324.
- (b) *R. v. Cuming, Ex parte Hall* (1887), 19 Q. B. D. 13. It is submitted that the decision in this case is equally applicable to a warrant officer, and even to a subordinate officer not holding a commission who has "accepted an appointment to serve in one of His Majesty's ships in commission"; and see *Hearson v. Churchill*, [1892] 2 Q. B. 144, C. A.
- (c) A point specifically left undecided in *R. v. Cuming, Ex parte Hall*, *supra*, at p. 91; compare Naval Discipline Act (29 & 30 Vict. c. 109), s. 87; p. 9, *post*; and see p. 7, *ante*; as to the disciplinary control over officers, see pp. 9 *et seq.*, *post*.
- (d) 1 Bl. Com. 419. The earliest statute seems to be stat. (1378) 2 Ric. 2, stat. 1, c. 4.
- (e) For impressment, see pp. 19 *et seq.*, *post*.
- (f) This follows from the nature of impressment viewed in the first instance as a prerogative of the Crown, and secondly as a burden upon the subject. Once on shipboard, there is no distinction affecting the Crown between a volunteer and one impressed.
- (g) Naval Enlistment Act, 1835 (5 & 6 Will. 4, c. 24), s. 1.
- (h) Naval Enlistment Act, 1884 (47 & 48 Vict. c. 46), s. 2 (1) (a), (b). This Act and the Naval Enlistment Acts, 1835 (5 & 6 Will. 4, c. 24) and 1853 (16 & 17 Vict. c. 69), must be construed together as one Act, and may be cited together as the Naval Enlistment Acts, 1835—1884. Though under the Naval Enlistment Acts discharge cannot be claimed as a right, it may under the regulations be purchased in exceptional cases (King's Regulations, art. 597).

continuity occasioned by desertion, invalidity, imprisonment or any other cause (*i*).

SECT. 3.
Entry and
Service.

False state-
ments.

11. Any person who, upon entering or offering himself to enter the Navy, makes any false statement with intent to deceive any officer authorised to enter seamen or others for the Navy is liable to be treated as a rogue and vagabond (*j*).

Any certificate which is by law evidence of the birth of a person and any declaration under the Statutory Declarations Act, 1835 (*k*), by the parent or a guardian of a person entering into the naval service of the Crown as a boy, respecting the place of birth of such boy, and a declaration made by a man respecting his place of birth, is evidence for the purpose of the Naval Discipline Acts (*l*) of the facts stated in such declarations (*m*).

Certificates
and declara-
tions as
evidence.

A merchant seaman leaving his ship to enter the naval service is not a deserter, nor can he thereby incur any punishment or loss whatever. Any stipulation to the contrary in any agreement is void, and its insertion therein renders the person responsible therefor liable to a fine. The effects and money, including any arrears of wages, of such a seaman must be paid over to the officer authorised to receive him into the service. But any wages advanced to and not earned at the time the seaman left his ship can be recovered out of his naval pay. Further, by an application to the High Court, any moneys paid to a necessary substitute in excess of what would have been payable to the seaman under his agreement can be recovered from the Admiralty (*n*).

Merchant
seamen
joining the
Navy.

SECT. 4.—Discipline.

12. The maintenance of discipline in the Navy is regulated by the Naval Discipline Act (*o*), which constitutes the penal code of the Navy.

Naval Dis-
cipline Act.

13. The persons subject to naval discipline are:—

(1) Persons in and belonging to His Majesty's Navy, whose names are, at the time an offence is committed, borne in the books of one of His Majesty's ships in commission (*p*);

Persons sub-
ject to naval
discipline.

(*i*) King's Regulations, art. 400.

(*j*) Naval Enlistment Act, 1853 (16 & 17 Vict. c. 69), s. 16; Vagrancy Act, 1824 (5 Geo. 4, c. 83); see title POOR LAW, Vol. XXII., pp. 606 *et seq.* This applies to entry into the Naval Reserves (Seamen's and Soldiers' False Characters Act, 1906 (6 Edw. 7, c. 5), s. 3); and see p. 99, *post*; as to false or fraudulent certificates, see p. 99, *post*; and see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 750 *et seq.*

(*k*) 5 & 6 Will. 4, c. 62.

(*l*) See note (*d*), p. 4, *ante*.

(*m*) Naval Enlistment Act, 1884 (47 & 48 Vict. c. 46), s. 2 (3). Foreigners are not to be entered or re-entered into the Navy without the sanction of the Admiralty (King's Regulations, 362A).

(*n*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 195—197; see title SHIPPING AND NAVIGATION.

(*o*) Naval Discipline Act (29 & 30 Vict. c. 109), as amended by the Naval Discipline Acts, 1884 (47 & 48 Vict. c. 39), and 1909 (9 Edw. 7, c. 41). The civil code of the Navy is contained in the regulations and instructions established by Order in Council.

(*p*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 87; compare p. 8, *ante*. "As to what are "His Majesty's ships in commission," see p. 4, *ante*.

SECT. 4. (2) Persons embarked as passengers, under regulations by the
Discipline. Admiralty (g);

(3) Land forces of the Crown when embarked on any of His Majesty's ships to the extent directed by Order in Council (a);

(4) Persons borne on the books of hired vessels in His Majesty's service in time of war where the Admiralty has thought fit so to direct, and where such direction has been specified in the ship's articles (b);

(5) Spies for the enemy and persons on board any of His Majesty's ships endeavouring to seduce persons subject to the Naval Discipline Act (c) from their allegiance (d);

(6) In certain circumstances, officers and men of the Royal Marines, Colonial Naval Forces, Indian Marine Forces, Royal Naval Reserve, Royal Fleet Reserve, Royal Naval Volunteer Reserve, Royal Naval and Marine Volunteers, and the Coastguard, as well as naval and marine pensioners, and seamen riggers (e).

Articles of War.

14. The naval penal code deals first with breaches of naval discipline and duty. These are specified under the Articles of War (f). For all these naval offences punishments are specified, and wherever committed, on board ship or on shore, within or without the United Kingdom, by a person subject to naval discipline, they are punishable under the naval penal code (g).

Naval penal code.

15. The purview of the naval penal code is, however, not confined merely to breaches of naval discipline and duty: it extends also to offences against the ordinary criminal law.

For such offences, if committed in any harbour, haven, or creek, or on any lake or river, or in any one of His Majesty's dockyards, victualling yards, steam factory yards, or on any gun wharf or in any arsenal, barrack, or hospital belonging to His Majesty, whether within or without the United Kingdom, or anywhere within the jurisdiction of the Admiralty, or at any place on shore out of the United Kingdom, a person subject to naval discipline may be tried

(g) Naval Discipline Act (29 & 30 Vict. c. 109), s. 89; see King's Regulations, art. 726.

(a) Naval Discipline Act (29 & 30 Vict. c. 109), s. 88; King's Regulations, ch. 34; Order in Council, 30th June, 1890.

(b) Naval Discipline Act (29 & 30 Vict. c. 109), s. 90.

(c) 29 & 30 Vict. c. 109.

(d) *Ibid.*, ss. 6, 13; and see *ibid.*, s. 49; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 464, 465; *R. v. Bowman* (1912), 76 J. P. 271.

(e) See pp. 21 *et seq.*, 29 *et seq.*, *post*.

(f) Naval Discipline Act (29 & 30 Vict. c. 109), ss. 2—44; see title COURTS, Vol. IX., p. 98. As to seducing the forces of the Crown from their allegiance and inciting to mutiny, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 464, 465; *R. v. Bowman*, *supra*. As to desertion, see Naval Deserters Act, 1847 (10 & 11 Vict. c. 62), s. 9; title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 302, note (c). A fraudulent confession of desertion renders a person liable to serve in the Navy or else to be punished as a rogue and vagabond (Naval Deserters Act, 1847 (10 & 11 Vict. c. 62), s. 10); see title POOR LAW, Vol. XXII., p. 613. These provisions apply also to the Coastguard Service (Coastguard Service Act, 1856 (19 & 20 Vict. c. 83), s. 8). As to the Coastguard Service generally, see p. 28, *post*.

(g) Naval Discipline Act (29 & 30 Vict. c. 109), s. 46.

under the naval penal code (*h*), and punished either as for an act to the prejudice of good order and naval discipline, or in the same manner as under the ordinary criminal law (*i*).

SECT. 4.
Discipline

No powers thus conferred upon the naval authorities destroy or supersede the jurisdiction of the ordinary courts of law or operate to prevent a person punishable by ordinary law being punished otherwise than under the provisions of the naval penal code (*k*).

Jurisdiction
of civil courts.

Further, whether for offences against naval discipline or duty or for breaches of the ordinary law, no person, except offenders who have avoided justice or fled from apprehension, can be tried and punished under the naval penal code after the lapse of three years from the commission of the offence, or of one year after his return to the United Kingdom if he has been absent therefrom for three years (*l*).

Time limit
for prosecu-
tions.

16. This naval penal code is administered by courts-martial (*m*) or, with certain limitations, summarily by the commanding officer of the ship to which the offender belongs. The summary jurisdiction extends to all non-capital offences, except those committed by an officer (*n*), but there is no power under it to award penal servitude, or more than three months' imprisonment or detention (*a*). Moreover, except in cases of mutiny, corporal punishment can only be ordered after an inquiry and report by one or more officers appointed by the commanding officer (*b*).

Administra-
tion of naval
penal code.

17. Special provision is made for subordinate officers. In their case the punishment of forfeiture of time or seniority can be imposed for not more than three months by the commanding officer, for not more than six months by the commander-in-chief on a foreign station, and for not more than twelve months by the Admiralty. Further, the commander-in-chief on a foreign station may impose upon them the punishments numbered (8), (9) and (10) in the list of punishments set out elsewhere (*c*).

Subordinate
officers.

18. The procedure and practice of naval courts-martial are regulated by the Naval Discipline Act (*d*) and the rules framed thereunder in the King's Regulations and Admiralty Instructions (*e*).

Naval courts-
martial.

A court-martial may be held either to inquire generally into the

(*h*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 46.

(*i*) *Ibid.*, s. 45.

(*k*) *Ibid.*, s. 101.

(*l*) *Ibid.*, s. 54.

(*m*) *Ibid.*, s. 56 (1).

(*n*) For the meaning of "officer," see p. 7, *ante*.

(*a*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 56 (2).

(*b*) *Ibid.*, s. 56 (4).

(*c*) *Ibid.*, s. 57 (1), (2); see pp. 15 *et seq.*, *post*. As to subordinate officers, see note (*l*), p. 7, *ante*.

(*d*) 29 & 30 Vict. c. 109, ss. 58—69.

(*e*) *Ibid.*, s. 65; King's Regulations, arts. 659—697. These courts are convened on the authority of either the Admiralty or an officer holding a commission authorising him to order courts-martial (Naval Discipline Act (29 & 30 Vict. c. 109), s. 58 (9)—(12)); for their composition and the position and duties of the Judge-Advocate of the Fleet and the Deputy Judge-Advocate in their regard, see title COURTS, Vol. IX., pp. 97—100. Neither the prosecutor nor the officer ordering a court-martial may sit thereon (Naval Discipline Act (29 & 30 Vict. c. 109), s. 58 (8), (13)).

SECT. 4.

Discipline.

Public court.

circumstances of the loss, capture, wreck, or destruction of one of His Majesty's ships (*f*), or to investigate a specific charge (*g*).

A court-martial is a public court, must be held on one of His Majesty's ships of war and sit from day to day, except on Sundays (*h*).

General inquiry.

19. In the case of a general inquiry into loss or capture a warrant may be issued by the convening authority (*i*) without any complaint being addressed to him (*k*). No specific charge is made against anyone, and all the officers and crew can be tried by one and the same court, before which any of them may be required to give evidence, though not such as might criminate himself (*l*).

It is submitted that no punishment can be imposed by such a court-martial, which is in reality nothing more than a court of inquiry (*m*).

*Specific charge.
"Circumstantial letter" and other documents.

20. A court-martial convened to investigate a specific charge is initiated by a letter of complaint, called the "circumstantial letter," addressed to the convening authority, stating in detail the facts on which a charge is made (*n*). This letter may not refer in any way to the accused's previous record (*n*), and can only be admitted as evidence against him if at the trial he pleads guilty (*o*). With the circumstantial letter is sent a formal document in the nature of an indictment stating the charge or charges, with a list of the witnesses for the prosecution, a summary of evidence, a certified copy of the accused's certificate of service, and a certified extract from the conduct book of any offences from the time of his joining the ship to the date of the offence (*p*). If satisfied by this information that there are reasonable grounds for considering that an offence has been committed by the person accused, the convening authority authorises an officer by warrant to act as president of the court-martial, and sends to him the circumstantial letter and the formal charge (*q*).

Prosecutor.

21. As a general rule, the commanding officer of the ship to which the accused belongs acts as prosecutor, but some other officer

(*f*) Naval Discipline Act (29 & 30 Vict. c. 109), ss. 91, 92.

(*g*) *Ibid.*, s. 56.

(*h*) *Ibid.*, ss. 59, 60.

(*i*) See note (*e*), p. 11, *ante*.

(*k*) King's Regulations, arts. 662, 662a.

(*l*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 92.

(*m*) It was the better practice, before the passing of the Naval Discipline Act (29 & 30 Vict. c. 109), for a charge to be embodied in the warrant convening a court-martial under these circumstances; compare a form in Hickman, Law and Practice of Naval Courts Martial, 1851. But even where no charge was made, it was not unusual to inflict various punishments as the result of these inquiries. This abuse survived the passing of the Naval Discipline Act (29 & 30 Vict. c. 109), though it is elementary justice that no man should be punished except on a formulated charge against which he has the opportunity to defend himself; compare Naval Discipline Act (29 & 30 Vict. c. 109), s. 93.

(*n*) King's Regulations, arts. 659, 659a.

(*o*) *Ibid.*, art. 687a.

(*p*) *Ibid.*, art. 660. But the two last documents are required only where the accused is below the rank of subordinate officer.

(*q*) King's Regulations, art. 663; as to the office of president, see title Courts, Vol. IX., p. 97.

is appointed by the convening authority to act as prosecutor in cases where it is undesirable or impossible that the commanding officer of the accused's ship should act (*r*).

SECT. 4.
Discipline.

22. The accused must have notice in writing of the date and time of his trial and proper opportunity to prepare his defence. He should receive a copy of the circumstantial letter, the formal charge, and a list of the witnesses for the prosecution at least twenty-four hours before the trial. Any witnesses he may desire to call are summoned by the judge-advocate, and he is entitled to obtain any person or persons to assist him in the conduct of his case (*s*). A person so assisting may advise on all points, but requires the permission of the president to examine or cross-examine witnesses. He may not, however, examine the prisoner, nor may he address the court (*t*), though in practice he prepares a written defence for the accused and reads it to the court.

Notice of
charge to
accused.

23. The prisoner, who is in the custody of a provost-marshal (*a*), has an opportunity of objecting to any particular member of the court or generally to its constitution, and any objection is decided by the votes of the court (*b*).

Objections.

The members of the court and the judge-advocate having taken the prescribed oaths (*c*), the trial is begun by the reading of the charge and the circumstantial letter by the judge-advocate (*d*). The prisoner is not obliged to plead, and a plea of guilty involves the admission of the material accuracy of the circumstantial letter. It is then only open to the prisoner to make a statement in mitigation of punishment, and to call evidence as to character before the court deliberates on its sentence (*e*).

Trial.

Pleading to
charge.

In the absence of a plea of guilty the case for the prosecution begins at once by the calling of witnesses in support of the charge. Ordinary criminal procedure is followed, except that witnesses cannot be present without the president's permission, and that both the prosecutor and any member of the court are competent witnesses. The examination must be on oath, and oral, and, except in one case, in the presence of the court (*f*).

Case for
prosecution.

When the case for the prosecution is closed time may be allowed the prisoner for the preparation of his defence, the court adjourning

Defence

(*r*) King's Regulations, art. 664.

(*s*) See Naval Discipline Act (29 & 30 Vict. c. 109), s. 66; King's Regulations, arts. 661, 668, 669; titles BARRISTERS, Vol. II., p. 375; EVIDENCE, Vol. XIII., pp. 585, 586, note (*r*). As to exemption of witnesses from arrest, see title SHERIFFS AND BAILIFFS, p. 818, *post*.

(*t*) King's Regulations, art. 674.

(*a*) *Ibid.*, art. 664 (2).

(*b*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 62; King's Regulations, art. 672.

(*c*) Naval Discipline Act (29 & 30 Vict. c. 109), ss. 63, 64; and see note (*e*), p. 11, *ante*.

(*d*) King's Regulations, art. 673.

(*e*) *Ibid.*, art. 675.

(*f*) King's Regulations, arts. 681—684. Where any witness is unable through sickness to attend, the court must adjourn and his evidence be taken on oath before a magistrate or counsel in the presence of the judge-advocate, the prisoner, his adviser, and the prosecutor (*ibid.*, art. 683).

The giving of false evidence before a court-martial is perjury (Naval Discipline Act (29 & 30 Vict. c. 109), s. 67, as amended by the Perjury Act,

SECT. 4.
Discipline.

if necessary (*g*). In making it he must be granted considerable latitude. It may be either oral or in writing. In the latter case, it is read to the court either by himself, his friend, or by the judge-advocate. When the prisoner is ready and the court reassembled, if the prisoner is the only witness for the defence, his evidence is then taken. It is followed immediately by his statement in defence. If the prisoner does not desire to give evidence, or if there are witnesses other than himself, he must make his statement immediately on the opening of his case (*h*).

After the conclusion of the evidence for the defence the prisoner, with the consent of the court, may deal with discrepancies between his own evidence or his own statement in defence and the evidence of his witnesses and comment on new facts elicited (*h*).

Finding.

24. At the close of the evidence the prisoner is removed, and with the assistance of the judge-advocate the court arrives at its finding (*i*).

The decision of the court in all matters, except as to sentence of death, goes by the majority (*k*); but the finding must be signed by every member of the court (*i*).

It is competent for the court (*a*) to find the intent with which an offence was committed where intent is of the essence of the charge, and the intent found is less grave than the intent charged (*l*); (*b*) in certain cases to find a prisoner guilty of a lesser offence of the same class on a charge of a greater (*m*); (*c*) to find that the prisoner is insane (*n*); or (*d*) to record a verdict of honourable acquittal where the charge affected personal honour (*o*).

On the reopening of the court the prisoner is brought in and the finding read to him and, on a verdict of guilty, specific evidence as to the character of the prisoner may be adduced before sentence (*p*).

Sentence.

25. The court is again cleared and the punishment agreed upon. The sentence drawn up by the judge-advocate is signed by every member of the court, the prisoner is once more brought in, sentence pronounced, and the court dissolved. The finding and sentence must be reported straightway to the commander-in-chief or the senior officer, and the minutes of the whole proceedings transmitted to the Admiralty (*q*).

1911 (1 & 2 Geo. 5, c. 6)); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 290, 331, 490—497.

A court-martial has power to punish naval witnesses summarily with imprisonment for non-attendance, prevarication, or contempt of court (Naval Discipline Act (29 & 30 Vict. c. 109), s. 66); King's Regulations, art. 685. *Quære*, whether it has an inherent power to commit for contempt.

There are special rules as to evidence to be adduced in certain special cases, e.g., loss, stranding, or hazarding of one of His Majesty's ships (King's Regulations, arts. 686, 687a).

(*g*) *Ibid.*, arts. 658, 688a, 689.

(*h*) *Ibid.*

(*i*) *Ibid.*, art. 692.

(*k*) *Ibid.*, art. 691; see, as to sentence of death, p. 15, *post*.

(*l*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 47.

(*m*) *Ibid.*, s. 48.

(*n*) *Ibid.*, s. 68.

(*o*) King's Regulations, art. 692, note 3.

(*p*) *Ibid.*, arts. 693, 694.

(*q*) King's Regulations, arts. 695, 696; Naval Discipline Act (29 & 30 Vict. c. 109), s. 69.

26. In some cases for a specific offence the punishment prescribed is peremptory, and admits of neither alteration nor diminution (*r*). In others the punishment prescribed necessarily involves lesser consequences (*s*). In one case punishment is left entirely to the discretion of the court (*t*).

In most cases the addition to the prescribed punishment of the words "or such other punishment as is hereafter mentioned" gives a court-martial or an officer exercising his summary powers a wide discretion in the imposition of punishment; but this discretion is confined to imposing punishments of a degree inferior to the one specified. In the case of any offence not punishable with death or penal servitude, unless otherwise expressly provided, the offender may be proceeded against and punished according to the laws and customs in such cases used at sea (*a*).

SECT. 4.
Discipline.
Punishment.

Discretionary powers.

27. The following are the punishments which may be inflicted under the naval penal code, arranged in order of gravity (*b*), and the Admiralty has power to suspend, annul, or modify any sentence except a sentence of death, which can only be remitted by His Majesty. But no modification by the Admiralty may increase the punishment involved in any sentence, either in its degree or in its duration (*c*).

Nature of punishment :

(1) Death may be inflicted under the naval penal code in cases of murder (*d*), of acting as a spy for the enemy (*e*), of treachery, cowardice, mutiny, or desertion to the enemy (*f*), and of burning any dockyard, magazine, building, stores, vessels, or any similar property, not belonging to an enemy, pirate, or rebel (*g*).

death ;

Judgment of death can only be passed with the concurrence of a two-thirds majority, or if the officers present do not exceed five, with the concurrence of four of them. A sentence of death can only be remitted by His Majesty, and, except in cases of mutiny, can only be carried out after confirmation by the Admiralty, or, on a foreign station, by the Commander-in-Chief (*h*).

(*r*) Cowardice or traitorous conduct or murder involves a sentence of death (*ibid.*, ss. 2, 3, 5, 45); scandalous or fraudulent conduct, or cruelty, on the part of an officer involves a sentence of dismissal, with disgrace, from the service; conduct "unbecoming the character of an officer" involves dismissal without disgrace (*ibid.*, s. 28).

(*s*) *Ibid.*, s. 53 (5), (8), (10). Such punishments are penal servitude, dismissal with disgrace, and imprisonment. For their lesser consequences, see p. 16, *post*.

(*t*) *I.e.*, for stirring up any disturbance; see Naval Discipline Act (29 & 30 Vict. c. 109), s. 37.

(*a*) *Ibid.*, ss. 44, 45.

(*b*) *Ibid.*, s. 52.

(*c*) *Ibid.*, s. 53 (1).

(*d*) *Ibid.*, s. 45; see note (*r*), *supra*.

(*e*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 6.

(*f*) *Ibid.*, ss. 2—13, 16, 19; see note (*r*), *supra*.

(*g*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 34. As to offences in connexion with ships, dockyards, and naval and military stores, apart from the Naval Discipline Act (29 & 30 Vict. c. 109), see titles CONSTITUTIONAL LAW, Vol. VI., p. 357; CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 277, 284, note (*c*), 376, note (*w*), 409, 773.

(*h*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 53 (1), (2), (3).

SECT. 4.

Discipline.

penal
servitude ;

(2) The punishment next in severity is penal servitude. It can only be awarded by a court-martial (*i*) ; it may be for life, but cannot be for less than three years (*k*), and in all cases it involves dismissal from the service with disgrace (*l*).

A sentence of penal servitude by court-martial carries with it all the consequences of a similar sentence under the ordinary law. It runs from the day of sentence, and the order of the Admiralty or the warrant of the Commander-in-Chief, or of the officer who ordered the court-martial, is a sufficient warrant for the transfer of the prisoner to the prison to undergo his sentence (*m*).

dismissal
with disgrace ;

(3) Dismissal from the service with disgrace (*n*). This involves in all cases a forfeiture of all pay, head money, bounty, salvage, prize money, allowances, annuities, pensions, gratuities, medals and decorations earned by or granted to the offender and an incapacity again in any way to serve His Majesty (*o*).

imprison-
ment ;

(4) Imprisonment (*p*) may not exceed two years (*q*), or, if inflicted summarily, three months (*r*). Under the provisions of the naval penal code it may include a period of solitary confinement (*a*), or of hard labour (*b*), or both, in addition to corporal punishment (*c*). It involves disrating in the case of a petty officer and reduction to the ranks in the case of a non-commissioned officer of Marines, and the stoppage of all wages and pay (*d*).

corporal
punishment ;

Corporal punishment (*e*), which is restricted to forty-eight lashes, can never be inflicted on an officer, or, except in cases of mutiny, on a petty or non-commissioned officer ; it cannot be inflicted without an inquiry by one or more officers under the direction of the commanding officer (*f*).

A term of imprisonment runs from the day of sentence (*g*), unless (1) the offender is already serving a sentence by a court-martial for a former offence, and the court directs the latter sentence to run from the completion of the former, or (2) the ship is at sea or off a place where there is no proper prison or detention quarters. In this case the term runs from the date of arrival at a suitable place subject to deduction of any time spent in confinement (*h*).

(*i*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 56 (2).

(*k*) Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), s. 2.

(*l*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 53 (4), (5) ; and see *ibid.*, s. 73.

(*m*) *Ibid.*, ss. 70, 74 (1).

(*n*) *Ibid.*, s. 52 (3).

(*o*) *Ibid.*, s. 53 (6) ; and see the King's Regulations, art. 695a.

(*p*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 52 (4).

(*q*) *Ibid.*, s. 53 (7) ; whether under a single sentence or under sentences by different courts-martial made to run consecutively (*ibid.*, s. 73).

(*r*) *Ibid.*, s. 56 (2).

(*a*) *Ibid.*, s. 53 (8). But this power is now, by the King's Regulations, art. 695a (ii.), directed not to be exercised.

(*b*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 53 (9).

(*c*) The infliction of corporal punishment is at present suspended (King's Regulations, arts. 695a (a), 748, 753). *

(*d*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 53 (10).

(*e*) *Ibid.*, s. 52 (4).

(*f*) *Ibid.*, s. 53 (11) ; but see note (c), *supra*.

(*g*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 74 (1) ; amended by the Naval Discipline Act, 1909 (9 Edw. 7, c. 41) ; this applies also to detention.

(*h*) Naval Discipline Act (29 & 30 Vict. c. 109), ss. 73, 74 (2) ; this applies also to detention.

SECT. 4.
Discipline.

A sentence of imprisonment requires an order from the Admiralty or the Commander-in-Chief or the officer ordering the court-martial, or the commanding officer if the sentence was imposed by him, before it is carried into execution (*a*); and any time spent in naval custody is reckoned towards its term (*b*).

(5) Detention (*c*) in buildings or vessels set apart as detention quarters for a term not exceeding two years. No officer is subject to detention (*d*). A sentence of less than fourteen days does not, but a longer sentence does, necessarily involve a stoppage of wages or pay (*e*). The term of detention is calculated in the same way and the requirements as to confirmation of the sentence are the same as in the case of imprisonment (*f*).

(6) Dismissal from His Majesty's service (*g*).

(7) Forfeiture of seniority as an officer (*h*).

(8) Dismissal from the ship to which the offender belongs (*i*).

(9) Severe reprimand, or reprimand (*j*).

(10) Disrating a subordinate or petty officer (*k*).

(11) Forfeiture of pay, allowances, pensions, gratuities and decorations (*l*).

(12) Minor punishments customary in the Navy (*m*).

28. No provision is made in the naval penal code for appeals either on the law or on the facts from the findings of naval courts-martial. In practice the minutes of all courts-martial in which the accused does not plead guilty are referred to the Judge-Advocate of the Fleet for his report. On this report the Admiralty acts as it may be advised.

It is submitted, however, that there is an inherent right of appeal to the Crown (*n*).

detention ;

dismissal ;

loss of
seniority ;dismissal
from ship ;reprimands ;
disrating ;

loss of pay ;

other punish-
ments.

Appeals.

(*a*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 74 (3); this applies also to detention.

(*b*) *Ibid.*, s. 79; this applies also to detention.

(*c*) First introduced by Naval Discipline Act, 1909 (9 Edw. 7, c. 41), which was passed to prevent persons found guilty of offences against discipline and not dismissed from the service from being subject to the stigma attaching to imprisonment.

(*d*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 53 (11), as amended by the Naval Discipline Act, 1909 (9 Edw. 7, c. 41).

(*e*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 53 (10). Imprisonment or detention for more than fourteen days involves also the forfeiture of good conduct medal and deprivation of badges, and, in the case of a petty officer or leading seaman, disrating to a grade below that of a leading seaman (King's Regulations, art. 757).

(*f*) See p. 16, *ante*, and the text, *supra*.

(*g*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 52 (5).

(*h*) *Ibid.*; King's Regulations, art. 695.

(*i*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 52 (7); King's Regulations, art. 695a.

(*j*) Naval Discipline Act (29 & 30 Vict. 109), s. 52 (8).

(*k*) *Ibid.*, s. 52 (9).

(*l*) *Ibid.*, s. 52 (10).

(*m*) *Ibid.*, s. 52 (11).

(*n*) In the case of Admiral Byng, in 1755, the Lords of the Admiralty, having been petitioned for a review of the sentence, presented a memorial to the King praying "that the opinion of the judges might be taken, whether the sentence was legal." The matter was referred to the judges and their report communicated to the Admiralty by Order in Council; see

SECT. 4.
Discipline.

The question of jurisdiction may, in many cases, be tested by an action for false imprisonment(o), or by application for a writ of *habeas corpus* (p); but it is submitted that no prohibition lies to a naval court-martial, for it ceases to exist as soon as sentence is pronounced (q).

No instance exists of a writ of *certiorari* being granted to bring up the sentence of a naval court-martial (r).

Places of
confinement :

29. The Admiralty has power to set apart buildings or vessels as naval prisons or naval detention quarters, and to exercise in their regard powers similar to those possessed by a Secretary of State over military prisons and detention barracks (s).

A naval offender sentenced to penal servitude is removed to an ordinary convict prison (t).

imprison-
ment ;

A term of imprisonment may, however, be served either in a naval or military prison, or in naval detention quarters or in a common gaol or house of correction, according as the punishing authority directs, or as the Admiralty or Commander-in-Chief or senior officer on a foreign station from time to time appoints (a).

detention.

A person sentenced to detention, on the other hand, must undergo his punishment either in detention quarters or in detention barracks (b).

Within these limits the place of confinement may be varied from time to time by order in writing of the Admiralty or the Commander-in-Chief (c). The expense of any naval offender's confinement in or removal from any non-naval prison is met by an allowance from the Admiralty (d).

Discharge.

A person undergoing imprisonment or detention may be discharged by an order in writing by the Admiralty or Commander-in-Chief on a foreign station, and, if the punishment was imposed

Delafons, *Naval Courts-Martial*, 1805, pp. 200 *et seq.*, where the author's opinion is added that appeals "may certainly be made on subjects of less moment."

(o) Compare *Sutton v. Johnstone* (1787), 1 Term Rep. 493, 784, II. L. As to the relation of the ordinary courts to naval jurisdiction, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 271, and, generally, pp. 89 *et seq.*, *post*; see also p. 11, *ante*.

(p) Compare *R. v. Cuming, Ex parte Hall* (1887), 19 Q. B. D. 13; *Hearson v. Churchill*, [1892] 2 Q. B. 144, C. A. As to the writ of *habeas corpus*, see title CROWN PRACTICE, Vol. X., pp. 39 *et seq.*

(q) *Re Poe* (1833), 5 B. & Ad. 681. As to prohibition, see title CROWN PRACTICE, Vol. X., p. 141 *et seq.*

(r) It is submitted, however, that if the effect of the sentence is not to deprive him of any civil rights, no such writ can be granted (*Re Mansergh* (1861), 1 B. & S. 400), entirely apart from the question whether there is anyone to whom the writ could be directed; see the text, *supra*. As to *certiorari*, see title CROWN PRACTICE, Vol. X., pp. 155 *et seq.*

(s) Naval Discipline Act (29 & 30 Vict. c. 109), s. 81 (1), (2), as amended by the Naval Discipline Act, 1909 (9 Edw. 7, c. 41); see Regulations for Naval Prisons, Stat. R. & O. Rev., Vol. IX., Navy, p. 11. For the powers of the Secretary of State, see Army Act, s. 133. As to the Army Act, see note (s), p. 30, *post*. As to prisons generally, see title PRISONS, Vol. XXIII., pp. 229 *et seq.*

(t) Naval Discipline Act (29 & 30 Vict. c. 109), s. 70.

(a) *Ibid.*, s. 74.

(b) Naval Discipline Act 1909 (9 Edw. 7, c. 41), s. 1 (2).

(c) Naval Discipline Act (29 & 30 Vict. c. 109), s. 75.

(d) *Ibid.*, ss. 72, 76.

by his commanding officer, by an order of that officer. By a similar order he can be brought up either as a prisoner or witness before a court-martial (*e*). SECT. 4.
Discipline.

Heavy penalties are imposed for aiding an escape, or an attempt to escape, by persons undergoing imprisonment or detention, for breaches of prison regulations, and for defaults by gaolers and keepers of prisons in their duties (*f*). Offences.

SECT. 5.—Impressment.

30. The practice of compelling persons by force into the naval (*g*) service of the realm is called "impressment" (*h*). Justifiable only on grounds of public necessity, the power to impress, though now in abeyance (*i*), is part of the prerogative of the Crown (*k*). It is supported by the continued usage of centuries (*l*), by express judicial opinions (*m*), and by the implied sanction of numerous statutes and repeated decisions (*n*). Impressment.

(*e*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 78.

(*f*) *Ibid.*, ss. 82, 83.

(*g*) The Crown exercised formerly a very wide power in compelling assistance in the defence of the realm. As to compulsory military service, see p. 38, *post*. The practice of impressment anciently extended to ships as well as men; see instances quoted in judgment in *R. v. Broadfoot* (1743), 18 State Tr. 1323; Laird Clowes, History of the Royal Navy, Vol. I., pp. 19, 112, 114, 118, 146; Maitland, Constitutional History, p. 280. Nor was compulsory service confined to the necessities of the defence of the realm; see Barrington, Observations on Statutes, 3rd ed., p. 302, note (*u*), where is set out a writ of Henry VI. for the taking of singing-boys.

(*h*) The word "impressment" originally connoted no idea of physical compulsion. Press money was given both to soldiers and to sailors on voluntary enlistment as the earnest of their contract to serve. It was the "King's Shilling": see Maitland, Constitutional History, p. 461; 1 Hale, P. C. 677; Barrington, Observations on Statutes, 3rd ed., pp. 299 *et seq.*; and Oxford English Dictionary, "Impress." Pepys seems to have considered the giving of press money essential to the validity of a forcible taking (Diary, 1666, 30th June, 1st July, 2nd July; 1667, 27th February, 22nd August).

(*i*) The Royal Commission on Manning of the Navy, 1859, p. xi., declared it to be impracticable. The Crimean war was the first important war in which impressment was not employed.

(*k*) 1 Bl. Com. 419; Fost. 154; Broom, Constitutional Law, 7th ed., pp. 112, 113; as to its usage in modern times, see note (*i*), *supra*.

(*l*) See the instances quoted in *R. v. Broadfoot*, *supra*; and Laird Clowes, History of the Royal Navy, Vol. I., pp. 19, 112, 114, 118, 146; and see also Maitland, Constitutional History, p. 280; Stubbs, Constitutional History, Vol. II., p. 313; May, Constitutional History, Vol. II., p. 272.

(*m*) *R. v. Broadfoot*, *supra*; *R. v. Tubbs* (1776), 2 Cowp. 512.

(*n*) The legality of impressment is necessarily implied in all cases and statutes quoted in the notes to p. 20, *post*; and see *R. v. Phillips* (1778), 2 Cowp. 830; *Goldswain's Case* (1778), 2 Wm. Bl. 1207; *Napier v. Browning* (1781), 16 Mor. Dict. 6610; *Chalmers v. Napier* (1782), 16 Mor. Dict. 6612; *Ex parte Drydon* (1793), 5 Term Rep. 417; *Ex parte Gallile* (1798), 7 Term Rep. 673; *Ex parte Brocke* (1806), 6 East, 238; *Flewster v. Royle* (1808), 1 Camp. 187; *Payne and Thoroughgood's Case* (1813), 1 M. & S. 223; *Chalacombe's Case* (1811), 13 East, 560, n.; and note (*o*), p. 20, *post*; see also the following statutes: stats. (1378) 2 Ric. 2, stat. 1, c. 4; (1556) 2 & 3 Phil. & Mar. c. 16; (1696) 7 & 8 Will. 3, c. 21; (1697) 8 & 9 Will. 3, c. 23; (1705) 4 & 5 Anne, c. 6 (all repealed).

SECT. 5.

Impressment.

Extent of liability.

Exemptions.

31. The power of impressment extends at common law over all persons of a seafaring character, whether employed on the sea or on navigable rivers (*o*).

From the general liability of all persons within this description a salt-water ferrymen alone is excepted at common law (*p*). Statutory exemptions were, however, frequent. Created, most of them, in the interests of certain special trades (*q*), and suspended in times of emergency (*r*), these exemptions are now almost wholly swept away; but the Admiralty is still bound to issue protections to all persons under eighteen or over fifty-five years of age (*s*); to foreigners serving in merchant ships or privateers; to every person using the sea for two years from his first going to sea; to apprentices to the sea service for three years if they have not before used the sea (*s*); and to persons who have served in the Royal Navy, for two years if discharged by the Admiralty, for one year if discharged at their own request (*t*).

Method of impressment.

32. Impressment is carried out under warrant from the Admiralty grounded on an Order by the King in Council (*a*). The terms of the warrant must be strictly adhered to, and any

(*o*) 1 East, P. C. 307; *R. v. Broadfoot* (1743), 18 State Tr. 1323; *R. v. Tubbs* (1776), 2 Cowp. 512, 519; *Ex parte Softly* (1801), 1 East, 466. This seafaring character attaches to a ship's carpenter (*Ex parte Boggin* (1811), 13 East, 549), but not to mere shipwrights (*Syme v. Napier* (1780), 16 Mor. Dict. 6607). It is effaceable by a *bond fide* retirement from the sea (*Nash v. Wyllie* (1810), 15 Fac. Coll. 568), but not by the sole act of being bound apprentice to a trade on land (*Turnbull v. Home* (1793), 16 Mor. Dict. 6612). It does not attach, by an uncomplimentary exception, to gentlemen yachtsmen (*R. v. Tubbs, supra*). As to the liability of seafaring men in public employment to be employed in times of emergency, see p. 29, *post*.

(*p*) *Ipswich (Inhabitants) v. Browne* (1581), Sav. 14, Ex. Ch.; compare *Ex parte Fox* (1793), 5 Term Rep. 276, where BULLER, J., at p. 277, speaks of ferrymen generally as exempt. *Semie*, this is wrong. See also title FERRIES, Vol. XIV., p. 558, note (*f*). There is no exemption attaching to Lord Mayor's Watermen (*R. v. Tubbs, supra*), to freemen or liverymen (*R. v. Young* (1808), 9 East, 466), to freeholders (*R. v. Douglas* (1804), 5 East, 477), or to a person serving as headborough (*Ex parte Fox, supra*).

(*q*) *E.g.*, the Greenland trade was privileged by stats. (1702) 1 Anne, c. 10; (1771) 11 Geo. 3, c. 38; (1786) 26 Geo. 3, c. 41; (1792) 32 Geo. 3, c. 22; (1801-2) 42 Geo. 3, c. 22; the fishing industry by stat. (1562-3) 5 Eliz. c. 5 (repealed), the Fish Carriage Act, 1762 (2 Geo. 3, c. 15), and the Sea Fisheries (Scotland) Act, 1810 (50 Geo. 3, c. 108); the sugar trade by stat. (1745) 19 Geo. 2, c. 30 (repealed); insurance offices' watermen by the Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3, c. 78), s. 82; the coal trade by stat. (1695) 6 & 7 Will. 3, c. 18, s. 19 (repealed). For other exemptions, see stats. (1703) 2 & 3 Anne, c. 6; (1706-7) 6 Anne, c. 64; (1710) 9 Anne, c. 15, s. 64; (1786) 26 Geo. 3, c. 50, s. 25 (all repealed).

(*r*) Stats. (1778-9) 19 Geo. 3, c. 75; (1797-8) 38 Geo. 3, c. 46 (both repealed).

(*s*) Exemption from Impressment Act, 1739 (13 Geo. 2, c. 17), s. 2.

(*t*) Naval Enlistment Act, 1835 (5 & 6 Will. 4, c. 24), s. 2.

(*a*) Prendergast, Navy Law, 1852, pp. 90 *et seq.* Since the office of Lord High Admiral was put into commission, no power of impressment has been inserted in the patents of the Board. See forms of warrants in *R. v. Broadfoot, supra*; *Ex parte Softly, supra*; Prendergast, Navy Law, 1852, p. 121; and see facsimiles of passes against impressment, Laird Clowes, History of the Royal Navy, Vol. II., pp. 236, 237.

irregularity renders an attempted seizure unlawful and resistance thereto justifiable (b).

The method of obtaining release after an unlawful impressment is by means of the writ of *habeas corpus* (c).

SECT. 5.
Impress-
ment.

Part II.—Reserve Naval Forces.

SECT. 1.—*Royal Naval Reserve.*

33. The Admiralty was authorised in 1859 (d) to raise and maintain and train a body of volunteers drawn from seamen (c) within or without the British Islands (f) as a reserve for the regular naval forces in time of emergency. There is no restriction on the size of the force so raised (g), now known as the Royal Naval Reserve (h).

Raising and
maintenance.

Power is given to the Admiralty to make regulations as to the manner in which volunteers are entered to serve, the payment in consideration of entry, and as to service generally (i).

Regulations.

(b) *R. v. Broadfoot* (1743), 18 State Tr. 1323; 1 East, P. C. 308, 312; *Fost.* 313; *R. v. Webb* (1747), 1 Wm. Bl. 19; *R. v. Borthwick* (1779), 1 Doug. (K. B.) 207. As to the use of force in the execution of or in resistance to a warrant, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 574, 580.

(c) See title CROWN PRACTICE, Vol. X., p. 49, note (k); *R. v. King* (1794), Comb. 245; *Ex parte Fox* (1793), 5 Term Rep. 276; *Ex parte Grocot* (1825), 5 Dow. & Ry. (K. B.) 610; *Ex parte Harrison* (1805), 2 Smith, K. B. 408.

(d) Royal Naval Reserve (Volunteer) Act, 1859 (22 & 23 Vict. c. 40), s. 1. This Act is, in the main, a re-enactment of the Naval Volunteers Act, 1853 (16 & 17 Vict. c. 73), authorising the raising of a volunteer force to be known as the Royal Naval Coast Volunteers, and is the principal Statute for all the divisions of the naval reserves. The first mention of a naval reserve force is in 1696; see *Laird Clowes, History of the Royal Navy*, Vol. II., p. 237. Under the Naval Volunteers Act, 1853 (16 & 17 Vict. c. 73), a volunteer force of not more than ten thousand men, to be called the Royal Naval Coast Volunteers, was authorised (*ibid.*, s. 1). No force raised under this power exists. A coast volunteer was not while training to be sent more than fifty leagues from the United Kingdom, was to be called into actual service only in case of imminent danger or great emergency, and was to serve when so called out for one year only, extendible to two by Royal Proclamation. While a volunteer he was protected from service in the Navy, except when called out in national emergency, but was not eligible for admission to Greenwich Hospital. Regulations made under the Act by the Admiralty must be laid before both Houses of Parliament (*ibid.*, ss. 3—5, 8, 11). See also p. 29, *post*.

(e) "Or others specially suitable" (Royal Naval Reserve (Volunteer) Act, 1859 (22 & 23 Vict. c. 40), s. 1). As to the liability of seafaring men in public departments to service in times of emergency, see p. 29, *post*.

(f) But not outside the British Islands, unless he is a British subject (Royal Naval Reserve Volunteer Act, 1896 (59 & 60 Vict. c. 33), s. 1 (1); Royal Naval Reserve Act, 1902 (2 Edw. 7, c. 5), s. 1).

(g) Naval Forces Act, 1903 (3 Edw. 7, c. 6), s. 5, repealing restrictions imposed by the Royal Naval Reserve (Volunteer) Act, 1859 (22 & 23 Vict. c. 40), s. 1, and the Naval Reserve Act, 1900 (63 & 64 Vict. c. 52), s. 1 (2) (b).

(h) The title given by the Act was the Royal Naval Volunteers (Royal Naval Reserve (Volunteer) Act, 1859 (22 & 23 Vict. c. 40), s. 1). The Royal Naval Reserve comprises also the Royal Fleet Reserve; see p. 23, *post*.

(i) Royal Naval Reserve (Volunteer) Act, 1859 (22 & 23 Vict. c. 40),

- SECT. 1.**
Royal Naval Reserve.
Discipline. All the laws and customs relating to the government of the Navy are applicable in like manner to volunteers, and officers having command over them, while training or on actual service (*k*), as well as to pensioners called out for actual service (*l*). Volunteers while training or on actual service are in the same position as regards billeting as the Royal Marines (*m*).
- Service.** **34.** The volunteer enters for five years (*n*), but may be discharged at any time (*o*). His service entitles him to certain civil exemptions, and the privilege of eligibility, under Admiralty regulations, for admission to Greenwich Hospital (*p*).
- Training** **35.** Training and instruction, which may be on board ship or on shore, must not extend over more than twenty-eight days in any one year (*q*); and during these periods the volunteer is victualled in the same manner as seamen of the fleet, or, where trained on shore and not victualled, receives a money allowance in lieu of provisions (*r*).
- Calling out on actual service.** **36.** The volunteers may be called into actual service, under Admiralty directions, "on such occasions as His Majesty shall deem fit." The occasion must be communicated to Parliament, or, if Parliament be not sitting, declared in Council and proclaimed (*s*). When so called out they are liable to serve on board ship or ashore for three years, and this period may on emergency be extended by Royal Proclamation to five years, at extra pay for any service beyond three years (*t*).
- Pay and pensions.** **37.** While on actual service, whether ashore or afloat, they are in the same position as regards pay, allotment of wages, remittances, and other provisions relating to pay, as men of their respective ratings in the Royal Navy (*u*).
- With the consent of the Treasury pensions may be granted under Admiralty regulations, but when conferred may be paid to the pensioner himself only (*a*). In time of emergency these pensioners may be required to serve in the Navy for so long as the emergency continues, and while so serving receive, besides their pensions, the pay and allowances of men of their ratings in the Royal Navy (*b*).
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- ss. 9; 13; see Royal Naval Reserve (Men) Regulations, 1910, amended, 1912.
(*k*) Royal Naval Reserve (Volunteer) Act, 1859 (22 & 23 Vict. c. 40), s. 15.
(*l*) *Ibid.*, s. 12.
(*m*) *Ibid.*, s. 8; see note (*m*), p. 54, *post*. For billeting, generally, see pp. 53 *et seq.*, *post*.
(*n*) Royal Naval Reserve (Volunteer) Act, 1859 (22 & 23 Vict. c. 40), s. 2.
As to making a false statement on entry, see p. 9, *ante*.
(*o*) Royal Naval Reserve (Volunteer) Act, 1859 (22 & 23 Vict. c. 40), s. 14.
(*p*) *Ibid.*, s. 7.
(*q*) *Ibid.*, s. 3.
(*r*) *Ibid.*, s. 6.
(*s*) *Ibid.*, s. 4; Naval Reserve (Mobilisation) Act, 1900 (63 & 64 Vict. c. 17), s. 1.
(*t*) Royal Naval Reserve (Volunteer) Act, 1859 (22 & 23 Vict. c. 40), s. 5.
(*u*) *Ibid.*, ss. 6, 15; as to extra pay on service, see the text, *supra*.
(*a*) Royal Naval Reserve (Volunteer) Act, 1859 (22 & 23 Vict. c. 40), s. 10.
(*b*) *Ibid.*, s. 11. This liability extends to persons holding deferred

38. Shipping masters acting under the Merchant Shipping Act, 1854 (c), have power to call for information concerning reserve men from masters and other persons on British merchant ships, and are bound, under penalty, to give such information and other assistance as the Admiralty or Board of Trade requires (d).

SECT. 1.
Royal Naval Reserve.

Information as to reserve men.
Offences.
Wrongful enlistment.

39. Any person enrolled as a volunteer of the Royal Naval Reserve, in this section referred to as a "volunteer," who enlists in the Regular Forces or the Militia or the Royal Naval Coast Volunteers, or any person enrolled in the Militia or belonging to the Royal Naval Coast Volunteers who enters as a volunteer, commits an offence punishable with six months' imprisonment. The enlistment and entering respectively are null and void, and anyone enlisting or entering as a volunteer in such circumstances is liable to a fine (e).

A volunteer or a pensioner not appearing when required for actual service may be apprehended and punished as a deserter from the Royal Navy (f).

Failure to appear for service or training.

A volunteer not appearing for or improperly afterwards absenting himself from training after proper notice given is liable to a penalty not exceeding £20 (g), and any person inducing a volunteer to absent himself, or knowingly harbouring or employing a volunteer absenting himself from duty, is liable to a penalty not exceeding £30 (h).

Penalties are also imposed on the buying or selling of volunteers' arms, accoutrements, ammunition, slops or necessaries; and provision is made for a search warrant to issue on suspicion, supported by oath, of unlawful possession thereof (i).

Sale of arms etc.

Provision is made for the enforcement of these penalties by summary procedure, and for their apportionment where an informer is concerned (k).

Enforcement of penalties.

SECT. 2.—Royal Fleet Reserve.

40. A new division of the Royal Naval Reserve was authorised in 1900 (l), which received in 1903 the name "Royal Fleet Reserve" (m).

Who may join.

It is restricted to persons enlisted in the Royal Navy or Royal Marines on and after the 8th August, 1900, and holding pensions pension certificates or tickets (Royal Naval Reserve Volunteer Act, 1896 (59 & 60 Vict. c. 33), s. 2). As to naval pay and pensions, generally, see pp. 33 *et seq.*, *post*.

(c) 17 & 18 Vict. c. 104.

(d) The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), is repealed by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 745, but the effect of registration under the new Act in this matter remains the same (Royal Naval Reserve (Volunteer) Act, 1859 (22 & 23 Vict. c. 40), s. 17).

(e) *Ibid.*, s. 18; not exceeding £20 (*ibid.*). But as to entry of a Royal Naval Coast Volunteer, see also *ibid.*, s. 7.

(f) *Ibid.*, ss. 12, 21. This seems to involve liability to be tried by court-martial, though the name of such a person is not at the time borne on the books of one of His Majesty's ships in commission.

(g) *Ibid.*, s. 20.

(h) *Ibid.*, s. 22.

(i) *Ibid.*, s. 19.

(k) *Ibid.*, ss. 24, 25. As to summary procedure generally, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(l) Naval Reserve Act, 1900 (63 & 64 Vict. c. 52), s. 1 (1), which received the Royal Assent on the 8th August, 1900.

(m) Naval Forces Act, 1903 (3 Edw. 7, c. 6), s. 4 (2).

SECT. 2.
Royal Fleet
Reserve.

subject to a condition of service in this division of the Reserve (*n*), or persons employed as artisans or otherwise in the Admiralty and naval or civil establishments subject to the same condition (*o*); persons enlisted in the Royal Navy or Royal Marines before the 8th August, 1900, and in receipt of pensions (*p*), and other persons not in receipt of pensions after service in the Royal Navy or Royal Marines, who voluntarily enlist in this division of the Reserve (*q*); and persons entered for non-continuous service in the Royal Navy who are engaged for not more than twelve years on condition that after a specified period of service in the Royal Navy they are liable to serve for the residue of their terms in this division of the Reserve (*r*).

Conditions of
service.

41. Members of the Royal Fleet Reserve are subject to the same provisions as ordinary Royal Naval Reservists (*s*), except that the term of service in the Royal Fleet Reserve is regulated by conditions attaching to pensions, enlistment or employment, as the case may be (*t*); and, in the case of Marine Reserves, the words "non-commissioned officers or men" are substituted for the words "petty officers or seamen in the Royal Navy," and whether being trained or on actual service they are in the same position as the Royal Marines (*a*).

SECT. 3.—*Officers of the Royal Naval Reserve.*

Qualification.

42. His Majesty may accept as officers of reserve to the Royal Navy, masters, mates, or engineers from the merchant service or other British ships, retired commissioned officers, masters or engineers of the Indian Navy (*b*), or any other person on the recommendation of the Admiralty (*c*). They are enrolled and bear rank and receive such pay and allowances as the Admiralty directs, and when training or on actual service are subject to all laws, regulations and customs in force in the Royal Navy (*d*). If killed or wounded in action, they stand in the same position as regards pensions

Position.

- (*n*) Naval Reserve Act, 1900 (63 & 64 Vict. c. 52), s. 1 (2) (a) (i.).
- (*o*) *Ibid.*, s. 1 (2) (c).
- (*p*) *Ibid.*, s. 1 (2) (a) (ii.).
- (*q*) *Ibid.*, s. 1 (2) (b). The restriction as to numbers imposed by *ibid.*, s. 1 (2) (b), was repealed by the Naval Forces Act, 1903 (3 Edw. 7, c. 6), s. 5.
- (*r*) *Ibid.*, s. 4 (1).
- (*s*) Naval Reserve Act, 1900 (63 & 64 Vict. c. 52), s. 1 (4); see p. 21, *ante*.
- (*t*) Naval Reserve Act, 1900 (63 & 64 Vict. c. 52), s. 1 (3). The Royal Naval Reserve (Volunteer) Act, 1859 (22 & 23 Vict. c. 40), s. 2, relating to terms of service, does not apply to the Royal Fleet Reserve (Naval Reserve Act, 1900 (63 & 64 Vict. c. 52), s. 1 (3)).
- (*a*) *Ibid.*, s. 1 (4). A marine enrolled in the Royal Fleet Reserve, when on actual service or in training, is included in the expression "man of the Royal Marines" used in the Army Act. As to the Army Act, see note (*e*), p. 30, *post*.
- (*b*) Officers of the Royal Naval Reserve Act, 1863 (26 & 27 Vict. c. 69), s. 1.
- (*c*) Merchant Shipping Act, 1872 (35 & 36 Vict. c. 73), s. 17.
- (*d*) Officers of the Royal Naval Reserve Act, 1863 (26 & 27 Vict. c. 69), ss. 2, 3; Royal Naval Reserve (Volunteer) Act, 1859 (22 & 23 Vict. c. 40), s. 15; see Royal Naval Reserve (Officers) Regulations, 1911, amended, 1912.

and allowances as officers of corresponding rank in the Royal Navy (*e*).

SECT. 4.—*Indian Marine Service.*

SECT. 3.
Officers of
the Royal
Naval
Reserve.

Laws and
regulations.

43. The making of laws and regulations for the Indian Marine Service is in the hands of the Governor-General of India in Council (*f*), subject to the following restrictions:—The power to impose sentence of death on natural-born European subjects or their children cannot be given to any but the High Courts without the previous consent of the Secretary of State for India in Council (*g*); laws so made are applicable only to offences committed in Indian waters (*h*); the scale of punishments must be similar to, and may not exceed, those provided for like offences in the Naval Discipline Acts (*i*).

Within these limits such laws have all the force of Acts of Parliament until repeal or notice given by the Governor-General of disallowance by the Crown (*k*).

Extent.

In time of war any vessel belonging to the Indian Marine Service may be placed by the Crown under the command of the senior naval officer of the station, and such a vessel becomes an integral part of the Royal Navy subject to the regulations made by the Board of Admiralty in conjunction with the Secretary of State for India in Council (*l*).

Time of war.

SECT. 5.—*Royal Naval Volunteer Reserve (m).*

44. Power to raise and maintain a new naval volunteer force, to be called the "Royal Naval Volunteer Reserve," was given in 1903 (*n*).

Origin.

45. This body is governed (*o*) by the Royal Naval Reserve (Volunteer) Act, 1859 (*p*), with the exception (*q*) of the provisions

Governing
Act.

(*e*) Officers of the Royal Naval Reserve Act, 1863 (26 & 27 Vict. c. 69), s. 3.

(*f*) Indian Marine Service Act, 1884 (47 & 48 Vict. c. 38), s. 2. For provisions so made, see Indian Marine Act, 1887 (Act No. XIV. of 1887).

(*g*) Indian Marine Service Act, 1884 (47 & 48 Vict. c. 38), s. 5.

(*h*) *Ibid.*, s. 2 (*a*). Indian waters include the high seas between the Cape of Good Hope and the Straits of Magellan and all territorial waters within those limits (*ibid.*, s. 3).

(*i*) *Ibid.*, s. 2 (*b*); see pp. 15 *et seq.*, *ante*. Imprisonment for not more than fourteen years, or transportation for any period, may be substituted for penal servitude in the case of persons other than Europeans or Americans (Indian Marine Service Act, 1884 (47 & 48 Vict. c. 38), s. 2 (*b*)).

(*k*) *Ibid.*, s. 4.

(*l*) *Ibid.*, s. 6.

(*m*) The formation of a Royal Naval Artillery Volunteer Corps was authorised by statute in 1873 (Naval Artillery Volunteer Act, 1873 (36 & 37 Vict. c. 77), s. 1). A force was raised, which was disbanded in 1892, under power given to the Admiralty by the Act (*ibid.*, s. 12; see Laird Clowes, History of the Royal Navy, Vol. VII., p. 19, as to the circumstances). The Act itself still remains unrepealed. As to the Royal Naval Coast Volunteers, see note (*d*), p. 21, *ante*.

(*n*) Naval Forces Act, 1903 (3 Edw. 7, c. 6), s. 1 (1).

(*o*) *Ibid.*, s. 1 (2).

(*p*) 22 & 23 Vict. c. 40; see p. 21, *ante*.

(*q*) Naval Forces Act, 1903 (3 Edw. 7, c. 6), s. 1 (2) (*i*).

SECT. 5.

Royal
Naval
Volunteer
Reserve.

dealing with the term of service (*r*); the training and instruction (*s*); the extension of the period of actual service in emergency by proclamation (*t*); the imposition of a penalty for non-attendance at training (*u*); the rate of pay when in actual service (*a*); and the power of the Admiralty to make regulations as to the sums payable on entry or re-entry, and to grant pensions (*b*).

Admiralty
regulations.

The Admiralty is empowered to make regulations for these purposes for the Royal Naval Volunteer Reserve, and in particular to adapt to this force the provisions in the Volunteer Act, 1863 (*c*), relating to the power to quit the corps when not in actual service, and to rules and property of the corps (*d*).

SECT. 6.—*Colonial Naval Forces.*Provision
under
Imperial
legislation.

46. The Colonial Naval Forces are of two kinds, according as to whether they are raised under the authority of the Imperial legislature or of the local legislatures. The former are regulated by the Colonial Naval Defence Acts (*e*).

Volunteers.

Under these Acts (*e*) the colonies have power, with the approval of His Majesty in Council, to raise a volunteer force, which shall form part either of the Royal Naval Reserve or the Royal Naval Volunteer Reserve, according as the local legislatures may provide. In either case, except when offered for general service in the Royal Navy, these volunteers are subject to the exclusive control of the local legislatures (*f*).

Voluntary
service in
Navy.

The Admiralty may, however, accept the offer by the Government of a colony of all or any of such volunteers for general service in the Navy. To these volunteers the provisions of the Acts governing the Royal Naval Reserves and the Royal Naval Volunteer Reserve respectively on actual service apply (*g*).

Provision
under
colonial local
legislation.

47. The colonies may also through their local legislatures, with the approval of His Majesty in Council, make provision for

(*r*) Royal Naval Reserve (Volunteer) Act, 1859 (22 & 23 Vict. c. 40), s. 2.

(*s*) *Ibid.*, s. 3.

(*t*) *Ibid.*, s. 5; the proviso only is inapplicable (Naval Forces Act, 1903 (3 Edw. 7, c. 6), s. 1 (2) (i.)).

(*u*) Royal Naval Reserve (Volunteer) Act, 1859 (22 & 23 Vict. c. 40), s. 20.

(*a*) *Ibid.*, s. 6; only so much as relates to naval pay is inapplicable (Naval Forces Act, 1903 (3 Edw. 7, c. 6), s. 1 (2) (i.)). A member of the Royal Naval Volunteer Reserve, whether training afloat, or on actual service, is deemed to be serving in His Majesty's naval or marine forces within the meaning of the Naval and Marine Pay and Pensions Act, 1865 (28 & 29 Vict. c. 73) (Naval Forces Act, 1903 (3 Edw. 7, c. 6), s. 3).

(*b*) Royal Naval Reserve (Volunteer) Act, 1859 (22 & 23 Vict. c. 40), ss. 9, 10.

(*c*) 26 & 27 Vict. c. 65.

(*d*) Naval Forces Act, 1903 (3 Edw. 7, c. 6), s. 1 (2) (ii.); see Royal Naval Volunteer Reserve Regulations, 1909, amended, 1912.

(*e*) Colonial Naval Defence Act, 1865 (28 & 29 Vict. c. 14); Colonial Naval Defence Act, 1909 (9 Edw. 7, c. 19); see title DEPENDENCIES AND COLONIES, Vol. X., pp. 520, 521.

(*f*) Colonial Naval Defence Act, 1865 (28 & 29 Vict. c. 14), s. 3 (3)—(7), 4; Colonial Naval Defence Act, 1909 (9 Edw. 7, c. 19), ss. 1 (1), (2); see title DEPENDENCIES AND COLONIES, Vol. X., pp. 520, 521.

(*g*) Colonial Naval Defence Act, 1865 (28 & 29 Vict. c. 14), s. 7; Colonial Naval Defence Act, 1909 (9 Edw. 7, c. 19), Sched., Part I.; see pp. 21, 25, *ante*.

providing and maintaining vessels of war and seamen to serve in them, for appointing commissioned, warrant and other officers, and for enforcing order and discipline. The Admiralty may accept the offer of any vessel of war so provided with its officers and men, and when so accepted, ships, officers, and men to all intents become part of the Royal Navy (*h*).

SECT. 6.
Colonial
Naval
Forces.

A colony may also provide that seamen and others maintained under these powers, entered on the terms of being bound to serve in any vessel provided by the colony, shall also in emergency be bound to serve in the Royal Navy, and where the service of such men is offered to and accepted by the Admiralty under the authority of the King in Council, the men and officers so accepted become to all intents members of the Royal Navy (*i*).

Compulsory
service in
Navy.

Any statutory powers of the Admiralty under these provisions (*k*) may be delegated to any officer in the Royal Navy of the rank of captain or higher, and special commissions may also be issued to officers volunteering for service under these provisions (*l*).

Commissions.

No power vested in the colonial Governments is affected by these provisions, and no charge can be imposed on the Exchequer of the United Kingdom under them unless expressly so provided by Parliament (*m*).

Jurisdiction.

48. After much discussion on naval colonial defence at three colonial conferences (*n*) an agreement was arrived at in execution of which Australia and Canada were to commence the formation of their own navies. Provision is made for the raising of navies by the other self-governing Dominions (*o*).

Naval
colonial
defence.

The legal position of these semi-independent fleets presented, until recently, serious difficulty. This arose from the necessity of providing legal sanction for the maintenance of discipline therein outside the territorial waters of the colony, whether on the high seas or in a foreign port. The power of the colonial legislatures, limited as it is by the terms of their constitution Acts, to give this necessary sanction is extremely doubtful. With certain specified exceptions, power is, indeed, conferred upon them to make laws for the peace, order, and good government of the Dominions. But this power, unless expressly extended, is confined within the territorial limits of the Dominions (*p*). It was urged, however, that this general restriction of authority to

Extent of
jurisdiction
of colonies.

(*h*) Colonial Naval Defence Act, 1865 (28 & 29 Vict. c. 14), ss. 3 (1)–(7), 6. As to the forces provided, see title DEPENDENCIES AND COLONIES, Vol. X., p. 520, note (*p*).

(*i*) Colonial Naval Defence Act, 1909 (9 Edw. 7, c. 19), s. 2, and Sched., Part II.

(*k*) *I.e.*, the Colonial Naval Defence Acts, 1865 (28 & 29 Vict. c. 14), and 1909 (9 Edw. 7, c. 19).

(*l*) Colonial Naval Defence Act, 1865 (28 & 29 Vict. c. 14), ss. 5, 8.

(*m*) *Ibid.*, ss. 9, 10.

(*n*) In 1902, 1907, and 1911. The debates at the last of these three conferences can be found in Parliamentary Papers [Cd. 5754-5746-2], July, 1911.

(*o*) *I.e.*, New Zealand, the Union of South Africa, and Newfoundland (Naval Discipline (Dominion Naval Forces) Act, 1911 (1 & 2 Geo. 5, c. 47), s. 1 (3)).

(*p*) *Macleod v. A.-G. for New South Wales*, [1891] A. C. 455, P. C.; and see Jenkins, *British Rule and Jurisdiction beyond the Seas*, p. 69.

SECT. 6.
Colonial
Naval
Forces.

Dominion
Naval
Forces.

these limits must be held inoperative, where its effect—as in the case of naval defence—is largely to nullify a power specially conferred (*q*).

This difficulty seems to be removed by the Naval Discipline (Dominion Naval Forces) Act, 1911 (*r*), under which, if provision is made by any self-governing Dominion (*a*) for applying the Naval Discipline Act (*b*) as at any time amended to its forces (*c*), it shall apply, subject to such modifications as may be made by law in the Dominion, to the forces and ships raised by the Dominion as if they were included in the expressions “His Majesty’s Navy” and “His Majesty’s ships” as they are used in the Naval Discipline Act (*b*).

In the event of a Dominion (*a*) placing its naval forces at the disposal of the Admiralty, the Naval Discipline Act (*b*) applies thereto without any modifications (*d*).

SECT. 7.—Coastguard.

Coastguard.

49. The Admiralty took over the then existing Coastguard service in 1856. From a date fixed by the Treasury it was empowered to exercise all the powers, rights, and privileges exercisable by any person whatsoever relating to the then existing Coastguard, and the raising and government and complete control of the Coastguard service passed into its hands (*e*).

Strength and
privileges.

The Coastguard was restricted to 10,000 officers and men, and was given the benefit of all rights, privileges, immunities, and legal protection which belonged to previously existing Coastguards (*f*).

Acquisition
of land.

All land and other property held or used for the existing Coastguard was vested in the Admiralty, and full powers given for the acquisition of land for Coastguard stations (*g*).

(*q*) Power is conferred on the legislatures of the three great self-governing Dominions to make laws for the peace, order and good government of the Dominion with regard to naval defence: see, as to Australia, Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12), s. 9 (the Constitution), s. 51 (vi.); as to Canada, British North America Act, 1867 (30 & 31 Vict. c. 3); as to South Africa, South Africa Act, 1909 (9 Edw. 7, c. 9), s. 59, though in this Act naval defence is not specifically mentioned.

(*r*) 1 & 2 Geo. 5, c. 47. The Act does not come into operation in relation to the forces of a self-governing Dominion unless or until provision to that effect is made in the Dominion (*ibid.*, s. 1 (2)).

(*a*) That is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland (*ibid.*, s. 1 (3)).

(*b*) 29 & 30 Vict. c. 109.

(*c*) Naval Discipline (Dominion Naval Forces) Act, 1911 (1 & 2 Geo. 5, c. 47), s. 1 (1). Such provision appears to have been made in Australia by the Naval Defence Act, 1910, No. 30 of 1910 (Commonwealth Act), and in Canada by the Naval Service Act, 1910 (9 & 10 Edw. 7, c. 43).

(*d*) Naval Discipline (Dominion Naval Forces) Act, 1911 (1 & 2 Geo. 5, c. 47), s. 1 (1). The officers’ names are placed in the Navy List for the purposes of seniority, and regulations have been made determining the relations *inter se* of the officers of the Royal Navy and of the Dominion naval forces.

(*e*) Coastguard Service Act, 1856 (19 & 20 Vict. c. 83), s. 3.

(*f*) *Ibid.*, ss. 3, 6. For the qualifications required for a coastguard, see King’s Regulations, art. 402.

(*g*) Coastguard Service Act, 1856 (19 & 20 Vict. c. 83), ss. 4, 5; see titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 6, 160; CONSTITUTIONAL LAW, Vol. VII., p. 89.

In case of emergency, officers and men of the Coastguard and revenue cruisers and seamen riggers may be ordered to join the Royal Navy and to serve therein for not more than five years (*h*); naval pensioners may also be ordered to rejoin (*i*), and seafaring men employed in public departments may be ordered to join for not more than a year (*k*).

SECT. 7.
Coastguard.
Service in
Navy.

Whether thus called into actual service or not, officers and men of the Coastguard borne on the books of any of His Majesty's ships have the same privileges of making remittances or allotments of wages to relatives, and are subject to the same provisions as to pay and discharge, as officers and men of their respective ratings in the Royal Navy (*l*).

Privileges.

When called into service in the Royal Navy, officers and men of the Coastguard receive the same pay as their respective ratings in the Royal Navy (*m*).

Pay.

Service in the Coastguard counts for pension in the same way as service in the fleet (*n*).

Pension.

Coastguards, whether called into actual service or not, borne on the books of any vessel of war are subject to the same laws and customs as persons serving in the fleet (*o*).

An officer of the Coastguard authorised by the Admiralty has the same power of summary punishment over the petty officers* and men of the Coastguard service on shore borne on a ship's books as the commanding officer of a vessel of war, but any order for imprisonment requires the written approval of the district Coastguard commander (*p*).

Discipline.

Coastguard officers may be put in command of and instruct and train the Royal Naval Coast Volunteers (*q*).

Royal Naval
Coast
Volunteers.

Part III.—The Royal Marines.

SECT. 1.—*Command, Enlistment, and Services.*

50. The ordinary operations of naval warfare frequently require to be supplemented by action military in character. The Royal Marines exist to supply this need.

Origin.

(*h*) Naval Volunteers Act, 1853 (16 & 17 Vict. c. 73), s. 13.

(*i*) *Ibid.*, s. 16. When so recalled they receive pay in addition to their pensions (*ibid.*).

(*k*) *Ibid.*, s. 14. As to pay, see *ibid.*, s. 15; note (*m*), *infra*.

(*l*) Coastguard Service Act, 1856 (19 & 20 Vict. c. 83), s. 7; Naval Volunteers Act, 1853 (16 & 17 Vict. c. 73), s. 17. As to desertion from the Coastguard service, see note (*f*), p. 10, *ante*.

(*m*) Naval Volunteers Act, 1853 (16 & 17 Vict. c. 73), s. 13. But if this pay be less than what a coastguard would be entitled to if not required to serve, the difference in amount is made up and paid to such persons as he may direct (*ibid.*, s. 15). This provision applies also to seafaring men in public employ called up for service (*ibid.*) As to pensioners, see Order in Council of the 7th May, 1913 (*London Gazette*, 9th May, 1913).

(*n*) Coastguard Service Act, 1856 (19 & 20 Vict. c. 83), s. 7; Naval Volunteers Act, 1853 (16 & 17 Vict. c. 73), s. 15.

(*o*) Coastguard Service Act, 1856 (19 & 20 Vict. c. 83), s. 8; Naval Volunteers Act, 1853 (16 & 17 Vict. c. 73), s. 17.

(*p*) Coastguard Service Act, 1856 (19 & 20 Vict. c. 83), s. 8.

(*q*) *Ibid.*, s. 10. For the Royal Naval Coast Volunteers, see note (*d*), p. 21, *ante*.

SECT. 1.
Command, Enlistment, and Services.

Maintenance and control.

Terms of service.

Originally ordinary soldiers serving on board ship, they are now a separate military force specially raised for naval service (*r*). Their legal position, from the nature of the force and its functions, is anomalous. Their maintenance as a military force requires the annual sanction of Parliament (*s*), but the cost is charged in the naval estimates, and their government and control are entirely in the Admiralty's hands (*t*).

51. Enlistment (*u*) in the Royal Marines is for any term not exceeding twelve years (*v*). A marine within six months (*w*) of the end of his term or after its completion may be re-engaged (*a*), and even after a second term he may continue in the service if he wishes (*b*). If his term of service, whether under the original enlistment or on a re-engagement, expires while he is on a foreign station, it may be prolonged by his commanding officer for not more than two years (*c*), but at the end of that time, unless he wishes to continue in the service, he must be conveyed to England and there finally discharged (*d*). The expiry of the term of service of a

(*r*) The first appearance of a force resembling the Royal Marines was in 1664. Regiments were frequently raised for sea service, while ordinary land regiments were also sent on board ship. The first real establishment of marines dates from 1755 (Clode, *History of the Military Forces of the Crown*, Vol. I., pp. 75, 264).

(*s*) Army Act, s. 190, includes the Royal Marines in the "regular forces" which need annual authorisation. Throughout this title references to the Army Act mean references to the Army Act, 1881 (44 & 45 Vict. c. 58), as re-enacted annually with amendments for a period of one year, by the Army (Annual) Act passed each year; see Army (Annual) Act, 1912 (2 & 3 Geo. 5, c. 5). The Army Act, when reprinted, is always to be printed with all amendments (Army (Annual) Act, 1885 (48 & 49 Vict. c. 8), s. 8 (2)), and it is in practice so reprinted every year. For the Army Act, as amended up to and including the amendments of 1909, see Butterworth's 20th Century Statutes, Vol. V., pp. 102 *et seq.*

(*t*) Army Act, s. 179. Moreover, in respect of the Royal Marines, the Admiralty exercises many functions exercised in the case of the ordinary land forces directly by the Crown (*ibid.*, s. 179 (1), (3), (4), (6), (9), (11)).

(*u*) The term of enlistment and the general conditions of service in the Royal Marines are expressly removed from the purview of the Army Act (*ibid.*, s. 179 (12)).

(*v*) Royal Marines Act, 1847 (10 & 11 Vict. c. 63), s. 1; Royal Marines Act, 1857 (20 Vict. c. 1), s. 1. Terms of enlistment or re-engagement are prescribed by the Admiralty (*ibid.*, s. 1). As to men engaging to serve a part of their time in the Royal Fleet Reserve, see p. 23, *ante*; as to false statements on enlisting, see p. 9, *ante*; as to the commissioning and promotion of officers, see title CONSTITUTIONAL LAW, Vol. VII., pp. 21, 22; Stat. R. & O. 1913, Marines, No. 220.

(*w*) Or, where ordered on foreign service, within three years (Royal Marines Act, 1847 (10 & 11 Vict. c. 63), s. 4).

(*a*) *Ibid.*, s. 3. The term of re-engagement, together with the first term, must not exceed twenty-one years (Royal Marines Act, 1857 (20 Vict. c. 1)), and he must previously make a declaration before a justice of the peace or some one with equal authority—a naval officer commanding a ship or the commanding officer of a battalion or detachment of the Royal Marines (Army Act, s. 179 (13); King's Regulations and Admiralty Instructions, art. 1174).

(*b*) Royal Marines Act, 1847 (10 & 11 Vict. c. 63), s. 5. But in all three cases above stated the approbation of his commanding officer is necessary.

(*c*) *Ibid.*, s. 5.

(*d*) *Ibid.*, s. 6. Unless, being in a British colony, he seeks from the

non-commissioned officer or marine between the commission of an offence by him and trial does not affect his status as a marine for the purposes of his trial and punishment, but in such circumstances the trial must always be by naval, general, district, or garrison court-martial (*e*).

SECT. 1.
Command,
Enlist-
ment, and
Services.

52. Any period of time during which a man (*f*) is absent from duty, whether because he is imprisoned under sentence of a court-martial or other authorised court, or is in confinement for debt, or by reason of his desertion, or absence without leave, is not reckoned as part of his term of service. Where a man is made prisoner of war, and a court-martial on inquiry finds he was made prisoner through his own wilful neglect, or that he has, or has not, returned to his duty as soon as possible, the court may direct that all or any of the time he was absent from his duty may be deducted from his term of service (*g*).

Absence.

53. Regulations made by a Secretary of State and the Admiralty may provide for the voluntary transfer of a man of the Royal Marines to another section of the regular forces, or *vice versa*, and a person so transferred is to be put as nearly as possible in the same position as if he had enlisted in the force to which he is transferred (*h*).

Transfers.

54. Persons in receipt of pensions for service as non-commissioned officers and men in the Royal Marines are liable to be called into actual service by the Admiralty in an emergency. Non-attendance, if so called upon, renders them liable to be treated as deserters. When serving they have the same status and pay as ordinary non-commissioned officers and men (*i*).

Service by
pensioners.

SECT. 2.—Discipline.

55. Officers and men of the Royal Marines are subject to naval or military law according to the circumstances of their service at any particular time.

Discipline.

When borne on the books (*k*) of any ship commissioned by His Majesty they are subject (*l*) to the Naval Discipline Act (*m*), and

Under mili-
tary law.

Governor of the colony, and receives, with the consent of his commanding officer, permission to remain there.

(*e*) Royal Marines Act, 1847 (10 & 11 Vict. c. 63), s. 7.

(*f*) This includes non-commissioned officers as well as marines in the Royal Fleet Reserve or the Royal Marine Volunteers (Army Act, s. 179 (21)). As to the Royal Fleet Reserve, see p. 23, *ante*; as to the Royal Marine Volunteers, see p. 33, *post*.

(*g*) Royal Marines Act, 1847 (10 & 11 Vict. c. 63), s. 8. Service is similarly forfeited by fraudulent enlistment (Army Act, s. 179 (14)).

(*h*) Army Act, s. 179 (12); see King's Regulations and Orders for the Army, 1912, paragraph 333 (*v*.).

(*i*) Naval Enlistment Act, 1884 (47 & 48 Vict. c. 46), s. 4, extending the provisions of the Naval Volunteers Act, 1853 (16 & 17 Vict. c. 43), ss. 16, 21, to the Royal Marines: see note (*d*), p. 21, *ante*.

(*k*) They are entered on the books even if embarked for service on shore (King's Regulations and Admiralty Instructions, art. 1133, made under authority of the Army Act, s. 179 (18)).

(*l*) Army Act, s. 179 (15).

(*m*) 29 & 30 Vict. c. 103; see pp. 9 *et seq.*, *ante*.

SECT. 2.
Discipline.

other laws and rules governing the Navy. But this general rule is subject to some modifications. Notwithstanding the fact that they are so borne, the Army Act (*n*) is applicable to any officer or man of the Royal Marines—

- (1) Found on shore as a deserter or absentee without leave (*o*);
- (2) Committing an offence punishable under the Army Act (*n*), but for which he is not amenable to a naval court-martial (*p*);
- (3) Committing an offence (*q*) on shore, even though amenable therefor to a naval court-martial, if the Admiralty so directs (*r*);
- (4) While employed on land, if the senior naval officer present so directs (*s*).

When not so borne on the books of a ship commissioned by the Crown, marines are subject to the ordinary military discipline of the rest of the land forces (*t*).

Courts-
martial.

56. Special provisions, however, are made for courts-martial on marines.

The Admiralty exercises in this regard, in the same manner and to the same extent, all powers exercisable by the Crown under the Army Act (*u*), whether by warrant or otherwise, of convening or authorising an officer to convene or delegate his power to convene, or of confirming the findings and sentences of courts-martial and generally in relation thereto (*u*).

A general court-martial for the trial of an officer or man in the Royal Marines can only be convened by an officer authorised by warrant from the Admiralty (*a*). Subject to the general power of confirmation by the Admiralty, the findings and sentences of a general or district court-martial on a marine may be confirmed either by an officer authorised to convene such a court-martial, or by an officer with the power of confirmation in the case of an ordinary member of the regular land forces (*b*).

(*n*) As to the Army Act, see note (*s*), p. 30, *ante*.

(*o*) And to any person dealing with or having relations with any such officer or man (Army Act, s. 179 (15) (*a*)).

(*p*) *Ibid.*, s. 179 (16).

(*q*) "Offence" means offence punishable under the Army Act.

(*r*) *Ibid.*, s. 179 (17).

(*s*) *Ibid.*, s. 179 (15). This means an employment on land amounting to an expedition, and not to a mere temporary landing; see King's Regulations and Admiralty Instructions, art. 1133. When not made under such circumstances subject to military law, the power of awarding summary punishment (see p. 11, *ante*) may be exercised by the officer in immediate command of the marines so serving on shore. As to billeting the Royal Marines, see note (*m*), p. 54, *post*.

(*t*) See p. 42, *post*. Formerly a Marine Mutiny Act was passed providing specially for them when not subject to naval discipline.

(*u*) Army Act, s. 179 (3), (4).

(*a*) *Ibid.*, s. 179 (1). A marine serving beyond the seas with another portion of the regular forces may be tried by a general court-martial convened by the officer in command of those forces, provided (1) that this officer has power to convene general courts-martial; (2) that in his opinion there is not present an officer with the requisite authority from the Admiralty (*ibid.*).

(*b*) *Ibid.*, s. 179 (5). As to courts-martial, see title COURTS, Vol. IX., pp. 97 *et seq.*; and see p. 11, *ante*.

57. When subject to naval law, marines are in all matters under the command of the captain, the executive officer, and the officer of the watch. In their distinctive duties as marines they are commanded by their own officers, but, when carrying out duties in conjunction with naval officers and men, the command depends on the relative ranks of the officers present (*c*). **SECT. 2.**
Discipline.
Under naval law.

58. While on board ship, the men are employed as sentinels and generally perform all ship's duties, regard being paid to the duties for which they are embarked. They must not be employed as petty officers, nor are they obliged to go aloft (*d*). On board ship.

SECT. 3.—Royal Marine Volunteers (*e*).

59. The Admiralty was given power in 1908 to raise and maintain a body of volunteers to be known as the Royal Marine Volunteers, and to make regulations for their enrolment (*f*). Royal Marine Volunteers.

Royal Marine Volunteers are subject to the enactments in force relating to volunteers, the Admiralty being substituted for a Secretary of State in making regulations adapting them. When subject to military law they are in the same position as the Royal Marines, and whether training, afloat, or on actual service are available for service beyond the seas (*g*).

Part IV.—Naval and Marine Pay, Pensions, and Prize Money (*h*).

60. The pay of officers and men both of the Royal Navy and Royal Marines is regulated by Orders in Council laid before Parliament (*i*). Pay.

(*c*) King's Regulations and Admiralty Instructions, art. 1134.

(*d*) *Ibid.*, art. 1156.

(*e*) As to marines of the Royal Fleet Reserve, see p. 23, *ante*.

(*f*) Naval Forces Act, 1903 (3 Edw. 7, c. 6), s. 2 (1). Volunteers when training, afloat, or on actual service are within the meaning of the Naval and Marine Pay and Pensions Act, 1865 (28 & 29 Vict. c. 73), (Naval Forces Act, 1903, (3 Edw. 7, c. 6), s. 3.

(*g*) Naval Forces Act, 1903 (3 Edw. 7, c. 6), s. 2 (2), (3). While on active service, as well as during training, a Royal Marine Volunteer is included in the term "man of the Royal Marines" used in the Army Act. No Royal Marine Volunteers have, up to the present, been raised.

(*h*) As to the offence of personation in order to receive any pay, pension etc., see Admiralty Powers, etc. Act, 1865 (28 & 29 Vict. c. 124), s. 8; title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 708. As to the making or uttering of false documents in order to obtain any pay, pension etc., see Admiralty Powers, etc. Act, 1865 (28 & 29 Vict. c. 124), s. 6; title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 750, 751. As to the procedure in the prosecution of these offences, see title MAGISTRATES, Vol. XIX., p. 586. It is a felony to forge, counterfeit, or utter any forged or counterfeited document relating to the payment of a pension (Pensions Act, 1839 (2 & 3 Vict. c. 51), s. 9); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 751.

(*i*) Naval and Marine Pay and Pensions Act, 1865 (28 & 29 Vict. c. 73), ss. 2, 3, 12. The Orders in Council are embodied in the King's Regulations and Admiralty Instructions, ch. 27, 28. The rates of pay for the time

PART IV.
**Naval and
 Marine Pay,
 Pensions,
 and Prize
 Money.**
 Pensions etc.

61. There is no statutory right to retired pay or pensions. Such right as there is depends upon the King's Regulations and Admiralty Instructions, which specifically declare that they are held only during good behaviour and are liable to forfeiture or suspension for any misconduct (*k*).

Besides the retired pay of officers and pensions to seamen, the Admiralty has the disposal of good service pensions, Naval and Greenwich Hospital pensions (*l*), Travers pensions (*m*), and pensions, gratuities, and compassionate allowances to the widows or other relatives of deceased officers or men (*n*). But neither officer nor man, nor a widow or other relative of an officer or man, has any right to these pensions, gratuities and allowances; they are awarded at the sole discretion of the Admiralty.

All pensions (*o*), bounty money, grants, or other allowances (*p*) are paid in such manner, and subject to such restrictions, conditions, and provisions, as are from time to time directed by Order in Council (*q*).

Not
 assignable.

Any assignment, sale, or contract, made by an officer, seaman, or marine entitled to a naval pension, or by a person entitled to a pension as the widow of an officer, or by a person entitled to a compassionate allowance, or by a person entitled to marine half-pay of or in relation to such pension, allowance or half-pay, is void (*r*). There is a similar prohibition with regard to the pay of a subordinate officer, seaman, or marine (*s*).

being in force will be found in the Quarterly Navy List. As to the liability of pensioners to further service, see p. 29, *ante*.

(*k*) See, as to officers, King's Regulations and Admiralty Instructions, art. 2014A; and as to men, *ibid.*, art. 1970A.

(*l*) Greenwich Hospital Acts, 1865 (28 & 29 Vict. c. 89), 1869 (32 & 33 Vict. c. 44), 1872 (35 & 36 Vict. c. 67), 1883 (46 & 47 Vict. c. 32), 1885 (48 & 49 Vict. c. 42), and 1898 (61 & 62 Vict. c. 24).

(*m*) Naval Knights of Windsor (Dissolution) Act, 1892 (55 & 56 Vict. c. 34).

(*n*) Greenwich Hospital Act, 1883 (46 & 47 Vict. c. 32), s. 2.

(*o*) This term comprises naval pensions, Greenwich Hospital pensions, gratuities, and allowances within the meaning of the Greenwich Hospital Acts, 1865 to 1883 (see note (*l*), *supra*) (Naval Pensions Act, 1884 (47 & 48 Vict. c. 44), s. 2).

(*p*) But not money distributable under the Naval Agency and Distribution Act, 1864 (27 & 28 Vict. c. 24), which is therein specially provided for; see p. 35, *post*.

(*q*) Naval and Marine Pay and Pensions Act, 1865 (28 & 29 Vict. c. 73), s. 3. The provisions of the Orders in Council in force will be found in the King's Regulations and Admiralty Instructions, Addenda, ch. 51a, 52a.

(*r*) Naval and Marine Pay and Pensions Act, 1865 (28 & 29 Vict. c. 73), s. 4. It is submitted that this provision repeals the Pensions Act, 1839 (2 & 3 Vict. c. 51), s. 3, which authorised the assignment of the next quarterly payment of a pension in certain cases. As to the meaning of the term "pension," see note (*o*), *supra*.

(*s*) Naval and Marine Pay and Pensions Act, 1865 (28 & 29 Vict. c. 73), s. 5. The assignment of any pay or other consideration for a continuing service is void at common law as being against public policy. As to the assignment of pay, half-pay, pensions etc., generally, see titles CHANCES IN ACTION, Vol. IV., pp. 400 *et seq.*; RECEIVERS, Vol. XXIV., pp. 368, 369; REVENUE, Vol. XXIV., p. 752; and as to commutation of pensions, see title REVENUE, Vol. XXIV., p. 752. See the special prohibition in

The Admiralty has power to restore a pension forfeited under the Forfeiture Act, 1870 (*a*).

62. Where a person entitled to a naval pension or other allowance, or his wife, or any person he is liable to maintain, is admitted into a workhouse, the guardians may require the next payment falling due to be paid to them (*b*).

Part of the pension of a person leaving a wife or family chargeable to a union or parish may be paid to the relief authorities by the order of two or more justices of the county or place where the union or parish is situate (*c*).

63. If a pensioner becomes lunatic, part or all of the pension may be paid to his wife, or anyone else having the care of him, for his support (*d*).

64. When an officer is a bankrupt, so much of his pay as the court, with the consent of the chief officer of the department dealing with it, may direct is available for distribution among his creditors; and, with regard to any half-pay or pension, the court may order it to be paid to the trustee and applied by him as it may direct (*e*).

65. Prize money is granted (*f*) to the officers and crew of ships (*g*) in the Navy in time of war as a reward for active assistance in the capture or destruction of one of the enemy's fleet (*h*), or in the taking of other property seizable under the rules of international law.

Its distribution, as well as the distribution of any other grant or reward, is provided for by the appointment of an agent for every ship of war in commission (*i*).

PART IV.
Naval and
Marine Pay,
Pensions,
and Prize
Money.

Forfeited
pension.
Pauper.

Lunatic.

Bankrupt.

Prize money.

Prize agents.

the case of prize money or other bounties (Naval Agency and Distribution Act, 1864 (27 & 28 Vict. c. 24), s. 15).

(*a*) 33 & 34 Vict. c. 23; King's Regulations and Admiralty Instructions, art. 2014A. Power is given by Order in Council made under authority of the Naval Pensions Act, 1884 (47 & 48 Vict. c. 44), s. 3. A pension is forfeited on its holder being convicted of treason or felony and sentenced to death or penal servitude, or any term of imprisonment with hard labour, or a term of imprisonment without hard labour exceeding twelve months (Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 2); and see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 428; REVENUE, Vol. XXIV., pp. 752, 753.

(*b*) Pensions Act, 1839 (2 & 3 Vict. c. 51), s. 2.

(*c*) *Ibid.*, s. 4; see King's Regulations and Admiralty Instructions, art. 1971A; and see also title POOR LAW, Vol. XXII., p. 572.

(*d*) Lunacy Act, 1800 (53 & 54 Vict. c. 5), s. 335; see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 439.

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 53 (1), (2); see titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 190, 191; RECEIVERS, Vol. XXIV., p. 369.

(*f*) Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 55 (1). See, generally, as to prize law, titles CONSTITUTIONAL LAW, Vol. VI., p. 445; PRIZE LAW AND JURISDICTION, Vol. XXIII., pp. 275 *et seq.*; SHIPPING AND NAVIGATION.

(*g*) This term includes "flag officers, commanders, and other officers, engineers, seamen, marines, soldiers and others on board" any ship of war (Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 2).

(*h*) *Ibid.*, s. 42; see title PRIZE LAW AND JURISDICTION, Vol. XXIII., p. 293.

(*i*) Naval Agency and Distribution Act, 1864 (27 & 28 Vict. c. 24), s. 12. This Act is applied to money payable under the Slave Trade Act, 1873 (36 & 37 Vict. c. 88), by *ibid.*, s. 16, or any ship, other than a ship of war,

PART IV
Naval and
Marine Pay,
Pensions,
and Prize
Money.

Appointment
of agent.

Disputes
and costs.

Authority for
distribution.

Forfeited and
unclaimed
shares.

Default
of agent.

The post of agent may be held by a partnership body, but not by anyone holding office or employment under the Crown, or by a proctor, attorney, or solicitor (*a*).

The appointment, which must be by attested instrument registered at the Admiralty, signed by the commanding officer, remains unaffected by a change in that command, and makes the holder an officer under the jurisdiction of the Court of Admiralty (*b*). The agent is entitled to copies of official accounts, and is remunerated by a percentage on the net amount distributable.

Disputes as to the distribution, or the investment which is authorised pending distribution, come within the jurisdiction of the Court of Admiralty (*c*). Before the distribution, the costs and expenses of officers and crew and agent and any other charges must be taxed and paid (*d*).

The distribution, where not specially provided for by Act of Parliament, must be made under the direction of a royal proclamation or Order in Council, and instruments made in pursuance of such an order by, to, or upon anyone in the service of the Crown are exempt from stamp duty (*e*).

Forfeited and unclaimed shares, together with a deduction of 5 per cent. on the proceeds of all prizes, on all grants to the Navy and Marines, and on all bounty money, and on any other money from which by law prior to 23rd June, 1864, a deduction was allowed, are carried to and form part of a naval prize cash balance (*f*).

The rights of the officers and crew to take any step as salvors, seizors, captors or otherwise, in the default of the agent, is not affected (*g*). The rights and authority of the Crown are also saved, and power is given to make Orders in Council for the purposes of the Act (*h*).

Part V.—The Regular Army.

SECT. 1.—*Command, Enlistment, and Services.*

Definition
of "regular
forces."

66. The term "regular forces" is defined by the Army Act (*i*) as meaning officers and soldiers who by their commission, terms of enlistment or otherwise are liable to render continuously for a term military service in any part of the world. It includes the regular

belonging to the Crown, by direction of the Admiralty (Naval Agency and Distribution Act, 1864 (27 & 28 Vict. c. 24), ss. 3, 4). As to slave trade, see title TRADE AND TRADE UNIONS.

(*a*) Naval Agency and Distribution Act, 1864 (27 & 28 Vict. c. 24), ss. 7, 8, 23 (1).

(*b*) *Ibid.*, ss. 5, 6, 9, 11.

(*c*) *Ibid.*, ss. 18—22.

(*d*) *Ibid.*, s. 13.

(*e*) *Ibid.*, ss. 14, 15, 16. The proclamation for the time being in force will be found in the Quarterly Navy List.

(*f*) Naval Agency and Distribution Act, 1864 (27 & 28 Vict. c. 24), s. 17.

(*g*) *Ibid.*, s. 23 (2).

(*h*) *Ibid.*, ss. 23 (3), 25.

(*i*) Army Act, s. 190 (8). As to the Army Act, see note (*s*), p. 30, *ante*,

army commonly so called, the Royal Marines (*k*), the Indian Army (*l*), and the Royal Malta Artillery (*m*); also the reserve forces, when subject to military law (*n*).

67. The Indian Army, which is practically entirely composed of natives of India, is subject to the Indian military law contained in the Indian Articles of War (*o*).

The Colonial Forces consist of troops raised by the various Colonial Governments, and of troops raised and maintained under the authority of the Imperial Parliament for service in the Colonies (*p*).

68. The maintenance of a standing army within the realm in times of peace, without the consent of Parliament, was declared to be illegal by the Bill of Rights (*q*), and since then the regular forces have only continued to exist by virtue of the annual renewal of the sanction given by Parliament (*r*).

69. The government of the forces is vested in the Crown (*s*), who has power to make regulations as to command and administration (*t*).

The administration of the Army is confided by the Crown to the Army Council (*a*).

70. The constituent elements of the regular forces are fighting troops, services, and departments. The two former are divided into "corps," an expression which means any military body declared by Royal Warrant to be a corps, which is the unit for purposes of

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Command,
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Services.

Indian Army
and Colonial
Forces.

Maintenance
of the regular
forces.

Government
and adminis-
tration.

Corps and
departments.

(*k*) When borne on the books of a man-of-war in commission the Marines are subject to naval law; see p. 31, *ante*; Army Act, s. 179 (15).

(*l*) The expression "India" is defined by *ibid.*, s. 190 (21).

(*m*) *Ibid.*, s. 190 (8).

(*n*) *Ibid.*; see pp. 43, 72, *post*. The reserve forces are defined by the Army Act, s. 190 (9).

(*o*) *Ibid.*, s. 180 (2) (a). The term "native of India" is defined by *ibid.*, s. 190 (22), as meaning a person triable and punishable under Indian military law. The Indian Articles of War do not apply to any British-born subject, or to any legitimate Christian lineal descendant of the same, whether in the paternal or maternal line; see Army Act, s. 180 (2) (b); Indian Articles of War (Act No. 5 of 1865); Indian Articles of War Amendment Act, 1894 (Act No. 12 of 1894). Native camp followers are made subject to Indian military law by the Army Act, s. 176 (10); see also title DEPENDENCIES AND COLONIES, Vol. X., p. 596.

(*p*) The term "colony" is defined by the Army Act, s. 190 (23). As to the Colonial Forces, see *ibid.*, s. 177.

(*q*) 1 Will. & Mar. sess. 2, c. 2, s. 1; see title CONSTITUTIONAL LAW, Vol. VI., p. 380.

(*r*) See, e.g., the Army (Annual) Act, 1912 (2 & 3 Geo. 5), c. 5.

(*s*) See stat. (1661) 13 Car. 2, stat. 1, c. 6; title CONSTITUTIONAL LAW, Vol. VI., pp. 417—419.

(*t*) Army Act, s. 71; see King's Regulations and Orders for the Army, (hereafter in Parts V.—VIII. of this title referred to as King's Regulations, 1912), paragraphs 217—236; and, as regards India and the colonies, *ibid.*, paragraphs 38—48. Power is also reserved to the Crown to make articles of war, provided that the same do not create any crimes or punishments not recognised by the Army Act (*ibid.*, s. 69).

(*a*) See, generally, title CONSTITUTIONAL LAW, Vol. VI., p. 418; Vol. VII., pp. 92 *et seq.*

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enlistment and service (b). The unit for purposes of discipline etc. is not necessarily the corps, and, like the term "commanding officer," is not capable of definition, its meaning depending upon the exigencies of any particular situation and the custom of the service (c).

Commissions.

71. Persons may join the regular forces either as officers (d) or as soldiers (e). Appointments to first commissions as officers are governed by the provisions of the Pay Warrant (f). Trafficking in commissions is an offence punishable on conviction, on indictment or information, by a fine of £100 or imprisonment not exceeding six months, and if committed by an officer entails dismissal on conviction by court-martial (g).

No right
to resign.

An officer has no right to resign his commission (h), and if he considers himself wronged by his commanding officer and cannot obtain redress, his only remedy is to complain to the Army Council, whose duty it is to investigate the complaint and report to the Crown through the Secretary of State (i).

Enlistment.

72. Enlistment is the acceptance of an engagement in the military service of the Crown, and is in the nature of a contract between the person enlisted and the Crown (j). It follows, therefore, that the terms upon which a person enlists cannot be altered without his consent. Recruits are enlisted either for service with a

(b) The expression "corps" is defined by the Army Act, s. 190 (15). A soldier on enlistment, is appointed to a corps and, unless transferred, serves in it for the whole period of his service. An officer is, on the other hand, liable to serve with any portion of the army. As to the Army Act, see note (a), p. 30, *ante*.

(c) See King's Regulations, 1912, paragraph 456; Rules of Procedure, 1907, s. 129 (reprinted with amendments, Stat. R. & O., 1912, No. 1905); see also *Bradley v. Arthur* (1825), 6 Dow. & Ry. (K. B.) 413.

(d) The expression "officer" is defined by the Army Act, s. 190 (4). An alien may not be appointed to a commission (*ibid.*, s. 95 (1)). An officer holds his position at the will of the Crown, and cannot bring an action for wrongful dismissal (*Re Tufnell* (1876), 3 Ch. D. 164; *R. v. Secretary of State for War*, [1891] 2 Q. B. 326, C. A.). The Army List is evidence of an officer's rank (Army Act, s. 163 (1) (d)). As to army chaplains, see title ECCLESIASTICAL LAW, Vol. XI., pp. 647, 648; and see *ibid.*, pp. 443, 483, note (f).

(e) The expression "soldier" is defined by the Army Act, s. 190 (6). "Non-commissioned officer" is defined *ibid.*, s. 190 (5).

(f) King's Regulations, 1912, paragraphs 213—216; Pay Warrant, 1909; and Army Candidates Regulations; and see title CONSTITUTIONAL LAW, Vol. VII., pp. 21, 22.

(g) Army Act, s. 155; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 486.

(h) *Parker v. Clive* (Lord) (1769), 4 Burr. 2419; *Vertue v. Clive* (Lord) (1769), 4 Burr. 2472; *R. v. Cumming, Ex parte Hall* (1887), 19 Q. B. D. 13; *Hearson v. Churchill*, [1892] 2 Q. B. 144, C. A.; *Ex parte Trenchard* (1874), L. R. 9 Q. B. 406.

(i) *Woods v. Lytleton* (1909), 25 T. L. R. 665, C. A.; Army Act, s. 42; and see *ibid.*, s. 27 (1), (2), as to false accusations.

(j) Compulsory military service was declared illegal by stat. (1640) 16 Car. 1, c. 28, the royal prerogative of purveyance was abolished by stat. (1680) 12 Car. 2, c. 24, s. 11, and any similar powers as far as the army is concerned now depend on the provisions of the Army Act; and see also notes (g), (h), p. 19, *ante*.

particular corps of the regular forces (*k*) or for general service (*l*). In the latter case the recruit is to be appointed as soon as practicable to some corps of the regular forces (*m*). A person enlisted for service with or appointed to a particular corps serves in it for the period of his army service (*n*), unless, when enlisted for general service, he is transferred within three months to some other corps of the same branch or arm of the service (*o*). A man may be transferred with his own consent to any corps at any time (*p*), or by compulsion to any corps of the same branch or arm serving in the United Kingdom (*q*).

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73. All British subjects are entitled to offer themselves for enlistment, and aliens may be enlisted with the consent of the Crown (*r*). Inhabitants of British protectorates, negroes, and persons of colour are not deemed to be aliens for this purpose (*s*). Apprentices may be enlisted, but where the apprentice was bound when he was under the age of sixteen for at least four years by a regular indenture, and was under twenty-one at the date of his enlistment, the master may apply to a court of summary jurisdiction for delivery up to him of the apprentice (*a*). The master may, however, elect to give up the indenture of his apprentice, and, where he

Persons who
may be
enlisted.

(*k*) For definition of the expression "corps," see Army Act, s. 190 (15).

(*l*) *Ibid.*, s. 82 (1).

(*m*) *Ibid.*, s. 82 (2).

(*n*) *Ibid.*, s. 83.

(*o*) *Ibid.*, s. 83 (1).

(*p*) *Ibid.*, s. 83 (2). The competent military authority may vary the conditions of his service in this case to suit the altered circumstances (*ibid.*, s. 83 (3)).

(*q*) A soldier may be compulsorily transferred in the following cases:—(1) where he is invalided from foreign service (*ibid.*, s. 83 (4) (a)); (2) where he is ordered abroad, and either his health renders him unfit for foreign service, or he is within two years from the end of his term of army service (*ibid.*, s. 83 (4) (b)); (3) where he is on foreign service and has more than two years of his term of army service unexpired, and his corps is ordered to another station or to return home (*ibid.*, s. 83 (5)); (4) soldiers transferred to serve as warrant officers, or on the staff, or in any corps not being infantry, artillery, or engineers, may be transferred to any other corps (*ibid.*, s. 83 (6)); (5) soldiers guilty of desertion, or fraudulent enlistment, or sentenced by court-martial to a punishment of not less than three months' detention, are liable to general service in commutation wholly or in part of other punishment (*ibid.*, s. 83 (7)); (6) soldiers in custody as deserters may be transferred to any other corps without prejudice to their subsequent trial and punishment (*ibid.*, s. 83 (8)).

(*r*) *Ibid.*, s. 95; see title ALIENS, Vol. I., p. 309.

(*s*) Army Act, s. 95 (2); see title ALIENS, Vol. I., p. 309.

(*a*) Army Act, s. 96. The master must within one month after the apprentice left his service take the oath specified in *ibid.*, Sched. I., before a justice of the peace, and obtain from the justice a certificate, in the form set out in the above schedule, of having taken such oath (*ibid.*, s. 96 (1), Sched. I.). He may then apply to a court of summary jurisdiction, within whose jurisdiction the apprentice is, and the court, if satisfied of the master's right to claim the apprentice, may order the latter to be delivered up to the master by his commanding officer. If the commanding officer so requires, the court must try the apprentice for falsely stating on attestation that he was not an apprentice (*ibid.*, s. 96 (2)). An apprentice may not be taken from the service except under an order of a court of summary jurisdiction (*ibid.*, s. 96 (3)). As to courts of summary jurisdiction generally, see title MAGISTRATES, Vol. XIX., pp. 571 *et seq.*

- SECT. 1.** does so within one month after the attestation of the apprentice, he is entitled to receive to his own use so much of the bounty, if any, payable to the apprentice on enlistment, as has not been paid to the latter before notice was given of his being an apprentice (*b*). Indentured labourers in a colony, if imported at the expense of the employer or the colony in consideration of the indenture, may be claimed under all circumstances (*c*).
- Command, Enlistment, and Services.**
- Period of service.** **74.** A person may be enlisted to serve for a period not exceeding twelve years, which is known as the term of his original enlistment (*d*). Such enlistment may be entirely for army service, that is with the colours, or partly for army service and partly for service in the reserve (*e*), and dates from the day of attestation (*f*) except in cases where a soldier has forfeited any part of his service (*g*).
- Re-engagement and continuance.** **75.** A soldier in army service may, after the expiration of nine years from the date of his original enlistment, be re-engaged on the recommendation of his commanding officer and with the approval of the competent military authority, for such a further period of army service as will make up a total of twenty-one years (*h*). A soldier who has completed twenty-one years' service may, if he so desires and the competent military authority (*i*) approves, be continued as a soldier of the regular forces (*k*).
- (*b*) Army Act, s. 96 (5); as to the Army Act, see note (*s*), p. 30, *ante*.
 (*c*) Army Act, s. 97.
 (*d*) *Ibid.*, s. 76. As to re-engagement and continuance, see *ibid.*, s. 84.
 (*e*) *Ibid.*, s. 77. The relative proportions of colour service and service in the reserve are varied from time to time as the exigencies of the service demand. The Army Council may allow a soldier to enter the reserve at once, or to extend his army service for all or any part of the unexpired residue of his term of enlistment, or to extend such term up to twelve years or any shorter period. A reservist may also be permitted to re-enter on army service for all or any part of the unexpired residue of his term of enlistment, or for any period not exceeding in the whole twelve years from his attestation (*ibid.*, s. 78). For the definition of "reserve," see *ibid.*, s. 101 (2).
 (*f*) *Ibid.*, s. 80 (5).
 (*g*) A soldier who has been guilty of desertion or fraudulent enlistment forfeits the whole of his service prior to conviction, and his period of service will date from the conviction, or, where he confesses the offence, from the order, if any, of the competent military authority dispensing with his trial. All or any part of the forfeited service may be restored by the Army Council (*ibid.*, s. 79; and see King's Regulations, 1912, paragraph 273).
 (*h*) Army Act, s. 84; and see King's Regulations, 1912, paragraphs 264—269. The period of twenty-one years is computed from the date of attestation, and is inclusive of any period previously served in the reserve (Army Act, s. 84 (1)). The provisions of the Army Act as to forfeiture also apply to a re-engagement (Army Act, s. 84 (2)); as to forfeiture, see note (*g*), *supra*. A declaration must be made before his commanding officer by a soldier desiring to re-engage (Army Act, s. 84 (3)); see King's Regulations, 1912, paragraph 264. A non-commissioned officer has the option of re-engaging and continuing, or of doing either of these things, subject to the veto of the Army Council (Army Act, s. 86).
 (*i*) *Ibid.*, s. 85. For the definition of "competent military authority," see *ibid.*, s. 101 (1).
 (*k*) *Ibid.*, s. 85; King's Regulations, 1912, paragraphs 270—272. He can claim his discharge on giving three months' notice (Army Act, s. 85); see also King's Regulations, 1912, paragraph 272.

76. A soldier who is entitled to be discharged may have his service prolonged for a period not exceeding twelve months, if at the time a state of war exists, or such soldier is beyond the seas, or the reserve has been called out on permanent service (*l*). If a soldier is entitled to be transferred to the reserve at a time when a state of war exists, he may be detained in army service for a period not exceeding twelve months (*m*). In both the above cases the soldier entitled to discharge or to transfer to the reserve may agree to continue as a soldier of the regular forces on making the prescribed declaration before his commanding officer (*n*).

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Enlist-
ment, and
Services.

Prolongation
of service.

Similarly, in case of imminent national danger or of great emergency the Crown may by proclamation order that soldiers who would be entitled to be transferred to the reserve shall continue in army service (*o*). In such case the soldiers continued in army service are liable to serve in army service for the same period for which they might be required to serve if they had been transferred to the reserve and called out on permanent service (*p*).

77. A person who offers to enlist in the regular forces receives from the recruiter a notice informing him of the general conditions of the contract he is about to enter into, and directing him to appear before a justice of the peace for attestation (*q*). If he fails to appear, or on appearing declines to be enlisted, no further proceedings are to be taken (*r*). If he appears, the justice must ask him whether he has been served with and understands the notice and agrees to be enlisted, and the enlistment is not to be proceeded with if the recruit appears to the justice to be under the influence of liquor (*s*). If the recruit agrees to be enlisted he is to be cautioned against making a false answer, and the questions contained in the attestation paper are to be put to him and his answers recorded on the paper itself. Upon signing the declaration contained in the attestation paper and taking the oath of allegiance, the recruit becomes an enlisted soldier of the regular forces (*t*). It is to be noted that a person may also become subject to military law as a

Procedure on
enlistment.

Attestation.

(*l*) Army Act, s. 87 (1).

(*m*) *Ibid.*, s. 87 (2).

(*n*) *Ibid.*, s. 87, (3), (4).

(*o*) *Ibid.*, s. 88 (1).

(*p*) *Ibid.*, s. 88 (3). As to the period of service when the reserve is called out, see p. 60, *post*.

(*q*) Army Act, s. 80 (1). The term "justice of the peace" includes, for attestation purposes, officers duly authorised by the Army Council; Colonial and Indian magistrates; British consuls abroad; persons duly authorised by the Governor-General of India or the Governors of Colonies; British residents and political agents in Indian native states (*ibid.*, s. 94).

(*r*) *Ibid.*, s. 80 (3).

(*s*) *Ibid.*, s. 80 (2). An enlistment on Sunday is not void under the Sunday Observance Act, 1677 (29 Car. 2, c. 7) (*Wolton v. Gavin* (1850), 16 Q. B. 48).

(*t*) Army Act, s. 80 (4). The justice must sign the attestation paper and deliver it to the recruiter, and the officer who approves of the recruit for service must, at the request of the recruit, furnish the latter with a certified copy of his attestation paper. A fee of 1s. is payable to the clerk of the justice for the attestation (*ibid.*). A statement made by a soldier in his attestation paper as to the place of his birth does not determine his place of settlement (*Chertsey Union Guardians v. Surrey* (Clerk

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soldier of the regular forces simply by receiving pay as such, even though he may not have been duly attested (*u*). Where a person has gone through the form of attestation, but the same is invalid, he cannot claim his discharge on that ground, unless he does so within three months from the date of the attestation (*u*). A person who has never been attested at all, but becomes a soldier of the regular forces by the mere fact of receiving pay, can at any time claim his discharge, but he remains a soldier of the regular forces for all purposes in the meantime (*b*).

Offences in connection with enlistment.

78. Any person who without due authority publishes notices or advertisements for recruits, or opens or keeps recruiting offices, or receives recruits, or in any way interferes directly or indirectly with the recruiting service of the regular forces, is liable on summary conviction to a fine not exceeding £20 (*c*). A person who knowingly makes a false answer to any question contained in the attestation paper, which has been put to him by or by the direction of the justice before whom he appears for attestation, is liable on summary conviction to imprisonment with or without hard labour for a period not exceeding three months (*d*). Where the attestation has been completed and the offender has consequently become a soldier of the regular forces, he may be proceeded against either before a court of summary jurisdiction or before a court-martial at the discretion of the competent military authority (*e*).

SECT. 2.—Discipline.

Military law.

79. It is one of the cardinal features of the law of England that a soldier does not by enlisting in the regular forces thereby cease to be a citizen, so as to deprive him of any of his rights or to exempt him from any of his liabilities under the ordinary law of the land (*f*). He does, however, in his capacity of a soldier, incur additional responsibilities, for he becomes subject at all times and in all circumstances to a code of military law contained in the Army Act, the King's Regulations and Orders for the Army, and Army Orders (*g*). This code, which is authorised and brought into operation from year to year by the Annual Army Act (*h*), is part of the

of the Peace) (1893), 69 L. T. 384; as to false answers, see the text, *infra*.

(*u*) Army Act, s. 100; as to the Army Act, see note (*s*), p. 30, *ante*. As to the "King's Shilling," see note (*h*), p. 19, *ante*.

(*a*) Army Act, s. 100 (1).

(*b*) *Ibid.*, s. 100 (2).

(*c*) *Ibid.*, s. 98. As to summary procedure generally, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*d*) Army Act, s. 99 (1); and see *ibid.*, ss. 33, 79 (2); as to irregular enlistment, see *ibid.*, ss. 32, 34; as to attestation, see p. 41, *ante*.

(*e*) Army Act, s. 99 (2). As to courts of summary jurisdiction generally, see title MAGISTRATES, Vol. XIX., pp. 571 *et seq.*

(*f*) *Burdett v. Abbot* (1812), 4 Taunt. 401; see p. 91, *post*.

(*g*) Compare *Wood v. Victoria Pier and Pavilion (Colwyn Bay) Co., Ltd.* (1913), 29 T. L. R. 317; see King's Regulations, 1912, paragraph 1119A.

(*h*) See, e.g., Army (Annual) Act, 1912 (2 & 3 Geo. 5, c. 5). The fact that the number of men constituting the forces for the time being exceeds the number authorised by Parliament does not exclude the operation of the Act (*ibid.*, s. 2 (3)).

ordinary law of the land, and must not be confused with so-called martial law, which is not law at all, but consists of regulations made by the military authorities in time of war for the purpose of securing the safety of the troops and maintaining order in cases where the ordinary courts of law have been compelled to suspend their functions (i).

SECT. 2.
Discipline.
Martial law.

80. The expression "persons subject to military law" includes all officers and soldiers of the regular forces, all civilians attached to or accompanying the regular forces when on active service (j), the Royal Marines when not borne on the books of any ship-of-war (k), the Indian and Colonial forces when attached to the regular forces in the United Kingdom (l), and under certain circumstances the auxiliary forces (m). The above persons may become subject to military law either as officers or as soldiers (n).

Persons
subject to
military law.

81. Where an offence under the Army Act has been committed by any person while subject to military law, the offender may be dealt with under the military code even though he has since the commission of the offence ceased to be subject to military law, provided that he is tried within three months of his ceasing to be subject to military law, excepting where he is charged with mutiny, desertion (m), or fraudulent enlistment (o). A person subject to military law who is sentenced by court-martial to penal servitude, imprisonment or detention and is discharged from the service, may be dealt with during the term of his sentence as if he continued to be subject to military law (p).

Duration of
subjection to
military law.

No one may be tried by court-martial for any offence committed more than three years before the date at which the trial begins, except in the cases of mutiny, desertion, and fraudulent enlistment (q); nor may anyone be tried twice by court-martial for the same offence (r).

Time limit
for court-
martial.

82. The term "military offences" includes all offences for which persons subject to military law may be tried and punished

Military
offences.

(i) See Dicey, *Law of the Constitution*; Holland, *Handbook of Laws and Customs of War*; *Ex parte Marais* (D. F.), [1902] A. C. 109, P. C., following *Elphinstone v. Bedreechund* (1830), 1 Knapp, 316, P. C.; *A.-G. for the Cape of Good Hope v. Van Reenen*, *A.-G. for the Cape of Good Hope v. Smit*, [1904] A. C. 114, P. C.; *Tilonko v. A.-G. of Natal*, [1907] A. C. 93, P. C.

(j) Army Act, ss. 175—178. A civilian subject to military law cannot be tried by a regimental court-martial (Army Act, s. 184 (1)); *Re Flint* (1885), 15 Q. B. D. 488.

(k) See p. 32, *ante*.

(l) *Ibid.*, ss. 175, 176.

(m) See p. 72, *post*.

(n) See Army Act, ss. 153, 154.

(o) *Ibid.*, s. 158 (1); *Marks v. Frogley*, [1898] 1 Q. B. 888, C. A.

(p) Army Act, s. 158 (2).

(q) *Ibid.*, s. 161. Exemplary service for three years is also a bar to trial for desertion, other than desertion on active service, or for fraudulent enlistment, subject to forfeiture of all service prior to the fraudulent enlistment. The Army Council may restore service forfeited (*ibid.*). *Ibid.*, s. 161 does not affect the jurisdiction of the civil courts (*ibid.*, ss. 158, 161). As to the offences of inciting to mutiny and assisting deserters, see title **CRIMINAL LAW AND PROCEDURE**, Vol. IX., pp. 464, 465.

(r) Army Act, s. 157.

SECT. 2.
Discipline.

by the military courts. Most of these offences are of a purely military character, such as offences against military discipline and offences committed by one soldier against the property or person of another soldier (s), but the military courts may also try persons subject to military law for any offence which is a civil crime (t), subject to certain restrictions in the case of treason, murder, manslaughter, treason felony, or rape (a).

Military
custody.

83. Every person subject to military law who is charged with an offence under the Army Act may be taken into military custody, that is, he may be put under arrest or in confinement (b). An officer may order any officer of inferior rank or any soldier, and a non-commissioned officer may order any soldier, into custody. An officer may also order his superior officer into custody if the latter is engaged in a quarrel, fray, or disorder (c). Officers or non-commissioned officers commanding guards, provost-m Marshals and assistant provost-m Marshals, must receive any person committed into their custody by any officer or non-commissioned officer. The officer or non-commissioned officer giving the prisoner into custody must within twenty-four hours sign and deliver to the person into whose custody the prisoner is given an account in writing of the offence with which the prisoner is charged (d). This charge must be investigated without delay (e).

Courts-
martial.

84. Serious offences against military law are dealt with by court-martial. There are three descriptions (f) of court-martial—the regimental court-martial, the district court-martial, and the general court-martial, which do not differ in the extent of their jurisdiction, each having seisin of any military offence, but varying as regards their competence to try officers and as to the amount of punishment which each can award (g) and in their composition (h).

(s) For a full list of the offences, see title COURTS, Vol. IX., p. 102, note (g).

(t) Army Act, s. 41; as to the Army Act, see note (s), p. 30, *ante*.

(a) As to these exceptions, see title COURTS, Vol. IX., p. 102. As to the confirmation of sentences passed for civil crimes by courts-martial, see Army Act, s. 54. As to the venue of trials of soldiers charged with murder, see Jurisdiction in Homicides Act, 1862 (25 & 26 Vict. c. 65).

(b) Army Act, s. 45 (1), (2); *Marks v. Frogley*, [1898] 1 Q. B. 888, C. A. As to expenses of conveying a deserter to gaol, see *R. v. Pierce* (1814), 3 M. & S. 62.

(c) Army Act, s. 45 (3). It may in certain circumstances become the duty of an officer to order the arrest of his superior officer; see Manual of Military Law, 1907, ch. iv., paragraphs 5, 6.

(d) Army Act, s. 45 (4). The person receiving the prisoner is fully protected (*Wolton v. Gavin* (1850), 16 Q. B. 48).

(e) Army Act, s. 45 (5).

(f) The field court-martial, which is of an exceptional character, is dealt with elsewhere; see title COURTS, Vol. IX., pp. 101, 104.

(g) As regards the trial of warrant and non-commissioned officers, see Army Act, ss. 182, 183. As to the jurisdiction of the different kinds of courts-martial, see title COURTS, Vol. IX., pp. 102 *et seq.* As to privilege protecting statements made in the course of administration of justice, see title LIBEL AND SLANDER, Vol. XVIII., pp. 678 *et seq.*

(h) The members of a court-martial may belong to any corps (Army Act, s. 50 (1)), including units of the Territorial Force (see pp. 72, 75, *post*), though under the Rules of Procedure, 1907, r. 20 (A), a district and a general court-martial should, if possible, consist of officers from other

85. Persons subject to military law who are charged with offences under the Army Act may, if they are soldiers, be dealt with summarily by their commanding officer. The latter has a discretion as to the exercise of this power, save that in the case of a charge for drunkenness he must deal with it summarily, unless the offender is a non-commissioned officer or the offence was committed on active service or duty, or after the offender was warned for duty, or is found unfit for duty by reason of drunkenness, or has been guilty of drunkenness on not less than four occasions in the preceding twelve months. The commanding officer's powers are limited to awarding twenty-eight days' detention, or, if on active service and the offender is not a non-commissioned officer, twenty-eight days' field punishment, and the fines, stoppages, and forfeiture of pay authorised by the Army Act. The offender may elect to be tried by district court-martial in every case where the commanding officer awards forfeiture of pay or anything more than a minor punishment (*i*).

SECT. 2.
Discipline.
Summary
procedure.

86. The rules of evidence in proceedings before a court-martial are identical with those followed in the English civil courts (*k*), though the proof of certain official documents is facilitated (*l*). The conviction or acquittal of a prisoner by a civil court for the same offence is proved by production of the certificate of the clerk of such court or his deputy (*m*).

Evidence and
procedure.

A conviction by court-martial can be proved by a copy of the original proceedings of the court-martial certified by the Judge-Advocate-General or his deputy, or the officer having the custody of the same, without any formal proof of their signatures (*n*).

The procedure of courts-martial is regulated by Rules of Procedure made by the Crown and signified under the hand of a Secretary of

corps. Where the prisoner is an officer the members should be of equal or superior rank to him if possible (Rules of Procedure, 1907, r. 21 (*a*)), and, if the prisoner belongs to the auxiliary forces, one member of the court should always belong to the same branch of the service as the prisoner (*ibid.*, r. 20 (*a*)). The officer convening the court, the prosecutor, a witness for the prosecution, the officer who investigated the charge, or the prisoner's commanding officer cannot sit on a court-martial save in the case of a field court-martial (Army Act, s. 50 (2), (3)). The president of the court is to be appointed by the convening officer (*ibid.*, s. 47 (3)), and must not be below rank of captain, except in certain special circumstances; see *ibid.*, s. 47 (4). The president of a district or general court-martial must, except in special circumstances, be a field officer (*ibid.*, s. 48 (9)). When a warrant officer is being tried the president must not be below the rank of captain (*ibid.*, s. 182 (4)). As to the composition and convening of courts-martial, see, further, title Courts, Vol. IX., pp. 100, 101.

(*i*) Army Act, s. 46; King's Regulations, 1912, paragraphs 493—513. The minor punishments referred to are specified in *ibid.*, paragraph 493. A non-commissioned officer cannot be dealt with summarily for drunkenness (Army Act, s. 183 (1)).

(*k*) *Ibid.*, s. 128; see also *Ship Bounty Case*, cited in *R. v. Suddis* (1801), 1 East, 306, 312; *Stratford's Case*, cited in *R. v. Suddis*, *supra*, at p. 313. Taking a false oath before a court-martial constitutes perjury at common law (*R. v. Heane* (1864), 4 B. & S. 947). As to evidence generally, see title EVIDENCE, Vol. XIII., pp. 415 *et seq.*

(*l*) Army Act, s. 163, where the documents are specified.

(*m*) *Ibid.*, s. 164; and see title EVIDENCE, Vol. XIII., p. 550.

(*n*) Army Act, s. 165.

SECT. 2.
Discipline.

State (o). These rules must not contain anything inconsistent with the Army Act (p), and must be laid before Parliament as soon as practicable after they are made (q). A prisoner may be represented at a general or district court-martial by counsel (r), whose position is subject to the Rules of Procedure and to the Army Act, which contains provisions for dealing with counsel guilty of improper conduct or contempt of court(s).

The Rules also provide for the summoning of witnesses (t), who are given the same privileges from arrest on civil process as witnesses before a superior court of civil jurisdiction (a). Civilians who are guilty of contempt of court towards a court-martial may be dealt with by a civil court to whom the offence has been certified by the president of the court-martial (b), and if guilty of giving false evidence are liable on indictment or information to be convicted of and punished for perjury (c). Persons who are charged or prisoners who become insane can be dealt with as provided by the Army Act (d).

Punishments.

87. The Army Act lays down a scale of punishments for offences on conviction by court-martial ranging from death (e) to a reprimand in the case of an officer, and to forfeiture, fines, and stoppages in the case of a soldier (f).

(o) Army Act, s. 70 (1); as to the Army Act, see note (s), p. 30, *ante*. They will be judicially noticed (*ibid.*, s. 70 (3)). Procedure is at present regulated by Rules of Procedure, 1907, reprinted with amendments, Stat. R. & O., 1912, No. 1905.

(p) Army Act, s. 70 (2).

(q) *Ibid.*, s. 70 (4).

(r) Rules of Procedure, 1907, rr. 88—94. Counsel may in England or Ireland be either a barrister or a solicitor, in Scotland an advocate or law agent (*ibid.*, r. 93 (B)). See also titles BARRISTERS, Vol. II., p. 375; SOLICITORS.

(s) Army Act, s. 129.

(t) Rules of Procedure, 1907, r. 78; Army Act, s. 125 (1); and see title EVIDENCE, Vol. XIII., p. 585. As to the administration of oaths, see Army Act, s. 52.

(a) *Ibid.*, s. 125 (2); see title EVIDENCE, Vol. XIII., pp. 585 *et seq.*

(b) Army Act, s. 126. As to contempt of court generally, see title CONTEMPT OF COURT, ATTACHMENT AND COMMITTAL, Vol. VII., pp. 279 *et seq.*

(c) Army Act, s. 126 (2); see also note (k), p. 45, *ante*.

(d) Army Act, s. 130; Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), s. 17.

(e) The death sentence can only be awarded by a general court-martial, and requires the concurrence of two-thirds at least of the members of the court (Army Act, s. 48 (6), (8)), and in the case of a field court-martial the concurrence of all the members of the court (*ibid.*, s. 49 (2)).

(f) *Ibid.*, s. 44; King's Regulations, 1912, paragraphs 583—599. Punishments for civil crimes are regulated by the Army Act, s. 41. Sentences of penal servitude and of imprisonment or detention for more than twelve months must be carried out in the United Kingdom, unless the prisoner belongs to a class with respect to which the Secretary of State has declared transfer to the United Kingdom to be undesirable, either by reason of the climate or the place of birth or enlistment of the prisoner or otherwise (*ibid.*, s. 131 (2); Army Order, No. 132 of 1907), or, in the case of a sentence of imprisonment or detention, if the court for special reasons otherwise orders (Army Act, s. 131); see General Regulations, October, 1881 (Manual of Military Law, 1907, p. 381). See also as to execution of sentence generally, Army Act, ss. 58—68, 131—135; King's Regulations, 1912, paragraphs 600—660. As to forfeiture and stoppages of pay, see note (p), p. 47, *post*. Punishment is not to be increased

SECT. 2.
Discipline.

Soldiers on active service may also be awarded field punishment, which must be a punishment other than flogging, and not of a nature to cause injury to life or limb (*g*). A conviction and sentence by court-martial is not valid until confirmed by the proper authority (*h*), who may mitigate or remit or suspend the sentence (*i*). An acquittal needs no confirmation (*k*).

88. An officer who thinks himself wronged by his commanding officer, and who has applied for but not obtained the redress he considers himself entitled to, may complain to the Army Council. It is the duty of the Army Council to examine into the complaint and to report to the Crown thereon through a Secretary of State, in order to receive the directions of the Crown (*l*). A soldier who considers himself wronged by any officer other than his captain, or, by a soldier, must complain to his captain, or if he cannot obtain satisfaction, to his commanding officer, from whom an appeal lies to the prescribed general officer. Every officer so complained to must investigate the complaint, and, if satisfied of its justice, grant full redress to the complainant (*m*). Anonymous complaints are strictly forbidden (*n*).

Redress of
wrongs.

SECT. 3.—Pay and Pensions.

89. The rates of pay and pension for officers and men are laid down by Royal Warrant (*o*). The pay of an officer or soldier of the regular forces must be paid without any deductions, other than those which are authorised by statute or Royal Warrant, or by any law passed by the Governor-General of India in Council (*p*).

Rates of
pay and
deductions.

by trying the prisoner elsewhere than where the offence was committed (Army Act, s. 160).

(*g*) *Ibid.*, s. 44 (5). It cannot be awarded to a non-commissioned officer by his commanding officer (*ibid.*, s. 46 (2) (d)). The nature of the punishment is prescribed by rules made by the Secretary of State; see Manual of Military Law, 1907, p. 598.

(*h*) For the confirming authorities, see title COURTS, Vol. IX., p. 104.

(*i*) The sentence may be mitigated or remitted even after confirmation. The persons possessing this power are specified in the Army Act, s. 57 (2)—(5).

(*k*) *Ibid.*, s. 54 (3).

(*l*) *Ibid.*, s. 42; King's Regulations, 1912, paragraphs 128, 439; *Woods v. Lyttelton* (1909), 25 T. L. R. 665, C. A. As to service in India, see Army Act, s. 180 (2) (d).

(*m*) *Ibid.*, s. 43; King's Regulations, 1912, paragraphs 128, 439. Where the soldier is serving in India the appeal from the commanding officer lies to the officer designated by the Commander-in-Chief in India with the approval of the Governor-General in Council (Army Act, s. 43).

(*n*) King's Regulations, 1912, paragraph 439.

(*o*) Full particulars with regard to pay, pension, and promotion are contained in the Pay Warrant, 1909.

(*p*) Army Act, s. 136. As regards stoppages and deductions from pay, see *ibid.*, ss. 137—140. Deductions must not exceed such sum as will leave a soldier, after paying for his messing and washing, less than one penny a day (*ibid.*, s. 138 (a)). The National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 46, provides for stoppages from pay for the purpose of providing soldiers with the benefits of the Act; see, generally, title WORK AND LABOUR. As regards stoppages from a soldier's pay for the maintenance of his wife or children, see p. 93, *post*; as to forfeiture, fines, and stoppages by way of punishment, see Army Act, ss. 44, 46. As to the Governor-General of India in Council, see title DEPENDENCIES AND COLONIES, Vol. X., p. 594.

SECT. 3.

Pay and Pensions.

Assignments of pay and pensions.

Disputes as to pay.

False oaths and personation.

Assignments of or agreements to assign pay or half-pay are void at common law and in equity (*q*).

90. Officers and soldiers, being servants of the Crown, hold their positions at and during the pleasure of the Crown, and consequently the civil courts have no power to intervene in any dispute relating to military pay or pensions (*r*).

91. Any person who wilfully makes any false statement, whether on oath or by statutory declaration, for the purpose of obtaining payment of any military reward, pension, or allowance, or any sum payable in respect of military service, or with respect to the payment of money or delivery of property in the possession of the military authorities, is liable to be punished for perjury (*s*). Any person who falsely represents himself to any military, naval, or civil authority as belonging to or being some particular man in the regular, reserve, or auxiliary forces is guilty of personation (*a*).

SECT. 4.—*Impressment of Carriages.*

Nature and extent of impressment.

92. The power of impressing carriages (*b*), animals, and drivers for purposes of military transport originally formed part of the

(*q*) Army Act, s. 141; see titles CHOSSES IN ACTION, Vol. IV., pp. 400 *et seq.*; REVENUE, Vol. XXIV., p. 752; as to the Army Act, see note (*s*), p. 30, *ante*. An exception is made in the case of the assignment of pensions to poor law guardians by the Pensions Act, 1839 (2 & 3 Vict. c. 51); but see stat. (1846) 9 & 10 Vict. c. 10, s. 2; Pensions and Yeomanry Pay Act, 1884 (47 & 48 Vict. c. 55), and Order of 14th March, 1885, made thereunder (Glen, Poor Law Orders, 11th ed., p. 452); and see title POOR LAW, Vol. XXII., p. 572. A receipt for army pension is not a negotiable instrument (*Jones & Co. v. Coventry*, [1909] 2 K. B. 1029). As to commutation of pensions, see Pension Commutation Acts, 1871 (34 & 35 Vict. c. 36) and 1882 (45 & 46 Vict. c. 44); and see title REVENUE, Vol. XXIV., p. 752. As to taking pay or pension in execution, see title EXECUTION, Vol. XIV., pp. 121, 122; *Jones & Co. v. Coventry*, *supra*; as to the appointment of a receiver, see title RECEIVERS, Vol. XXIV., pp. 368, 369; as to the effect of bankruptcy and lunacy, see titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 190, 191; LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 435.

(*r*) *Re Tufnell* (1876), 3 Ch. D. 164; *E. v. Secretary of State for War*, [1891] 2 Q. B. 326, C. A.; *Dunn v. R.*, [1896] 1 Q. B. 110, C. A.; *Grant v. Secretary of State for India* (1877), 2 C. P. D. 445; *Kinloch v. Secretary of State for India* (1882), 7 App. Cas. 619; *Gidley v. Palmerston* (Lord) (1822), 3 Brod. & Bing. 275; *Gibson v. East India Co.* (1839), 5 Bing. (N. C.) 262; *Ex parte Napier* (1852), 18 Q. B. 692; *Re de Bode* (Baron) (1838), 6 Dowl. 776; *De Dohse v. R.* (1886), 66 L. J. (Q. B.) 422, n., H. L.; *Macdonald v. Steel* (1793), Peake, 233 [175]; and see titles CROWN PRACTICE, Vol. X., p. 29; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 305, 306.

(*s*) Army Act, s. 142 (1).

(*a*) *Ibid.*, s. 142 (2); and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 707. The offence is triable summarily, and the penalty is imprisonment, with or without hard labour, for a maximum term of three months, or a maximum fine of £25 (Army Act, s. 142 (3)). Proceedings may also be taken under any other enactment or at common law, so long as the accused is not punished twice for the same offence (*ibid.*, s. 142 (4)); and see False Personation Act, 1874 (37 & 38 Vict. c. 36); Pension and Yeomanry Pay Act, 1884 (47 & 48 Vict. c. 55), s. 3; Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 6 (3)). See also title MAGISTRATES, Vol. XIX., p. 586.

(*b*) The word "carriages" is not defined by the Army Act, but it is submitted that it includes all wheeled vehicles; compare *ibid.*, Sched. III.

royal prerogative of purveyance, which was abolished in 1660 (*c*). It is now regulated by the provisions of the Army Act (*d*). The term "impressment" as used in this connection is somewhat misleading, as carriages and animals can only be forcibly seized when a state of emergency has been declared to exist (*e*). The power of impressment, like that of billeting, is confined to the civil authorities, and is put into operation by means of a justice's warrant. The extent of the power and the procedure to be adopted vary as the power is exercised in ordinary circumstances on production of a route, or by virtue of a requisition of emergency (*f*). A warrant of the justices is necessary in any event, but the power of impressment is much more extensive in the latter case.

SECT. 4.
Impress-
ment of
Carriages.

93. Every justice having jurisdiction in any place mentioned in a route (*g*) issued to the commanding officer of any portion of the regular forces (*h*) is required on production of the route, and on the demand of such commanding officer, to issue a warrant requiring any constable (*i*) having authority in such place to provide the carriages, animals, and drivers stated to be necessary for the purpose of moving the regimental baggage and stores of the forces in question (*k*). The warrant is to specify the number* and description of the carriages, also the places from and to which they are to travel and the distances between such places, and is further to name a reasonable time within which they are to be provided (*l*). All persons having carriages and animals suitable for the purpose are to provide the same when ordered to do so by the constable to whom the warrant is issued (*m*). The local police authority (*n*) or the county association (*o*) is empowered to draw up an annual list

Procedure on
impressment.

(*c*) Stat. (1660) 12 Car. 2, c. 24, s. 11.

(*d*) Army Act, Part III., ss. 112—121.

(*e*) See p. 50, *post*.

(*f*) The provisions of the Army Act relating to impressment of carriages do not extend to the Channel Islands or the Isle of Man (Army Act, s. 187 (1)). They apply, with certain modifications, to the auxiliary forces (*ibid.*, s. 181).

(*g*) *Ibid.*, s. 112. The route is conclusive evidence of the authority of the officer or non-commissioned officer producing it (*ibid.*, s. 112 (3)). It is similar to the route issued for billeting purposes (*ibid.*, s. 112 (2)).

(*h*) In the case of the auxiliary forces an order signed by the commanding officer of the unit in question is substituted for the route (*ibid.*, s. 181 (4)); and see note (*t*), p. 54, *post*.

(*i*) Including a high constable, and a commissioner, inspector, or other officer of police (*ibid.*, s. 190 (38)). The constable must observe the directions of the police authority (*ibid.*, s. 120). Where there is no constable the duty of executing the warrant devolves on the justices (*ibid.*).

(*k*) Army Act, s. 112. Persons may only be carried under a requisition of emergency; and see note (*t*), p. 50, *post*.

(*l*) The fee payable to the clerk of the peace for the warrant is 1s. (Army Act, s. 112 (6)).

(*m*) *Ibid.*, s. 112 (1). When sufficient carriages or animals cannot be procured within the jurisdiction of the justice granting the warrant, any justice having jurisdiction in the next adjoining place must supply the deficiency by a similar procedure (*ibid.*, s. 112 (5)).

(*n*) Defined *ibid.*, s. 190 (39).

(*o*) *Ibid.*, s. 114 (4), as amended by the Army (Annual) Act, 1911 (1 & 2 Geo. 5, c. 3), s. 4 (1). As to county associations, see, further, p. 87, *post*.

SECT. 4.
Impress-
ment of
Carriages.

of persons liable to supply carriages, and animals (*p*), and where such a list is in existence the justices may issue a warrant requiring a constable, as and when requested to do so by an officer or non-commissioned officer in pursuance of the Army Act, to provide orders for the necessary carriages and animals. Such orders are as far as possible to be made from the list in regular rotation (*q*).

Requisitions
of emergency.

94. The Crown may issue an order distinctly stating that a case of emergency exists, and authorising any general or field officer commanding the regular forces in any military district or place in the United Kingdom to issue what is known as a requisition of emergency. This requisition recites the order and requires the justices to issue warrants for the provision, for purposes stated in the requisition, of carriages of every description, including motor cars and locomotives, horses (*r*) of every description, and vessels used for the transport of any commodities on any canal or navigable river (*s*). A justice of the peace, on demand by an officer of the portion of the forces of the Crown mentioned in the requisition, or a duly authorised officer of the Army Council, and on production of the requisition, must issue his warrant for the provision of the carriages, animals, or vessels stated by such officer to be necessary for the purpose specified in the requisition (*t*). This warrant is then executed by the constable in the same manner as when a warrant has been issued on production of a route, except that where a person ordered in pursuance of the warrant to furnish carriages, animals, or vessels neglects or refuses to do so, then, if a proclamation calling out the Reserve is in force or the Militia has been embodied, the carriages, animals, or vessels in question may be forcibly seized by the officer at whose instance the warrant has been issued (*a*). In similar circumstances, the order of the Crown authorising the issue of a requisition of emergency may provide for the purchase as well as the hire of carriages, animals, and vessels (*b*).

(*p*) The proper officer authorised by the authority preparing the list may at all reasonable times enter, for purposes of inspection, premises in which he has reason to believe that carriages or animals are kept. If he is obstructed a search warrant will issue (Army (Annual) Act, 1911 (1 & 2 Geo. 5, c. 3), s. 4 (2)).

(*q*) Army Act, s. 114; as to the Army Act, see note (*s*), p. 30, *ante*. Any person who is aggrieved by an entry in the list may complain to a court of summary jurisdiction, which may order the list to be amended (Army Act, s. 114 (2)). As to the effect of the list, see *Sharratt v. Scotney*, [1892] 2 Q. B. 479.

(*r*) The expression "horse" includes mules and all beasts used for burden or draught or for carrying persons (Army Act, s. 190 (40)).

(*s*) *Ibid.*, s. 115 (1), (2). Canal, river, or lock tolls are not demandable for vessels so requisitioned, and any toll collector demanding or receiving tolls in contravention of the exemption is liable to a fine not exceeding £5 nor less than 10s. (*ibid.*, s. 115 (5)).

(*t*) *Ibid.*, s. 115 (3). The requisition is conclusive evidence of the authority of the officer to demand the carriages, animals, or vessels. It is also *prima facie* evidence of due issue and signature (*ibid.*, s. 115 (6)). Officers, soldiers, and their families or servants may be conveyed on the carriages, animals, or vessels, as well as baggage, provisions, and military stores (*ibid.*).

(*a*) *Ibid.*, s. 115 (8); National Defence Act, 1888 (51 & 52 Vict. c. 31), s. 5.

(*b*) Army Act, s. 115 (7); National Defence Act, 1888 (51 & 52 Vict. c. 31), s. 5.

The duty of furnishing the carriages, animals, and vessels necessary for mobilization purposes may be delegated by the Army Council to county associations established under the Territorial and Reserve Forces Act, 1907 (c).

SECT. 4.
Impress-
ment of
Carriages.

Payment.

95. Payment for the carriages and animals impressed is to be at the rates and subject to the regulations mentioned in the Army Act (d). The Act provides for the increase of such rates by a reasonable amount, not exceeding one third of the rate, where an order to that effect is made by the court of general or quarter sessions having jurisdiction in the place in question (e). Any such increase must be notified in writing by the justice granting the warrant to the person demanding the same (f). Where the warrant is issued on production of a route, the officer or non-commissioned officer demanding the warrant is responsible for the payment of sums due to the owners or drivers of the impressed carriages or animals; and, if required, one third of the payment must be made before the carriage is loaded, and also, if required, in the presence of a constable or justice (g). Where the officer or non-commissioned officer is from any cause unable to pay the amount due, he must make up and sign an account with the owner or driver and transmit it to the Army Council, which must cause it to be paid forthwith (h). Where default is made in making any payment or in making up an account, or where an owner or driver of any impressed carriage, animal, or vessel has been ill-treated, the person aggrieved may apply to a court of summary jurisdiction, which, if satisfied on oath of the default or ill-treatment, must certify the amount due by way of compensation, including the costs of the application, to the Army Council, which must cause the amount to be paid forthwith (i). If the Army Council considers that the amount is not justly due or is excessive, it may apply to a court of summary jurisdiction for the place where the certificate was granted for a rehearing (k). Where carriages, animals, or vessels are supplied in pursuance of a requisition of emergency, payment

(c) Army Act, s. 115 (9); Army (Annual) Act, 1909 (9 Edw. 7, c. 3), s. 5 (2); and see Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 2 (2) (i).

(d) Army Act, Sched. III. A day's march must not exceed twenty-five miles, and the justices may allow additional compensation for every mile travelled over fifteen miles. Except in cases of pressing emergency, a carriage is not to be required to travel more than one day's march. The load must not exceed 30 cwt. in Great Britain, and must, if practicable, be weighed before being placed on the carriage.

(e) *Ibid.*, s. 113 (2). The order must specify the average price of hay and oats at the nearest market town, and only remains in force for ten days, though it may be renewed from time to time (*ibid.*, s. 113 (3)). A copy of the order must be transmitted to the Army Council within three days (*ibid.*, s. 113 (4)).

(f) *Ibid.*, s. 113 (2).

(g) *Ibid.*, s. 113 (5).

(h) *Ibid.*, s. 113 (6).

(i) *Ibid.*, s. 119 (1). In the case of ill-treatment the person aggrieved must first complain to the offender's commanding officer if present (*ibid.*).

(k) *Ibid.*, s. 119 (2). As to the costs of summary jurisdiction generally, see title MAGISTRATES, Vol. XIX., pp. 571 *et seq.*

SECT. 4.
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must be made by the Army Council, and the determination of any dispute as to amount must be left to a county court judge (*l*). An owner whose carriages, animals, or vessels have been forcibly seized (*m*) is entitled to payment as though he had duly furnished them in compliance with the order (*n*).

Conveyance of troops by rail.

96. The conveyance of the royal forces by rail is now regulated in ordinary circumstances by statutory provisions for the transport of troops and their luggage, and also of public baggage, stores, arms, and ammunition, at special rates, on production of a route (*o*). Railroads and the plant belonging to them may also be seized for the public service where there is an Order in Council declaring an emergency to have arisen, but full compensation must be paid to the owners of the line for any loss or injury caused by the seizure (*p*). Where an order for the embodiment of the Territorial Force is in force, traffic for naval and military purposes is given precedence by the National Defence Act, 1888 (*q*).

Offences by civilians.

97. A constable who neglects or refuses to execute a warrant for impressment of carriages, animals, or vessels, or who receives, demands, or agrees for money or reward to excuse any person from being placed on a list as liable to furnish or from furnishing any carriage, animal, or vessel, or orders any carriage, animal, or vessel to be furnished for any person or purpose or on any occasion for and on which it is not required by the Army Act to be furnished, is liable on summary conviction to a fine of not less than 20s. nor more than £20 (*r*). A person who neglects or refuses to comply with an order for impressment, or who bribes a constable, officer, or non-commissioned officer for the purpose of obtaining relief from liability to impressment, or who obstructs the execution of a warrant or order for impressment, is liable on summary conviction to a fine of not less than 40s. nor more than £10 (*s*).

Offences by officers and soldiers.

98. Persons subject to military law who commit certain offences in relation to the impressment of carriages, animals, or vessels are liable on conviction by court-martial to the punishments prescribed

(*l*) Army Act, s. 115 (4); see, further, title COUNTY COURTS, Vol. VIII., pp. 634, 635; as to the Army Act, see note (*s*), p. 30, *ante*.

(*m*) See p. 50, *ante*.

(*n*) Army Act, s. 115 (8); see note (*a*), p. 50, *ante*.

(*o*) Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 6. This Act does not extend to Ireland, nor to any railway companies which lose the benefit of the Act. In those cases the conveyance of troops is regulated by the Railway Regulation Act, 1842 (5 & 6 Vict. c. 55), s. 20, and the Railway Regulation Act, 1844 (7 & 8 Vict. c. 85), s. 12. As to the carriage of baggage, see *A.-G. v. Great Southern and Western Rail. Co.* (1863), 14 I. C. L. R. 447. See also titles CARRIERS, Vol. IV., p. 27; RAILWAYS AND CANALS, Vol. XXIII., pp. 699, 700.

(*p*) Regulation of the Forces Act, 1871 (34 & 35 Vict. c. 86), s. 16. "Railroads" include tramways (*ibid.*).

(*q*) 51 & 52 Vict. c. 31, s. 4 (2); applied to the Territorial Force by Order in Council dated 19th March, 1908; see note (*k*), p. 64, *ante*. "Railway" includes tramway, whether worked by animal or mechanical power, or partly in one way and partly in the other (National Defence Act, 1888 (51 & 52 Vict. c. 31), s. 4 (8)); and see, further, title CONSTITUTIONAL LAW, Vol. VII., p. 69.

(*r*) Army Act, s. 116.

(*s*) *Ibid.*, s. 117; and see, further, pp. 49, 50, *ante*.

by the Army Act (*t*). They are also liable on summary conviction by a civil court to a fine not exceeding £50 nor less than 40*s.* (*a*).

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Impress-
ment of
Carriages.

Fraudulent
demands.

99. The following offences are punishable on summary conviction with imprisonment for not more than three months, with or without hard labour, or by a fine of not less than 20*s.* nor more than £5, namely :—forging or counterfeiting a route or requisition of emergency ; knowingly producing a forged route or requisition to a constable or justice ; personating an officer or soldier entitled to demand carriages, animals, or vessels ; producing to a justice or constable a route or requisition without authority, or producing a document falsely purporting to be a route or requisition (*b*).

SECT. 5.—*Billeting.*

100. Billeting consists in assigning quarters to officers, soldiers, and horses (*c*) by means of a billet or official order requiring the person to whom it is addressed to provide the necessary accommodation. The power of billeting is strictly confined to the civil authorities.

Definition.

101. The practice of billeting was declared to be illegal by the Petition of Right (*d*) and certain other statutes (*e*). These declarations of illegality still continue in force, although billeting is temporarily authorised from year to year within the limits laid down in the Army Act (*f*). The civil authorities are liable in damages to the injured party for any illegal or improper exercise of their billeting powers (*g*).

Nature and
extent of
billeting.

(*t*) These offences are :—wilfully demanding carriages, animals, or vessels not actually required ; failure to comply with regulations as to payment for carriages, animals, or vessels, and weighing of loads ; constraining any carriage, animal, or vessel to travel beyond the proper distance, or to carry an excessive load ; not discharging any carriage, animal, or vessel as speedily as practicable ; compelling the person in charge of any carriage, animal, or vessel to take any baggage, stores, or person not entitled to be carried ; ill-treating a person in charge of any carriage, animal, or vessel ; using any menace to or compulsion on a constable to make him provide any carriage, animal, or vessel which he is not bound to provide, or to dissuade him from the performance of his duty ; forcing any carriage, animal, or vessel from its owner (Army Act, s. 31). For the scale of punishments, see *ibid.*, and *ibid.*, s. 44.

(*a*) *Ibid.*, s. 118. A conviction must be certified by the court to the Army Council (*ibid.*). The effect of this section and of *ibid.*, s. 119, seems to be to prevent the court from dealing with the offences specified in the latter section except as therein mentioned. As to summary procedure, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*b*) Army Act, s. 121. As to summary procedure, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*c*) Includes all artillery horses, whether belonging to the ordnance or supplied by contract (*Read v. Willan* (1780), 2 Doug. (K. B.) 422).

(*d*) Stat. (1627) 3 Car. 1, c. 1, as to which see, further, title CONSTITUTIONAL LAW, Vol. VI., pp. 377 *et seq.*

(*e*) Stat. (1640) 16 Car. 1, c. 14 ; Habeas Corpus Act, 1679 (31 Car. 2, c. 1).

(*f*) Army Act, Part III. The Channel Islands and the Isle of Man are exempt from billeting (*ibid.*, s. 187 (1)).

(*g*) *Parker v. Flint* (1698), 12 Mod. Rep. 254 ; *Parkhurst v. Foster* (1699), 1 Ld. Raym. 479.

SECT. 5.

Billeting.

Persons and horses entitled to billets.

Methods of billeting :

(1) route or order ;

(2) requisition.

Enforcement of route or order.

102. All officers (*h*), soldiers (*i*), and horses (*k*) belonging to the regular forces (*l*) are entitled to be billeted, and the right also extends to horses belonging to officers of the regular forces in receipt of a forage allowance under the King's Regulations (*m*). The auxiliary forces (*n*), when subject to military law (*o*), are entitled to be billeted as though they were part of the regular forces (*p*).

103. A distinction must be drawn between the power of billeting troops in ordinary circumstances when no emergency exists and its exercise when directions have been given for the embodiment of all or any part of the Territorial Force (*q*).

In the former case troops are billeted on the production of a document, known as a route, signed by a Secretary of State and specifying the forces to be moved (*r*), or in the case of the auxiliary forces, when subject to military law (*s*), of an order issued and signed as a route, or an order signed by the officer commanding the unit in question (*t*).

When the Territorial Force is embodied the Crown may, by an order signed by a Secretary of State distinctly stating that a case of emergency exists, authorise any general or field officer commanding the regular forces (*a*) in any military district or place in the United Kingdom to issue a billeting requisition, which involves a more extensive power of billeting than a route (*b*).

104. Where billets are demanded in pursuance of a route, or order having the effect of a route, the power of billeting rests with the constable for the time being in charge at any place in the United Kingdom mentioned in the route or order (*c*). The constable's

(*h*) Defined by the Army Act, s. 190 (4); as to the Army Act, see note (*s*), p. 30, *ante*.

(*i*) Defined by Army Act, s. 190 (6).

(*k*) See *ibid.*, s. 190 (40); note (*r*), p. 50, *ante*.

(*l*) See p. 36, *ante*. For billeting purposes the Royal Marines are included (Army Act, ss. 105 (1), 190 (8)).

(*m*) *Ibid.*, s. 105; and see King's Regulations, 1912, paragraph 1233; Allowance Regulations, 1910, paragraphs 119 *et seq.*

(*n*) Defined by the Army Act, s. 190 (12).

(*o*) See p. 71, *post*. As regards the billeting of the Royal Naval Reserve and the Royal Naval Volunteer Reserve, see Royal Naval Reserve (Volunteer) Act, 1859 (22 & 23 Vict. c. 40), s. 8; Naval Volunteers Act, 1853 (16 & 17 Vict. c. 73), s. 9; as to these forces, see pp. 21—26, *ante*.

(*p*) Army Act, s. 181 (3).

(*q*) See p. 71, *post*.

(*r*) Army Act, s. 103; see, further, p. 55, *post*. For definition of "Secretary of State," see Army Act, s. 190 (1).

(*s*) See p. 71, *post*. The expression "auxiliary forces" is defined by the Army Act, s. 190 (12).

(*t*) *Ibid.*, s. 181 (3), (4). These provisions deal with the case of officers, non-commissioned officers and men of the Territorial Force, Militia, Yeomanry, or Volunteers assembling for training or on embodiment.

(*a*) Defined by *ibid.*, s. 190 (8).

(*b*) *Ibid.*, s. 108A, added by the Army (Annual) Act, 1909 (9 Edw. 7, c. 3), s. 7; see, further, p. 56, *post*.

(*c*) Army Act, s. 103 (1). Where there is no constable the duties devolve on the justices (*ibid.*, s. 120 (1)), but no justice holding a military office may act in billeting troops under his command (*ibid.*, s. 120 (2)). For the definition of "constable," see *ibid.*, s. 190 (38). The constable is to observe directions given to him by the police authority (*ibid.*, s. 120 (1)).

SECT. 5.
Billeting.

powers are restricted to an area within one mile from the place in which he has authority (*d*), though a justice may, on the request of a person entitled to demand billets, vary a route by adding or omitting any place, or may direct billets to be provided at a distance exceeding one mile (*e*). A justice may also call on the constable to account in writing for the exercise of his powers (*f*).

A route purporting to be duly issued and signed is conclusive evidence of the right to demand billets (*g*), but is only to be acted on by the constable so far as there are effective officers, soldiers, or horses present (*h*).

Effect of
route.

Where the Territorial Force is embodied, and a billeting requisition takes the place of a route, it is incumbent on the chief officer of police (*i*) to provide the necessary billets. The provisions relating to billeting in pursuance of a route apply to billeting under a requisition (*k*), with certain important modifications dealt with hereafter (*l*).

Effect of
requisition.

105. Where billeting takes place in pursuance of a route or of an order equivalent to a route, private houses are entirely exempt (*m*); but troops may be billeted in any victualling house (*n*). Every keeper of a victualling house is liable to provide lodging and attendance for officers, lodging, attendance and food for soldiers, and stabling and forage for horses, on the scale laid down in the Act (*o*). The keeper of a victualling house who desires to be relieved from his liability can obtain relief by providing adequate accommodation elsewhere in the immediate neighbourhood to the approval of the billeting authorities (*p*). The police authority (*q*) for any place

Liability
to provide
billets:
(1) under
route;

(*d*) Army Act, s. 108 (4).

(*e*) *Ibid.*, s. 108 (6). Except in the case of billeting by requisition (*ibid.*, s. 108A (3) (*d*)); see the text, *infra*.

(*f*) Army Act, s. 108 (7).

(*g*) *Ibid.*, s. 103 (3).

(*h*) *Ibid.*, s. 108 (1).

(*i*) *Ibid.*, s. 108A (3) (b). The chief officer of police is to have regard, as far as practicable, to the convenience of persons liable to provide quarters, and to act in accordance with any general instructions issued by the police authorities. His powers and duties correspond to those of the constable (see p. 54, *ante*), but he can only be called to account by a court of summary jurisdiction (Army Act, s. 108A (3) (b)). For definitions of chief officer of police and court of summary jurisdiction, *ibid.*, ss. 108A (5), 190 (35). As to courts of summary jurisdiction generally, see title MAGISTRATES, Vol. XIX., pp. 571 *et seq.*

(*k*) Army Act, s. 108A (3).

(*l*) See p. 56, *post*.

(*m*) Army Act, s. 104 (2) (a).

(*n*) This term includes inns, hotels, livery stables, alehouses, houses of sellers of wine by retail to be consumed on the premises, and houses of persons selling brandy, spirits, strong waters, cider or metheglin by retail (*ibid.*, s. 104 (1)). The liability extends to the whole of such premises, including the stables, if any. The term "victualling house" does not include military canteens (*ibid.*, s. 104 (2) (b)); taverns kept by members of the Vintners' Company (*ibid.*, s. 104 (2) (c)); foreign consulates (*ibid.*, s. 104 (2) (g)); premises of distillers and holders of off-licences, provided they do not allow tippling (*ibid.*, s. 104 (2) (d)—(*f*)).

(*o*) *Ibid.*, s. 106 (1), Sched. II., Part I. The regulations to be observed in billeting troops are contained in *ibid.*, Sched. II., Part II.

(*p*) *Ibid.*, s. 106 (2).

(*q*) Defined by *ibid.*, s. 190 (39).

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may make out an annual list of keepers of victualling houses liable to provide billets, which is to be open to inspection, and any person aggrieved may apply to a court of summary jurisdiction (*r*), which may amend the list (*s*). A keeper of a victualling house may also complain to a court of summary jurisdiction if he is aggrieved by having an undue proportion of officers, soldiers, or horses billeted on him (*t*).

(2) under
requisition.

Where the billets are given in pursuance of a billeting requisition, when the Territorial Force is embodied, the liability extends to occupiers of all public buildings (*a*), dwelling-houses, warehouses, barns, and stables (*b*). The liabilities of such occupiers are co-extensive with those of keepers of victualling houses furnishing billets in pursuance of a route (*c*), but they are to be compensated by the Army Council for any damage done by officers or soldiers billeted on them (*d*).

Billet money.

106. The prices to be paid for billets are fixed each year by the Annual Army Act (*e*). Payments by persons billeted must be made before such person departs, and, if he remains longer than four days, at least once in every four days (*f*). Where owing to a sudden order to march, or for any other reason, it is impracticable to make such payment, the person billeted must make up an account with the person on whom he is billeted, and, after signing the same, transmit it to the Army Council, which must cause the amount in question to be paid forthwith (*g*).

Offences.

107. Offences against the law of billeting may be either offences by persons subject to military law (*h*), or offences by occupiers of premises on which persons or horses are billeted (*i*), or offences by billeting authorities (*k*), or offences by other persons (*l*).

(*r*) Defined by Army Act, s. 190 (35); as to the Army Act, see note (*s*), p. 30, *ante*. As to courts of summary jurisdiction generally, see title MAGISTRATES, Vol. XIX., pp. 571 *et seq.*

(*s*) Army Act, s. 107. The fact that he is not included in the list does not exempt a keeper of a victualling house from his liability (*Sharratt v. Scotney*, [1892] 2 Q. B. 479).

(*t*) Army Act, s. 108 (3).

(*a*) Defined by *ibid.*, s. 108A (5).

(*b*) *Ibid.*, s. 108A (3) (a). Where the premises are unoccupied the owner is to be deemed to be the occupier (*ibid.*, s. 108A (5)).

(*c*) *Ibid.*, s. 108A (3). The prices to be paid to occupiers of such premises, not being keepers of victualling houses, are to be in accordance with regulations made by the Army Council with the consent of the Treasury (*ibid.*, s. 108A (3) (c)) and laid before both Houses of Parliament (*ibid.*, s. 108A (4)). There is no power in this case given to the justices to vary the route or increase the billeting area (*ibid.*, s. 108A (3) (d)).

(*d*) *Ibid.*, s. 108A (6). In default of agreement the amount of compensation is to be determined by arbitration under the Arbitration Act, 1889 (52 & 53 Vict. c. 49) (Army Act, s. 108A (6) (a)).

(*e*) See, *e.g.*, Army (Annual) Act, 1912 (2 Geo. 5, c. 2), Sched.

(*f*) Army Act, s. 106 (4).

(*g*) *Ibid.*, s. 106 (5).

(*h*) See p. 57, *post*. As to persons subject to military law, see p. 43, *ante*.

(*i*) See p. 57, *post*.

(*k*) See p. 58, *post*.

(*l*) See p. 58, *post*.

SECT. 5.
Billeting.

Offences by
persons
subject to
military law.

The following are offences in relation to billeting when committed by persons subject to military law:—ill-treatment by violence, extortion, or making disturbances in billets, of the occupier of a house in which any person or horse is billeted (*m*); failure to pay the just demands of any such occupier or make up and transmit an account of the same (*n*); wilfully demanding billets not actually required (*o*); taking or knowingly suffering to be taken money or reward for the purpose of relieving any person from his liability to have persons or horses billeted on him (*p*); using or offering any menace to or compulsion on a constable or other civil officer to induce him to give billets illegally, or to deter him from otherwise performing his duty in relation thereto (*q*); using or offering any menace to or compulsion on any person to induce him to receive without his consent any person or horse not duly billeted on him, or to furnish any accommodation which he is not required to furnish (*r*). An officer also commits an offence if he refuses or neglects to cause compensation to be made on complaint and proof of any ill-treatment by any officer or soldier under his command (*s*). Further, any officer illegally quartering or causing to be billeted any officer, soldier, or horse is guilty of a misdemeanour (*t*).

The offender is liable on conviction by court-martial, if an officer, to be cashiered, or, if a soldier, to suffer imprisonment, or in either case to such less punishment as may be awarded by the court (*u*). In addition, the offender is also liable on summary conviction by a civil court to a fine not exceeding £5 (*v*). The remedy for non-payment for billets and for ill-treatment is the same as in the case of non-payment for impressed carriages (*w*).

Offences by
civilians.

108. The following are offences when committed by occupiers of premises on which persons or horses are billeted:—refusing or neglecting to receive any such person or horse, or to furnish the requisite accommodation (*x*); bribing a constable to relieve him from liability to billets (*y*); giving or agreeing to give to any person billeted on him any money or reward in lieu of receiving any person or horse, or furnishing the requisite accommodation (*a*).

(*m*) Army Act, s. 30 (1).

(*n*) *Ibid.*, s. 30 (3); see *ibid.*, s. 106.

(*o*) *Ibid.*, s. 30 (4).

(*p*) *Ibid.*, s. 30 (5).

(*q*) *Ibid.*, s. 30 (6).

(*r*) *Ibid.*, s. 30 (7).

(*s*) *Ibid.*, s. 30 (2).

(*t*) *Ibid.*, s. 111 (1).

(*u*) *Ibid.*, s. 30. For forms of charges, see Rules of Procedure, 1907, App. I., Part II., Offences in Relation to Billeting (Manual of Military Law, 1907, p. 540; and see *ibid.*, p. 554); for the scale of punishments, see Army Act, s. 44; p. 46, *ante*.

(*v*) Army Act, s. 111 (2). A certificate of any such conviction must be transmitted to the Army Council by the court (*ibid.*, s. 111 (3)). As to summary procedure, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*w*) Army Act, s. 119 (1); see p. 52, *ante*. The combined effect of Army Act, ss. 111 (2), 119 (1), appears to be to deprive the court of summary jurisdiction of their power to inflict a fine for these offences.

(*x*) Army Act, s. 110 (1).

(*y*) *Ibid.*, s. 110 (2).

(*a*) *Ibid.*, s. 110 (3).

SECT. 5.
Billeting.

Offences by
billeting
authorities.

The penalty for any of the above offences is a fine on summary conviction of not less than 40s. and not exceeding £5 (*b*).

109. The following are offences when committed by billeting authorities:—billeting any person or horse on a person not liable to billets without his consent (*c*); receiving, demanding, or agreeing to receive a bribe to relieve a person from liability to billets (*d*); billeting any person or horse not entitled to be billeted on any person without his consent (*e*); neglecting or refusing after sufficient notice to give billets for any person or horse entitled to be billeted (*f*). The penalty for these offences is a fine on summary conviction of not less than 40s. and not exceeding £10 (*g*).

Fraudulent
claims.

110. Fraudulent claims to billets by any person are punishable in the same manner as similar offences in connexion with the impressment of carriages (*h*).

Part VI.—Reserve Forces.

SECT. 1.—*Army Reserve.*

Composition.

111. The Army Reserve is composed of two classes, the first consisting of men who have served in the regular forces and are liable, when called out on permanent service, to serve in the United Kingdom or elsewhere (*i*), and the Special Reserve (*j*); this class may be divided into two divisions for the purpose of constituting a supplementary reserve (*k*). The second class of the Army Reserve consists of Chelsea and Greenwich pensioners and men of the regular forces who have served for less than their original term of enlistment:

(*b*) Army Act, s. 110; as to the Army Act, see note (*s*), p. 30, *ante*. As to summary procedure, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*c*) Army Act, s. 109 (1).

(*d*) *Ibid.*, s. 109 (2).

(*e*) *Ibid.*, s. 109 (3).

(*f*) *Ibid.*, s. 109 (4).

(*g*) *Ibid.*, s. 109.

(*h*) *Ibid.*, s. 121; see p. 53, *ante*.

(*i*) Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 3. The first class Army Reserve is divided into three sections, A, B, and D. Section A consists of not more than 6,000 picked men (Reserve Forces and Militia Act, 1898 (61 & 62 Vict. c. 9), s. 1; Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 32 (2)), who must agree to the conditions of service in this section (see p. 60, *post*). After twelve months' service in this section, or by agreement two years (Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 32 (2)), a man reverts to section B, which consists also of men transferred direct to that section from the regular forces. Section D consists of men who have completed the term of their original enlistment, and are enlisted or re-engaged for a further period of service in the reserve (see Army Reserve Regulations; King's Regulations, 1912, paragraph 364). As to the residence abroad of army reservists, see Reserve Forces Act, 1899 (62 & 63 Vict. c. 40); Reserve Forces Act, 1906 (6 Edw. 7, c. 11). As to the pay of reservists, see Pay Warrant, 1909.

(*j*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 30 (1).

(*k*) There is no supplementary reserve at present.

they are only liable for service in the United Kingdom (*l*). There was also a militia reserve, which is now obsolete (*m*).

SECT. 1.
Army
Reserve.

112. Officers who have retired from the regular forces are liable to be recalled to service in the regular or auxiliary forces at a time of national emergency subject to certain limits of age (*n*). Officers may also voluntarily join the Reserve of Officers (*o*), provided that they possess certain qualifications (*p*). Reserve officers must report themselves annually (*q*), and are compulsorily retired on attaining certain age limits (*r*). They are liable to be called to army service at home or abroad at a time of national emergency, and with their consent and the sanction of the Army Council they may be employed in army service at any time (*s*). The Indian Reserve of Officers is governed by Indian Regulations (*t*). Special provision is made for appointing officers of Army Medical Reserve (*a*).

Reserve of
Officers.

113. Persons who possess efficient motor cars, and are willing to place their cars and their services as drivers at the disposal of the Army Council for six days in the year, may receive commissions in the Army Motor Reserve (*b*). They may be called to army service in time of national emergency (*c*), when they are required to give the Army Council the option of buying or hiring their cars at a price or rate to be assessed by a committee which must include officers of the Army Motor Reserve (*d*).

Army Motor
Reserve.

114. Soldiers of the Army Reserve enter it either by virtue of the terms of their original enlistment providing for a period of service in the reserve, in which case they are transferred to the

Enlistment.

(*l*) Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 3.

(*m*) *Ibid.*, s. 8. Enlistment for this branch of the reserve forces ceased by virtue of Army Order No. 88 of 1901.

(*n*) Pay Warrant, 1909, art. 468. For officers retiring as lieutenant or captain, the liability extends until reaching the age of fifty; for quarter-masters, riding-masters, majors, lieutenant-colonels or colonels, until the age of fifty-five; for general officers, until the age of sixty-seven (*ibid.*). During these periods these officers form part of the Reserve of Officers (*ibid.*, art. 623).

(*o*) *Ibid.*, art. 624.

(*p*) *Ibid.*, arts. 625 (South African war service), 627 (personal fitness), 628 (retired officers of auxiliary forces), 628A (retired officers of Special Reserve). For the age limits on appointment, see *ibid.*, art. 629. As to persons ineligible, see *ibid.*, art. 630. The Army Council may modify the conditions laid down in *ibid.*, arts. 625, 628—630, in particular cases (*ibid.*, art. 631).

(*q*) *Ibid.*, art. 634.

(*r*) *Ibid.*, art. 635; i.e., if above the rank of captain, at fifty-five, otherwise at fifty (*ibid.*).

(*s*) *Ibid.*, arts. 636, 637.

(*t*) *Ibid.*, art. 653; Indian Regulations.

(*a*) Pay Warrant, 1909, art. 632.

(*b*) *Ibid.*, arts. 645—652. As to their partial exemption from licence duty, see p. 97, *post*; title REVENUE, Vol. XXIV., p. 691.

(*c*) They must report themselves to the Army Council annually, and are only liable to army service in times of national emergency, though they may volunteer for army service at any time (Pay Warrant, 1909, art. 648 applying *ibid.*, arts. 634, 636, 637).

(*d*) *Ibid.*, art. 652.

SECT. 1.

Army
Reserve.Annual
training.

reserve (*e*), or they may be specially enlisted (*f*) or re-engaged for service in the reserve (*g*).

115. Men belonging to the Army Reserve may be called out for annual training in the United Kingdom, not exceeding in any one year twelve days or twenty drills (*h*); this training may be carried out with a body of the regular or auxiliary forces (*i*).

Calling out
the reserve.

116. Reservists may be called out by a Secretary of State, or in Ireland by the Lord Lieutenant, for the purpose of assisting the civil power in the preservation of the public peace (*k*). They may also be called out on permanent service by proclamation in case of imminent national danger or great emergency, the occasion being first communicated to Parliament, or, if Parliament is not then sitting, the occasion being declared in Council and notified by proclamation (*l*). Parliament, if not sitting, must be summoned by proclamation to meet in ten days if it would not otherwise meet sooner (*m*).

Section A.

Reservists belonging to section A of the first class Army Reserve are liable to be called out on permanent service during the period of their engagement in that section, if required for service outside the United Kingdom when warlike operations are in progress (*n*).

Period of
service.

117. A reservist when called out must serve for as long as his services are required, but in no case may he be required to serve for a longer period than that of his unexpired term of service in the reserve, unless a state of war exists, in which event he can be required to serve for a further twelve months (*o*). A reservist when called out becomes for all purposes and in all respects a soldier of the regular forces (*p*).

(*e*) Army Act, s. 90; as to the Army Act, see note (*s*), p. 30, *ante*.

(*f*) Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 4. Certain men having special qualifications (*e.g.*, railway men and post office employees) may be enlisted for the regular forces and immediately transferred to the reserve under the provisions of the Reserve Forces Act, 1890 (53 & 54 Vict. c. 42). The provisions of the Army Act relating to the attestation of recruits are made applicable to the enlistment of men for the Army Reserve by the Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 18.

(*g*) *Ibid.*, s. 3.

(*h*) *Ibid.*, s. 11 (1).

(*i*) *Ibid.*, s. 11 (2), (3). As to failure to attend training, see p. 61, *post*.

(*k*) Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 5 (1), (3). Any officer commanding the forces in any town or district may for this purpose, on the requisition in writing of a justice of the peace, call out the reservists residing in the town or district (*ibid.*, s. 5 (2)).

(*l*) *Ibid.*, s. 12; Army Act, s. 88 (1).

(*m*) Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 13; compare title PARLIAMENT, Vol. XXI., p. 699.

(*n*) Reserve Forces and Militia Act, 1898 (61 & 62 Vict. c. 9), s. 1. They are when called out under this Act liable to serve for twelve months (*ibid.*), and this period may by agreement be extended to two years (Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 32 (2)). If any other part of the Army Reserve is called out on permanent service, the liability of men serving in section A becomes merged in their liability to service as reservists.

(*o*) Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 14; Army Act, s. 87.

(*p*) Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 14 (2); and see Reserve Forces Act, 1906 (6 Edw. 7, c. 11), s. 2, which provides that

SECT. 1.
Army
Reserve.

Offences by
 reservists.

118. Reservists who fail to attend when called out for annual training are to be dealt with as though guilty of the offence of absence without leave (*q*); and if they fail to attend when called out on permanent service, or in aid of the civil power, they are to be deemed guilty either of the offence of absence without leave or desertion, according to the circumstances (*r*). They may be tried either by court-martial or by a court of summary jurisdiction, and may in any case be taken into military custody (*s*). The punishment for these offences is to be that prescribed by the Army Act, where the offender is convicted by a court-martial (*a*), and in the case of a conviction by a court of summary jurisdiction is fixed at a fine of not less than 40s. and not more than £25, and, in default of payment, imprisonment for not less than seven days and not exceeding the maximum term allowed by law on default in payment of the fine (*b*). An offender may not be tried both by court-martial and a court of summary jurisdiction (*c*). Proceedings may be instituted against an offender even after the expiration of his term of reserve service, provided that they are commenced within two months of the time at which the offence becomes known to an officer having power to direct the offender to be tried, if the offender is apprehended at the time, or, if he is not apprehended at the time, within two months of his apprehension (*d*). The provisions of the Army Act relating to evidence are applicable to the trial of reservists (*e*).

119. Persons falsely representing themselves to be deserters from the Army Reserve are liable on conviction by a court of

Offences by
 civilians.

reservists enlisted before the 20th July, 1906, cannot be appointed or transferred without their consent to any other arm or branch of the service except that in which they served originally.

(*q*) Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 15 (1) (*b*); Army Act, s. 15.

(*r*) Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 15 (1) (*a*); Army Act, ss. 12, 15.

(*s*) Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 15 (2). As to their apprehension, see *ibid.*, s. 16 (1); Army Act, s. 154. For all purposes of and incidental to the arrest, trial, and punishment by court-martial of the offender the offence is to be deemed an offence under the Army Act (Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 25 (1)). Proceedings before courts of summary jurisdiction are regulated in accordance with the Army Act, ss. 166—168 (Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 25 (2)). The Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), applies to the Channel Islands and the Isle of Man for all purposes in relation to the arrest, trial, and punishment of offences under the Act (*ibid.*, s. 25 (4)). Trial "by court-martial" includes summary proceedings before a commanding officer (*ibid.*, s. 26 (3)).

(*a*) Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 15 (2) (*a*) and p. 46, *ante*.

(*b*) Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 15 (2) (*b*); see title MAGISTRATES, Vol. XIX., p. 604, note (*h*); as to courts of summary jurisdiction and summary procedure generally, see *ibid.*, pp. 571 *et seq.*, 589 *et seq.*

(*c*) Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 26 (1). An offender can only be tried by a court of summary jurisdiction with the authority in writing of an officer having power to direct his trial by court-martial or a superior of that officer (Army Reserve Regulations, paragraph 50).

(*d*) Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 26 (2). This provision overrides any limitation contained in any other Act (*ibid.*).

(*e*) *Ibid.*, s. 27; Army Act, ss. 163, 164; see p. 45, *ante*.

SECT. 1.
Army
Reserve.

summary jurisdiction to imprisonment, with or without hard labour, for a term not exceeding three months (*f*). Persons inducing reservists to desert or absent themselves, or aiding or abetting them to commit those offences, or harbouring them after those offences have been committed, are liable on conviction by a court of summary jurisdiction to a fine not exceeding £20 (*g*).

SECT. 2.—*Special Reserve.*

Enlistment.

120. Men who have not served in the regular forces may be enlisted into the first class of the Army Reserve as special reservists (*h*), and by orders and regulations under the Reserve Forces Act, 1882 (*i*), may be formed into regiments, battalions, or other military bodies, and into corps either alone or jointly with any other part of the forces, and may be appointed, transferred, or attached to any corps (*j*).

Calling out
the special
reserve.

121. Special reservists, as part of the first class of the Army Reserve (*k*), are liable to be called out in case of imminent national danger or of great emergency (*l*). Where a special reservist so agrees in writing, he is liable during the whole of his service in the Army Reserve, or during such part as he agrees, to be called out on permanent service without proclamation or communication to Parliament, and, if Parliament is not in session, without Parliament meeting, provided that not more than 4,000 men are liable at any one time to be so called out, and that they are not called out except when they are required for service outside the United Kingdom when warlike operations are in progress (*m*).

(*f*) Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 16 (2).

(*g*) *Ibid.*, s. 17 (1). By *ibid.*, s. 17 (2), the Army Act, s. 153, applies to these offences; as to the Army Act, see note (*s*), p. 30, *ante*. As to courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*h*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 30 (1). The Crown has power to transfer by Order in Council battalions of the Militia to the Army Reserve, and officers and men so transferred with their consent form part of the reserve of officers and special reserve, respectively, as from the date specified in the order of transfer (*ibid.*, s. 34). The order of transfer made under this section is dated the 9th April, 1908, and applies (*ibid.*, art. 4) the provisions of the Reserve Forces Acts, 1882—1906, to the officers and men so transferred as far as they are applicable. A legacy to the officer commanding a militia unit is payable to the officer commanding the corresponding unit of the Army Reserve after such transfer (*Re Donald, Moore v. Somerset*, [1909] 2 Ch. 410).

(*i*) 45 & 46 Vict. c. 48, s. 20.

(*j*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 33.

(*k*) See *ibid.*, s. 30 (1); p. 60, *ante*.

(*l*) Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 12; see p. 60, *ante*. The calling out of special reservists, when the Army Reserve is called out, may be suspended by proclamation (Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 30 (5)). The service of a special reservist may be extended, when he becomes entitled to his discharge whilst called out on permanent service, provided that he has entered into an agreement in writing to that effect (*ibid.*, s. 31).

(*m*) *Ibid.*, s. 32 (1). An agreement under this provision may provide for its revocation upon notice being given in writing (*ibid.*). Any exercise of the power given by this provision must be reported to Parliament as soon as may be (*ibid.*). The number of men for the time being called out under this provision must not (*ibid.*) be reckoned in the numbers of the forces authorised by the Army (Annual) Act.

122. A special reservist may, in addition to being called out for annual training, be called out for a special course or courses of training for a period not exceeding six months, and may during any such course be attached to or trained with any body of His Majesty's forces (*n*), subject, as to both special or annual training, to any limitations as to such period contained in his attestation paper (*o*).

SECT. 2.
Special
Reserve.
Training.

Part VII.—The Territorial Force.

SECT. 1.—Organisation.

SUB-SECT. 1.—In General.

123. The Crown may raise and maintain a force called the Territorial Force (*p*), any part of which is liable to serve in any part of the United Kingdom, but may not without its consent be carried or ordered to go out of the United Kingdom (*q*).

Raising and
maintenance

Under the hand of a Secretary of State the Crown may make, vary, or revoke orders, and subject to such orders the Army Council may make, vary, or revoke general or special regulations as to the government, discipline, pay and allowances, or any other matters relating to the Territorial Force, and its formation into corps or other military bodies, either alone or jointly with any other part of the forces of the Crown (*a*). The regulations are the sole authority for the matters with which they deal (*b*).

Regulations.

(*n*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 30 (2). The annual training of special reservists is not limited by the provisions of the Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 11 (Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 30 (3)); see p. 60, *ante*.

(*o*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 30 (4).

(*p*) *Ibid.*, s. 6. The strength of the force is to be fixed by Parliament from time to time (*ibid.*).

(*q*) *Ibid.*, s. 13 (1). By *ibid.*, s. 40 (2), the Act is applied to the Isle of Man as if it formed part of the United Kingdom, subject to certain modifications; see note (*h*), p. 73, note (*n*), p. 74, p. 82, note (*i*), p. 83, *post*. The Isle of Man Volunteers are still subject to the provisions of the Volunteer Act, 1863 (26 & 27 Vict. c. 65). As to voluntary service outside the United Kingdom, see p. 80, *post*.

(*a*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 7 (1) —(3), 4 (1) (e), 37 (2). All orders and general regulations must be laid before both Houses of Parliament as soon as may be after they are made (*ibid.*, s. 7 (7)). The orders and regulations may provide for the constitution of a permanent staff, including adjutants and staff-serjeants, who must, except in special circumstances certified by the general officer commanding, be members of the regular forces. The expressions "regular forces" and "corps" are defined in the Army Act, s. 190 (8), (15) (b), applied to the Territorial Force by the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 38.

(*b*) Order by His Majesty, Territorial Force Regulations, 1912, p. 11. The Army Council is the sole administrator and interpreter of the regulations, and may vary them in any matter not affecting the rates and quantities laid down, until a subsequent order is made by His Majesty. The regulations contained in Part I. of the Regulations relating to the Territorial Force and to County Associations (subsequently referred to as Territorial Force Regulations, 1912) are declared to be orders made by His Majesty (Order by His Majesty, Territorial Force Regulations, 1912,

SECT. 1.

Organisa-
tion.Transfer and
posting.

124. No order or regulation may vary the term (c) or area of service laid down by statute or render a man of the Territorial Force (d) liable without his consent—

- (1) To be transferred from one corps to another (e);
- (2) When not embodied to be posted to any unit (f) other than that to which he was posted on enlistment;
- (3) To be posted to any part of the regular forces, if included in his corps;
- (4) If serving at the time at which the order or regulation is made, to be allocated to any military body to which he could not previously have been allocated without his consent (g).

Application
of Army Act.

125. The Army Act (h) applies to the Territorial Force in the same manner as it applied to the Militia (i). The Crown may also by Order in Council apply, with the necessary adaptations, to the Territorial Force any enactment relating to the Militia, Yeomanry and Volunteers other than those concerning the raising, service, pay, discipline, or government of those forces (k).

Precedence.

126. The Territorial Force takes precedence immediately after the Special Reserve (l). The precedence of the different arms is laid down in the King's Regulations (m). The precedence of units within the different arms is governed by the precedence of counties as shown in the Army List (n).

SUB-SECT. 2.—*Officers: Appointment, Promotion, Retirement.*

Appointment.

127. The appointment, rank, duties, and numbers of the officers of the Territorial Force are determined by orders and regulations (o).

p. 11). When embodied the Territorial Force is governed by the warrants, regulations and orders governing the regular forces, so far as they are applicable (*ibid.*).

(c) See also p. 66, *post*.

(d) The expression "man" includes a non-commissioned officer (Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 38).

(e) For transfer by consent, see Territorial Force Regulations, 1912, paragraph 154.

(f) For a definition of "unit," see *ibid.*, p. 8. As to the ability of a unit to contract, see title CONTRACT, Vol. VII., p. 340.

(g) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 7 (4), (5).

(h) As to the Army Act, see note (s), p. 30, *ante*.

(i) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 28 (1). This is subject to certain amendments contained in *ibid.*, Sched. 1. This application does not quite agree with the detailed application of the Army Act to the Territorial Force; see *ibid.*, s. 176 (6A), and compare *ibid.*, s. 176 (6) (application of the Army Act to the Militia).

(k) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 28 (3). Such an Order in Council must be laid before both Houses of Parliament within forty days after it is made, if Parliament is then sitting, or, if not, within forty days after the commencement of the next session. If within the next subsequent forty days an address is presented to the Crown by either House praying that the Order may be annulled, the Crown may annul it, and the Order is thenceforth void, but any proceedings meantime taken under it remain valid (*ibid.*, s. 37 (1)). For the enactments already so applied, see Order in Council of the 19th March, 1908 (Stat. R. & O., 1908, p. 963; Territorial Force Regulations, 1912, Appendix VIII.).

(l) Territorial Force Regulations, 1912, paragraph 540.

(m) King's Regulations, 1912, paragraph 1765.

(n) Territorial Force Regulations, 1912, paragraphs 541, 542.

(o) For the duties of officers, see Territorial Force Regulations, 1912;

First appointment to the lowest rank in any unit, except as quartermaster, is given to persons recommended by the president of the association for the county (*p*), provided that—

- (1) The candidate is approved by His Majesty ;
- (2) The recommendation is made within thirty days after notice has been received by the president ;
- (8) The candidate fulfils the conditions as to age, physical fitness, and educational qualifications required by the regulations (*q*).

In other respects officers of the Territorial Force are commissioned in the same way as officers of the regular forces (*r*).

128. Promotion is generally governed by establishment and given to qualified officers according to regimental seniority, but this rule may be departed from in the interests of particular units (*s*). To qualify for promotion officers must pass the prescribed examinations and undergo certain obligatory courses of instruction (*t*). Provision is also made for brevet promotion (*u*). Command may be given to regular officers over the Territorial Force or to officers of the Territorial Force over the regular forces, provided that it is not given to a person over a person superior in rank to himself (*v*). Promotion.

paragraphs 25—48. For the Officers' Training Corps, which provides military training for students at schools and universities, with a view to their eventually applying for commissions in the Special Reserve of Officers or the Territorial Force, see Regulations for the Officers' Training Corps, 1912. As to the training of officers who have served in the Officers' Training Corps, see Territorial Force Regulations, 1912, paragraph 313. As to Territorial Force chaplains, see title ECCLESIASTICAL LAW, Vol. XI., p. 648.

(*p*) Territorial Force Regulations, 1912, paragraphs 51A, 86; see p. 83, *post*. As to the procedure, see Territorial Force Regulations, paragraphs 51B—51D; as to appointments other than appointments in the lowest rank, see *ibid.*, paragraph 52; as to the president of a county association, see p. 83, *post*.

(*q*) Candidates must be British subjects and not under seventeen years of age, and in the opinion of the Army Council suitable in all respects (Territorial Force Regulations, 1912, paragraph 51). For the prescribed conditions, see Territorial Force Regulations, 1912, paragraphs 51—92.

(*r*) Officers' Commissions Act, 1862 (25 & 26 Vict. c. 4), and Regulation of the Forces Act, 1871 (34 & 35 Vict. c. 86), part of s. 6, as applied to the Territorial Force by the Order in Council of the 19th March, 1908, made under Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 28. The precedence of officers in the Territorial Force is primarily determined by rank and date of appointment to that rank (Territorial Force Regulations, 1912, paragraphs 93—95); as to officers transferred, see *ibid.*, paragraph 94A. The acceptance of a commission does not vacate the seat of a member of Parliament (Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 23 (1)); see title PARLIAMENT, Vol. XXI., p. 662.

(*s*) Territorial Force Regulations, 1912, paragraphs 96—103C. The promotion of officers who are not next in seniority or who have not served in the lower ranks is specifically authorised (*ibid.*, paragraph 96). For the procedure in cases of supersession, see *ibid.*, paragraph 99; for transfer and exchanges, seconding, retirement, and other matters specially affecting officers, see *ibid.*, paragraphs 94A, 104—124, 213, 220—222, 235—237, 239, 278, 435—472, 547.

(*t*) *Ibid.*, paragraphs 281—302.

(*u*) *Ibid.*, paragraph 98.

(*v*) Army Act, s. 71.

SECT. 1.

Organisa-
tion.

Recruiting.

SUB-SECT. 3.—Men: Enlistment.

129. Recruiting for the Territorial Force is carried out under the authority of the county associations, assisted by the adjutants and permanent staff of the units concerned, and by the officers in charge of recruiting for the regular forces within each area (*w*). The primary military examination, attestation, and final approval are the same as those for recruits for the Regular Army (*x*). Attestation may be carried out by any lieutenant or deputy-lieutenant of a county in the United Kingdom, or by an officer of the Regular Army, or Territorial Force, or by a justice of the peace (*y*).

Enlistment.

130. Every man who enlists into the Territorial Force must be—

(1) Enlisted for a "county," that is an area for which an association has been established (*a*);

(2) Enlisted to serve for not more than four years;

(3) Appointed to serve in such corps for the county as he may select, and be posted to such unit in that corps as he may select.

After enlistment he remains subject to the statutory and other prescribed conditions of service in the Territorial Force until duly discharged (*b*).

(*w*) For recruiting and enlistment generally, see Territorial Force Regulations, 1912, paragraphs 126—143H. Subject to the provisions of the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), Part I., the manner and conditions of enlistment are left to be determined by regulation (*ibid.*, s. 9 (1)).

(*x*) Territorial Force Regulations, 1912, paragraphs 134—140. Recruits must possess the physical qualifications required by regulations, and on enlistment must pass a medical examination (*ibid.*, paragraphs 47, 129, 133): the standards of measurement are laid down in *ibid.*, Appendix IV. They may be required to give the name of some person of respectability from whom a personal reference can be obtained (*ibid.*, paragraph 132). The age for enlistment or re-enlistment is from seventeen to thirty-five years (*ibid.*, paragraph 129), or, in the case of men discharged from the regular army, with no liability for further service, up to thirty-eight years (*ibid.*, paragraph 143B); the ages of enlistment of boys, bandsmen, clerks, and certain technical branches are governed by special regulations; see *ibid.*, paragraphs 75A, 143A, 143D, 143G, 143H. The provisions of the Army Act, ss. 80, 99, 101, 163 (see note (*e*), p. 30, *ante*), relating to the mode of enlistment and attestation, the validity of attestation, enlistment or re-engagement, and the admissibility in evidence of an attestation paper or copy thereof, or a declaration are, with the necessary modifications, applied to the Territorial Force by the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 10 (1); see pp. 41, 42, *ante*. In the case of the Territorial Force one attestation paper only is prepared (Territorial Force Regulations, 1912, paragraph 134). Particulars of former service in the forces of the Crown must always be declared (*ibid.*, paragraph 142); and see p. 67, *post*.

(*y*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 10 (2); Territorial Force Regulations, 1912, paragraph 138. The sections of the Army Act applied to the Territorial Force by the Territorial and Reserve Forces Act, 1910 (7 Edw. 7, c. 9), s. 10 (1) (see note (*x*), *supra*), and also the Army Act, s. 33, are to be construed as if a justice of the peace in those sections included a lieutenant, deputy-lieutenant, or officer.

(*a*) Territorial Force Regulations, 1912, paragraph 130.

(*b*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 9 (1), (2); Territorial Force Regulations, 1912, paragraph 130. For a definition of "unit," see Territorial Force Regulations, 1912, p. 8. For the

131. The following classes are not allowed to enlist or re-enlist into the Territorial Force:—

SECT. 1
Organisa-
tion.

Who may
not enlist.

(1) Men belonging to any corps of the Royal Navy, Regular Army, Royal Marines, Army or Special Reserve, Territorial Force, Militia, Irish Horse, or any Royal Naval Reserve force;

(2) Men who have been discharged from those forces or from the Royal Irish Constabulary (1) as unfit for further service, (2) for misconduct, (3) with a bad or an indifferent character;

(3) Men who have been convicted of a serious offence by the civil power;

(4) Foreigners;

(5) Men in receipt of disability pensions from army funds (c).

132. Men of the Territorial Force may be re-engaged during the twelve months prior to the completion of their current term of service on making the prescribed declaration (d). In cases of doubt their medical fitness must be ascertained by re-examination.

Re-engage-
ment.

Employees in any of His Majesty's dockyards may not enlist in the Royal Garrison Artillery or coast defence units of the Royal Engineers (e).

Dockyard
employees.

133. Men of the Territorial Force may enlist into the Royal Navy (f), the Regular Army, or the Royal Marines, and into the Special Reserve, including the Irish Horse (g).

Enlistment
into other
branches of
the service.

method of numbering, see Territorial Force Regulations, 1912, paragraph 146. For the conditions under which transfer may be effected, see *ibid.*, paragraph 154, and p. 64, *ante*.

(c) Territorial Force Regulations, 1912, paragraph 136. This provision is subject to the exception that men who have been discharged from the Army, Army or Special Reserve, Militia, Imperial Yeomanry, or the Territorial Force, as medically unfit, but are pronounced by the medical authority (having complete knowledge of the cause of discharge) to be fully fit for service in the Territorial Force, may be enlisted, provided that their character on discharge was at least "fair" (*ibid.*, paragraph 137).

(d) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 9 (1) (c). The term of re-engagement is for one, two, three or four years, as each county association may decide (Territorial Force Regulations, 1912, paragraphs 139, 141, 142, 165). The provisions of the Army Act as to the validity of enlistment and re-engagement are applied to the Territorial Force by the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 10 (1).

(e) Territorial Force Regulations, 1912, paragraph 136A.

(f) Enrolment in the Royal Naval Reserve is not included (Territorial Force Regulations, 1912, paragraph 144).

(g) *Ibid.*, paragraphs 144, 145. As to service in the Special Reserve, see Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), ss. 30, 36; see pp. 62, 63, *ante*. Men enlisting into the Special Reserve of the Royal Engineers (category b), Army Service Corps (category b), Royal Army Medical Corps (category b), or Army Post Office Corps are, while so serving, supernumerary to the Territorial Force until their service in the Territorial Force has expired. All other men so enlisting into the Royal Navy, Regular Army, Royal Marines, Irish Horse, and parts of the Special Reserve not set out above are, on completion of the attestation form by the attesting officer, deemed to be discharged from the Territorial Force, but are liable to deliver up in good order, fair wear and tear excepted, all public property issued to them (*ibid.*, paragraphs 144, 145). No payment is due to a county association from men leaving the Territorial Force to enlist into the Royal Navy, Regular Army, Royal Marines or Special Reserve (category a) (*ibid.*, paragraph 802; and see note (i), p. 68, *post*).

SECT. 1.
Organisation.

If a man enlists into the Army Reserve without being discharged from the Territorial Force, the conditions of his service while he remains in the Army Reserve are those applicable to the Army Reserve and not to the Territorial Force (*h*).

SUB-SECT. 4.—Men: Discharge.

Discharge.

134. A man of the Territorial Force has a right to be discharged at any time before the completion of his term of service, provided that no proclamation calling out the Army Reserve on permanent service is in force, and provided that he gives to his commanding officer three months' notice in writing, or less if so prescribed, pays to his county association £5, or less if so prescribed, and delivers up in good order, fair wear and tear excepted, all public property issued to him, or, when from good cause delivery is impossible, pays the value of the same.

All or any of these conditions may be dispensed with by a county association, or an officer authorised by them, in any case in which it appears that the reasons for claiming discharge are of sufficient weight (*i*).

If, when a man would otherwise be entitled to his discharge, a proclamation ordering the Army Reserve to be called out on permanent service is in force, he may be required to prolong his service for a further period not exceeding one year (*k*).

Grounds of discharge.

A man may be discharged from the Territorial Force (*l*) on the ground of (1) unsatisfactory conduct (*m*); (2) having made a false answer on attestation (*n*); (3) medical unfitness (*o*); (4) inefficiency (*p*); (5) or on the ground of his services being no longer required (*q*).

Discharge may also be claimed by (1) reason of irregularity of enlistment (*r*); (2) on the application of the master on the ground

(*h*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 12.

(*i*) *Ibid.*, s. 9 (3). Associations must, subject to the approval of the Army Council, frame scales of payment to be made by men in such cases, the payments to vary with the length of service uncompleted on the current engagement; no payment is due from a non-commissioned officer or man appointed directly from the ranks to a commission in the Territorial Force (Territorial Force Regulations, 1912, paragraph 802); see, further, note (*g*), p. 67, *ante*.

(*k*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 9 (5). The period is to be determined by the competent military authority as defined by the Army Act, s. 101, applied to the Territorial Force by the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 10 (1). As to the Army Act, see note (*s*), p. 30, *ante*.

(*l*) For discharge generally, see Territorial Force Regulations, 1912, paragraphs 155—162.

(*m*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 9 (4); Territorial Force Regulations, 1912, paragraph 156 (4). For appeal against discharge for this cause, see *ibid.*, paragraph 278.

(*n*) *Ibid.*, paragraph 156 (7).

(*o*) *Ibid.*, paragraph 156 (11).

(*p*) *Ibid.*, paragraph 156 (5).

(*q*) *Ibid.*, paragraph 156 (6).

(*r*) Army Act, ss. 80, 100, 163, applied to the Territorial Force by the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 10 (1); see Territorial Force Regulations, 1912, paragraph 156 (8).

of apprenticeship (s); or (3) on the application of the parents on the ground of misstatement of age (t).

SECT. I.
Organisa-
tion.

SUB-SECT. 5.—*Training.*

135. Every man of the Territorial Force must during the first year of his enlistment attend the drills and fulfil the conditions prescribed by orders or regulations for a recruit of his arm or branch of the service (u). If so provided by Order in Council, he must further attend for training at such places in the United Kingdom and at such times and for such periods, not exceeding in the aggregate the number of days specified in the Order in Council, as may be prescribed by regulations (v). Preliminary training.

136. Every man of the Territorial Force is liable by way of annual training to be called out at such times and at such places in the United Kingdom as may be fixed by orders or regulations, and further to attend the drills and fulfil the other conditions relating to training prescribed for his arm or branch of the service. These requirements may be dispensed with either wholly or in part as regards any unit or individual man by the prescribed authority (a). Annual training is additional to preliminary training and to the performance of voluntary duty or attendance at courses of instruction (b). The period of annual training is not less than eight nor more than fifteen, or in the case of the mounted branch eighteen, days in each year (c). The period, however, may by Order in Council be extended to not more than thirty days, or Annual training.

(s) Army Act, s. 96, applied to the Territorial Force by the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 10 (1); Territorial Force Regulations, 1912, paragraphs 156 (9), 258.

(t) *Ibid.*, paragraph 156 (10).

(u) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 14 (1). For the conditions at present prescribed, see Territorial Force Regulations, 1912, paragraphs 311—317, Appendix VII. As to the effect of failure to fulfil the conditions, see p. 77, *post*.

(v) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 14 (1). The draft of the Order in Council must be laid before both Houses of Parliament for not less than forty days during session, and if either House presents an address to His Majesty against the whole or part of the draft it becomes inoperative, but without prejudice to the making of a new draft order (Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 16). No such Order has yet been made.

(a) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 15 (1). Annual training consists of three parts—drills, musketry, and training in camp. The primary authority for granting leave is the officer commanding the unit. The legal obligation applies to each calendar year during the period of engagement, if the dates fixed for annual training fall within the period of engagement. For general instructions as to annual training, see Territorial Force Regulations, 1912, paragraphs 318—353, and for the training of the different arms, see *ibid.*, Appendix VII. For regulations as to leave of absence, see *ibid.*, paragraphs 393—400. As to failure to fulfil the conditions, see p. 77, *post*; for inspection of units, see Territorial Force Regulations, 1912, paragraphs 354—358, 362, 716.

(b) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 15 (2), (3).

(c) *Ibid.*, s. 15 (1). This elastic period is adopted by regulation (Territorial Force Regulations, 1912, paragraphs 217, 340). As to the periods of training of medical officers attached to units, and of the Army Veterinary Corps, see *ibid.*, paragraphs 65, 75c, 341, 342.

SMOR. 1.
Organisa-
tion.

Notice to
attend
training.

reduced, or dispensed with, for all or any part of the Territorial Force (*d*).

137. Personal notice to attend the annual training in camp is sent by post so as to reach the residence of each officer and man at least fourteen days before the date of assembly. Public notices are at the same time sent to the constabulary and police in the United Kingdom and to the inspectors of poor in Scotland, who must affix a copy without delay in each parish in places where Government notices are usually affixed. Such public notice is deemed sufficient notice, notwithstanding failure in the transmission or receipt of the personal notice; and any man not appearing at the time and place appointed in the public notice is liable to be proceeded against as an absentee (*e*).

SUB-SECT. 6.—Embodiment and Disembodiment.

Embodiment.

138. On the issue of a proclamation ordering the Army Reserve to be called out on permanent service (*f*), the Crown may immediately order the Army Council to give directions (*g*) for the embodiment of all or part of the Territorial Force. When directions have been issued for calling out the whole of the first class* of the Army Reserve, the Army Council must within one month issue directions for embodying the whole of the Territorial Force, unless both Houses of Parliament present to the Crown an address against embodiment. If Parliament is adjourned or prorogued in such circumstances that it will not meet within ten days, it must be summoned by proclamation to meet within ten days. Only in case of emergency may the directions for embodiment be given before Parliament has had an opportunity of presenting an address (*h*). When directions have been issued for the embodiment of any part of the Territorial Force, every officer and man belonging to that part must attend at the time and place fixed in the directions, and after that time is deemed to be embodied (*i*).

(*d*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 15 (2). Such an Order in Council is subject to the provisions of the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 16; see note (*i*), p. 69, *ante*. No such Order has yet been made.

(*e*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), ss. 19, 40 (1) (*d*); Territorial Force Regulations, 1912, paragraphs 270, 352. For the form of public notice, see *ibid.*, Appendix XXI. A constable or inspector of poor who fails to conform to the regulations as to publication and service of notices is liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding £20 (Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 19). As to summary procedure, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.* As to failure to appear, see p. 77, *post*.

(*f*) Under the Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 12; see p. 60, *ante*. For the effect of this proclamation on the right to discharge, see p. 68, *ante*.

(*g*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 17 (1). The directions may be revoked or varied; special arrangements may be made with regard to units or individuals whose services are required in other than a military capacity (*ibid.*).

(*h*) *Ibid.*, s. 17 (2); and see title PARLIAMENT, Vol. XXI., p. 699.

(*i*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 17 (3). As to failure to attend, see p. 77, *post*.

139. The Crown may by proclamation order the disembodiment of the Territorial Force, and the Army Council must then give directions for carrying the proclamation into effect. Until the issue of such a proclamation the Army Council may from time to time, as it thinks expedient, give directions for disembodiment of any embodied part of the Territorial Force, or for embodying any part not embodied, whether previously disembodied or not. After the date fixed by the directions for the disembodiment of any part, the officers and men of that part are no longer deemed to be embodied (*k*).

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tion.
Disembodi-
ment.

140. During any authorised training or on embodiment officers and men of the Territorial Force are entitled to impress transport for baggage and stores, and to be billeted with their horses in the same manner and under the same conditions as the regular forces (*l*).

Impressment
and billeting.

SUB-SECT. 7.—Pay and Allowances.

141. Pay and allowances are granted to officers and men of the Territorial Force for attendance at specified duties, including annual training in camp, obligatory courses of instruction, and, if approved by the general officer commanding in chief, staff rides, instructional tours, and voluntary courses of instruction. The rates and conditions are those laid down in the Pay Warrant and Allowance Regulations for officers and men of the corresponding rank and arm of the regular forces, subject to certain variations. The performance of the prescribed number of drills is a condition precedent to the issue of pay and allowances during camp, but exceptions may be made by the general officer commanding in chief for sickness or other extraordinary cause (*m*).

Pay and
allowances.

On embodiment the emoluments of members of the Territorial Force are governed by the Pay Warrant and Allowance Regulations,

(*k*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 18.

(*l*) The provisions of the Army Act dealing with impressment (ss. 31, 112—121, 181 (3), (4)) and billeting (ss. 30, 102—111, 181 (3), (4)) are applied to the Territorial Force by the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 28 (1). For the effect of these sections, see pp. 48 *et seq.*, *ante*. For allowances and issue of rations and forage to units when billeted, see Territorial Force Regulations, 1912, paragraph 579. As to the Army Act, see note (*s*), p. 30, *ante*.

(*m*) Territorial Force Regulations, 1912, paragraphs 576, 577. See as to personal emoluments generally, *ibid.*, paragraphs 551—678; pay and allowances of permanent staff, paragraphs 555—570, 809, 810; divisional and brigade headquarters, paragraphs 571—575, 576*z*; regimental officers and men, paragraphs 576—603; outfit grants, paragraphs 604—610; chaplains, paragraphs 619—623; travelling expenses, paragraphs 627—655; hospital treatment, medical and funeral expenses, paragraphs 656—669. Separation allowance is granted to all married non-commissioned officers for the periods for which they draw pay for annual training in camp and at authorised courses of instruction, and during annual training to all private soldiers, provided that they attend for the full period (*ibid.*, paragraph 600). The payment of members of permanent staffs appointed as instructors prior to September, 1910, is governed by the Territorial Force Regulations, 1910, paragraphs 809, 810 (Territorial Force Regulations, 1912, paragraph 809 (note)). As to the Imperial and Special Service sections see pp. 80, 81, *post*.

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and conform in all respects to those of the regular forces. Separation allowance is granted to the wives and families of all married non-commissioned officers and men (*n*). A gratuity of £5 5s. is issued to each officer and man who joins his unit on embodiment subject to the fulfilment of certain conditions (*o*).

Period of
limitation.

Any pecuniary advantages granted by regulation to a member of the Territorial Force, if unclaimed within a period of twelve months, are deemed to be forfeited, except in special circumstances approved by the Army Council or an officer authorised by it. Pay and all other emoluments granted by regulations are liable to be stopped by order of the Army Council to meet any outstanding public claims, regimental debt, or regimental claim of which the Army Council may direct payment (*p*).

SUB-SECT. 8.—Discipline.

Subjection to
military law.

142. Officers of the Territorial Force are at all times subject to military law, and may sit on courts-martial for the trial of members of the regular forces as well as of the Territorial Force (*q*). Non-commissioned officers and men are subject to military law when being trained or exercised (*r*), either alone or with any portion of the regular forces or otherwise; when attached to or acting with or as part of the regular forces; when embodied; and when called out for actual military service for purposes of defence in pursuance of any agreement (*s*).

Orders.

143. Any power vested in the holder of any military office may in relation to the Territorial Force be exercised by any other person for the time being authorised according to the custom of the service. Orders authorised under the Territorial and Reserve Forces Act, 1907 (*t*), Part II., to be made by a military authority may be signified by an order, instruction, or letter under the hand of any officer authorised in that behalf; and any order, instruction or letter,

(*n*) Territorial Force Regulations, 1912, paragraph 551. As to separation allowance in camp, see note (*m*), p. 71, *ante*.

(*o*) Territorial Force Regulations, 1912, paragraphs 614, 615.

(*p*) Order by His Majesty, Territorial Force Regulations, 1912, pp. 11, 12. The expression "public claim" is defined in the Pay Warrant, but in this connection includes any similar claim by a county association.

(*q*) Army Act, ss. 50 (1), 175 (3) (a); Territorial Force Regulations, 1912, paragraph 213. As to the Army Act, see note (*s*), p. 30, *ante*. For the liabilities arising from subjection to military law, see pp. 42 *et seq.*, *ante*; p. 89, *post*.

(*r*) This comprehends the performance of any military duty required by regulations or ordered by a commanding officer (Territorial Force Regulations, 1912, paragraph 216). For the time at which subjection to military law begins and ends, see *ibid.*, paragraph 217; *Marks v. Frogley*, [1898] 1 Q. B. 888, C. A.

(*s*) Army Act, s. 176 (6A); Territorial Force Regulations, 1912, paragraph 214. Men of the Territorial Force are liable to dismissal as a punishment for offences under the Army Act (Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 28 (1)). For discipline generally, see Territorial Force Regulations, 1912, paragraphs 34, 213—241. For agreement to serve for purposes of defence, see p. 80, *post*; for the permanent staff, see Army Act, s. 181 (2). By *ibid.*, ss. 186, 190 (12), the Territorial Force is part of His Majesty's forces within the meaning of the Naval Discipline Act (29 & 30 Vict. c. 109), s. 88.

(*t*) 7 Edw. 7, c. 9.

purporting to be signed on behalf of such military authority is evidence that the officer who signed it was so authorised (u).

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144. Officers must at all times make themselves acquainted with regulations and orders (a); ignorance of a published order is not admitted as an excuse for its non-observance (b). A commanding officer must cause all orders issued for general information to be re-published or circulated to those in the unit whom it may concern. He must also afford facilities to the officers under his command to become acquainted with changes in orders and regulations (c). During training in camp, orders specially relating to non-commissioned officers and men must be read and explained to them immediately on receipt (b).

Acquaintance
with and
publication
of orders.

145. Personal appeals by officers must be submitted through the commanding officer, or, in cases of his refusal or unreasonable delay, through his next superior (d). An appeal by an officer against a decision of a county association must be addressed to that association. If the association does not accede, the officer may request them to submit the appeal to the Army Council. If the association refuses or unreasonably delays to forward the appeal, the officer may address the Army Council through the usual military channel, but must at the same time inform the Association of his action (e).

Appeals by
officers.

146. During training in camp, all applications and complaints by men must be made through the squadron, battery, or company commanders; if they are unable to settle the complaint, the commanding officer will submit it to the inspecting officer for his decision (f). During embodiment, the procedure to be followed is that laid down for the regular army (g). At all other times applications and complaints must be made through the company commander or adjutant to the officer commanding the unit (f).

Complaints
by men.

147. Any member of the Territorial Force who is qualified and wishes to vote at an election is granted leave of absence from training for the purpose, and is not liable to any penalty or punishment for his absence during the time he is voting or going to or returning from voting (h).

Voting at
and assembly
during elec-
tions.

(u) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 27 (1), (2); Territorial Force Regulations, 1912, paragraph 271.

(a) Territorial Force Regulations, 1912, paragraph 273. This applies in particular to officers rejoining after leave of absence (*ibid.*, paragraph 274).

(b) *Ibid.*, paragraph 273.

(c) *Ibid.*, paragraph 275.

(d) *Ibid.*, paragraph 276. The provisions of the Army Act, s. 42, and of the King's Regulations, 1912, paragraph 439, must be observed. In no case may testimonials as to services or character be forwarded to the War Office (Territorial Force Regulations, 1912, paragraph 234).

(e) *Ibid.*, paragraph 276.

(f) Territorial Force Regulations, 1912, paragraph 277. Direct communication to the War Office is expressly prohibited. For appeal against discharge under the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), see Territorial Force Regulations, 1912, paragraph 278.

(g) *I.e.*, under the Army Act, s. 43; see p. 47, *ante*.

(h) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 23 (2),

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No commanding officer may assemble his unit in any electoral district during the period from the issue of the writ to the termination of the election. Exceptions may be made by a general officer commanding in chief in certain cases, including camps or annual training, but in this event the members of the Territorial Force must be kept within limits which preclude the possibility of their interference in the election (*i*).

Political
meetings.

Members of the Territorial Force may not attend political gatherings in uniform, or discuss political questions at military gatherings, whether in uniform or not. Military bands are prohibited from playing at political gatherings. No assembly of soldiers may be sanctioned for a day on which through local circumstances it might be made to serve party purposes (*k*).

SUB-SECT. 9.--Offences, Courts-martial, and Procedure.

Jurisdiction
over officers.

148. The following offences are cognizable either by court-martial or by a court of summary jurisdiction: certain offences connected with enlistment (*l*); failure to attend on embodiment without leave lawfully granted or reasonable excuse (*m*); and offences cognizable by court-martial under the Army Act, if committed by members of the Territorial Force when not embodied (*n*).

The following offences are cognizable by a court of summary jurisdiction only: failure, without leave lawfully granted or

and Territorial Force Regulations, 1912, paragraph 224; see title ELECTIONS, Vol. XII., p. 278, note (*o*). The period of leave may be reckoned as attendance at training. For the Isle of Man, see Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 40 (2) (*d*).

(*i*) Territorial Force Regulations, 1912, paragraph 223, where a list of permissible cases is given.

(*k*) *Ibid.*, paragraphs 223, 225, 226. See also as to unlawful drilling, titles CONSTITUTIONAL LAW, Vol. VI., p. 359; CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 467.

(*l*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 11 (1), applying the Army Act, ss. 32, 34; see p. 76, *post*; as to the Army Act, see note (*s*), p. 30, *ante*.

(*m*) See p. 77, *post*.

(*n*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), ss. 24 (1), 25 (1); Territorial Force Regulations, 1912, paragraph 247. A man may not be tried both by court-martial and by a civil court for the same offence. If he has been dealt with summarily by his commanding officer, he is deemed to have been tried by court-martial. Offences (1) and (2) are, as a rule, tried by court-martial. Serious offences at individual drill are ordinarily punished by discharge under the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9) s. 9 (4); see p. 68, *ante*. Offences at continuous training are ordinarily disposed of by the commanding officer or by court-martial (Territorial Force Regulations, 1912, paragraph 249). Proceedings before a civil court should in no case be taken until the sanction of the commanding officer of the unit, or a superior military authority, has been signified to the court, and must not be taken if the case has already been dealt with by the commanding officer or a court-martial, or if the time limit (see p. 76, *post*) has been exceeded (Territorial Force Regulations, 1912, paragraph 250). For the definition of "court of summary jurisdiction," see Army Act, s. 190 (35), applied by Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 38; as to courts of summary jurisdiction, generally, and summary procedure, see title MAGISTRATES, Vol. XIX., pp. 571 *et seq.*, pp. 589 *et seq.*; for the jurisdiction in the Isle of Man, see

reasonable excuse, to fulfil the conditions of preliminary or annual training (o); and offences connected with equipment (p).

Offences against the Army Act triable by court-martial only, if committed by members of the Territorial Force when embodied, are cognizable by court-martial only (q).

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tion:

149. Courts-martial, courts of inquiry, committees and boards are conducted in accordance with the Rules of Procedure and the King's Regulations, and should, if practicable, contain at least one officer of the Territorial Force; if none such is forthcoming for courts of inquiry, committees, or boards, an adjutant of a Territorial Force unit must be detailed. If it is impracticable to detail an officer of the Territorial Force to serve on a court-martial for the trial of an accused person belonging to the Territorial Force, this must be stated by the convening officer in the order convening the court (r).

Courts-
martial etc.

150. The following provisions of the Army Act dealing with procedure are made applicable to the Territorial Force:—

Application
of Army Act.

(1) Provisions relating to evidence apply to all proceedings under the Territorial and Reserve Forces Act, 1907 (s), Part II.

(2) Provisions relating to evidence of civil conviction or acquittal apply to men of the Territorial Force tried by a civil court, whether at the time of trial they are subject to military law or not (t).*

(3) Provisions relating to the arrest, trial, and punishment of offenders, including the summary dealing with a case by a commanding officer, are applied to any offence under the Territorial and Reserve Forces Act, 1907 (s), Part II., punishable on conviction by a court-martial, but the forfeiture and stoppages referred to are to be interpreted as those prescribed by orders and regulations for the Territorial Force (u).

(4) Provisions relating to summary and other legal proceedings are applied to the prosecution of and recovery of fines for offences under the Territorial and Reserve Forces Act, 1907 (a), Part II.

Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 40 (2) (c). For the supremacy of the civil courts, generally, see pp. 89, 91, *post*.

(o) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 21; see p. 77, *post*.

(p) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 22; Territorial Force Regulations, 1912, paragraph 247. For these offences, see p. 78, *post*.

(q) Territorial Force Regulations, 1912, paragraphs, 216, 247. Any offence cognizable by a court-martial may be dealt with under the Army Act, s. 46, by the commanding officer, who has, in addition to the powers mentioned, the power of awarding dismissal as a punishment (Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 28 (1)).

(r) Territorial Force Regulations, 1912, paragraph 242. An adjutant of a Territorial Force unit cannot be considered an officer of the Territorial Force for the purpose of serving on a court-martial (*ibid.*). Regimental courts-martial and courts of inquiry involving expense require the sanction of the divisional, mounted brigade, or coast defence commander (*ibid.*, paragraph 243). As to offences by the permanent staff, see *ibid.*, paragraphs 244, 245.

(s) 7 Edw. 7, c. 9.

(t) Army Act, ss. 163, 164; Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 26 (1), (2); Territorial Force Regulations, 1912, paragraphs 255A—255C; see p. 45, *ante*.

(u) Army Act, ss. 45—75, 122—142, 152—165; Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 24 (2); see pp. 43 *et seq.*

(a) 7 Edw. 7, c. 9.

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tion.
- punishable on conviction by a court of summary jurisdiction, but all fines recovered are to be paid to the association of the county for which the offender was enlisted (b).
- (5) Provisions relating to the attestation of apprentices (c), unlawful recruiting (d), false answers on attestation (e), and desertion (f).
- Enlistment**
offences.
- 151.** Certain offences in connection with enlistment into the Territorial Force are made subject to the same penalties as the corresponding offences in connection with enlistment into the regular army (g).
- Commence-**
ment of
proceedings.
- 152.** Proceedings against an offender for any offence punishable under the Territorial and Reserve Forces Act, 1907 (h), Part II., and alleged to have been committed by him when a member of the Territorial Force, may be instituted at any time within two months after the offence becomes known to his commanding officer, if the alleged offender is then apprehended, or within two months after the time at which he is apprehended (i).
- Members of the Territorial Force alleged to be guilty of offences against the Army Act are liable to be tried by court-martial for such offences, although they may have ceased to be subject to military law, provided that the trial is begun within three months after they have ceased to be so subject (k).
- Repeated**
offences.
- 153.** An offender who has been guilty of repeated offences of desertion, fraudulent enlistment, or making a false answer may for
- (b) Army Act, ss. 166, 168; Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 24 (3). As to the Army Act, see note (s), p. 30, *ante*.
- (c) Army Act, s. 96; Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 10 (1); see pp. 39, 40, *ante*.
- (d) Army Act, s. 98; Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 10 (1); see p. 42, *ante*.
- (e) Army Act, s. 99; Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 10 (1). As to discharge for this cause, see p. 68, *ante*; as to procedure in case of several offences, see p. 77, *post*. For offences in connexion with personation, see Army Act, s. 142; p. 48, *ante*.
- (f) Army Act, ss. 153, 154; Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 20 (2). These sections are applied to desertion on embodiment, with the addition that any person who employs or continues to employ a man of the Territorial Force, knowing him to be a deserter, is deemed to aid him in concealing himself within the meaning of the Army Act, s. 153.
- (g) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 11; Army Act, ss. 32, 34; see pp. 42, 74, *ante*. Offenders under this section may also be tried in a civil court (see p. 74, *ante*). For irregular enlistment by men of the regular forces into the Territorial Force, see Army Act, s. 13 (1), (b); and p. 67, *ante*; for irregular enlistment by men of the Territorial Force into other forces, see Army Act, ss. 13 (1) (a), 99; Territorial Force Regulations, 1912, paragraphs 256, 259, 260, 262; for rewards to informers, see *ibid.*, paragraph 804.
- (h) 7 Edw. 7, c. 9.
- (i) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 25 (2); Territorial Force Regulations, 1912, paragraph 248. This applies to proceedings of every description (except to proceedings in England and Wales by complaint under the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), ss. 21, 22, which are subject to the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11), and is not affected by contrary provisions in other Acts or by the expiry of the offender's term of service.
- (k) Army Act, s. 158; Territorial Force Regulations, 1912, paragraph 246.

the purpose of proceedings against him be deemed to belong to any one or more of the corps to which he has been appointed or transferred as well as to the corps to which he properly belongs. He may also be charged and tried for any number of such offences at the same time, and if convicted of more than one offence may be punished as though previously convicted (*l*).

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154. A member of the Territorial Force when subject to military law and charged with an offence under the Army Act may be placed in military custody (*m*). If charged with an offence cognizable both by court-martial and by a court of summary jurisdiction (*n*), he may be taken into custody, although it is intended to proceed against him in the civil court (*o*). If charged with certain offences relating to enlistment he may be taken into military custody (*p*).

Arrest.

155. Proceedings before a court of summary jurisdiction in England and Wales, except for absence from training or offences in connexion with equipment (*q*), are either by summons or warrant, if the accused has not been apprehended and brought before the court in military custody.

Proceedings.

156. A man of the Territorial Force who, without leave lawfully granted or reasonable excuse allowed in the prescribed manner, fails to fulfil the conditions of preliminary or annual training is liable to forfeit to His Majesty a sum not exceeding £5 (*r*). The proceedings are on complaint to a court of summary jurisdiction by the officer commanding the unit acting under the direction and authority of the county association concerned (*s*).

Non-fulfil-
ment of
conditions of
training.

157. A man of the Territorial Force who, without leave lawfully granted or reasonable excuse allowed in the prescribed manner, fails to attend at the time and place appointed for assembly on embodiment is guilty of desertion or absence without leave, according to

Failure to
attend on
embodiment.

(*l*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 25 (3). This applies to offences within the meaning of the Army Act as well as of the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), Part II.

(*m*) Army Act, ss. 45, 176 (6A) (*a*); Territorial Force Regulations, 1912, paragraphs 216, 217. The expression "military custody" is defined by the Army Act, s. 45, applied by the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 38.

(*n*) See p. 74, *ante*.

(*o*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 24 (1); Territorial Force Regulations, 1912, paragraphs 251, 263.

(*p*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 11 (1).

(*q*) *Ibid.*, ss. 21, 22; for procedure in these cases, see the text, *infra*, and p. 78, *post*; and as to summary procedure generally, see title **MAGISTRATES**, Vol. XIX., pp. 589 *et seq.*

(*r*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 21; as to such defaulters, see Territorial Force Regulations, 1912, paragraphs 266, 268. For regulations as to leave, see *ibid.*, paragraphs 396—403; for rewards to informers, see *ibid.*, paragraph 304. A man who, after having joined for annual training in camp, absents himself may be dealt with under the Army Act, s. 15 (Territorial Force Regulations, 1912, paragraph 267). For courts of inquiry in such cases, see Territorial Force Regulations, 1912, paragraph 255. Officers are at all times subject to the provisions of the Army Act; see p. 72, *ante*.

(*s*) Territorial Force Regulations, 1910, paragraph 253. Such proceeding will be by summons by the commanding officer with the authority of the county association, and will be commenced within six months of the date of the offence (*ibid.*).

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the circumstances, within the meaning of the Army Act, and is liable, whether otherwise subject to military law or not, to be tried either by court-martial or by a court of summary jurisdiction. If the offence is one of desertion, the time between the commission of the offence and the apprehension or voluntary surrender of the offender is not reckoned as service for the purpose of discharge (t).

Damage
or loss of
equipment.

158. If a member of the Territorial Force designedly makes away with, wrongfully damages, negligently loses, or wrongfully omits to deliver up on demand anything issued to him as a member of the Territorial Force, the value may be recovered from him by the county association as a civil debt under the Summary Jurisdiction Acts (u). All such proceedings are by summons issued on complaint to a justice only, and must be instituted within six months of the date of the offence. If the offence is one of designedly making away with or wrongfully damaging, he is further liable on conviction under the Summary Jurisdiction Acts (u) to a fine not exceeding £5 (a).

SUB-SECT. 10.—Civil Duties and Privileges.

Duties in aid
of civil power.

159. Members of the Territorial Force are not liable to be called out in their military capacity to aid the civil power in the preservation of peace (b). They are subject to the general obligation attaching to all His Majesty's subjects to use all reasonable endeavours to suppress riots. If required by the civil authority to act as special constables they must carry the ordinary constable's staff and must not wear uniform (c). In case of serious and dangerous disturbance the civil authority may require them, in common with all other subjects of His Majesty, to use weapons suitable to the occasion (d). In case of an attack on their store-houses or armouries they may combine in organised force to resist it, and may use arms if necessity so requires (e).

Exemptions
from certain
offices.

160. No member of the Territorial Force can be compelled to serve as a peace or parish officer, or to serve on any jury (f). The

(t) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 20, applying the Army Act, ss. 12, 15, 153, 154; see also p. 68, *ante*; as to the Army Act, see note (s), p. 30, *ante*. For the military procedure in such cases, see Territorial Force Regulations, 1912, paragraphs 263—266, 269; for the alternative of procedure by court-martial or in a civil court, see p. 74, *ante*; for courts of inquiry in cases of illegal absence on embodiment, see Territorial Force Regulations, 1912, paragraph 255.

(u) As to such recovery of civil debts, see title MAGISTRATES, Vol. XIX., pp. 609, 610.

(a) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 22; Territorial Force Regulations, 1912, paragraph 253A; see p. 75, *ante*. For the definition of "Summary Jurisdiction Acts," see Army Act, s. 190 (34), applied by Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 38; and as to summary procedure generally, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(b) Territorial Force Regulations, 1912, paragraph 404.

(c) *Ibid.*, paragraph 405.

(d) *Ibid.*, paragraph 406.

(e) Territorial Force Regulations, 1912, paragraph 407; as to the responsibility for the protection of armouries, gun parks, magazines, and ammunition stores, see *ibid.*, paragraph 407A.

(f) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 23 (4).*

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tion.

acceptance of a commission in the Territorial Force does not vacate the seat of a member of Parliament. Officers who are members of Parliament are not on that account seconded (*g*). A field officer of the Territorial Force cannot be required to serve in the office of high sheriff. During embodiment a sheriff who is an officer of the Territorial Force is discharged from personally performing the office of sheriff, and the under-sheriff is responsible for the due execution of the office (*h*). An officer of the Territorial Force may be nominated or elected to or hold the office of sheriff or a municipal office, notwithstanding the assembly for annual training of his battalion or corps (*i*).

161. A member of the Territorial Force does not by enlistment or service forfeit or lose any interest which he possesses in a friendly society, whether registered or unregistered (*k*). Members of friendly societies.

The exemption from jury service is absolute as regards Scotland, but as regards England and Wales is under the Juries Act, 1870 (33 & 34 Vict. c. 77), s. 12, dependent on the exclusion of the privileged person's name from the jury list. Every member of the Territorial Force who is legally qualified and otherwise liable for service as a county or borough juror should obtain from his immediate commanding officer a certificate of membership and at once forward it, with a claim for exemption, to the overseer of his parish in the case of a county or to the clerk of the peace of the borough. On leaving the Territorial Force he should give notice to the overseer or the clerk of the peace. To ensure exemption while serving he should, in the case of a county, ascertain personally that his name is not upon the published list of jurors, with a view, if necessary, to an appeal to special sessions: in the case of a borough, he should claim exemption whenever summoned to serve and should send in notices of exemption in each year. In either case, if summoned, he should return the citation to the summoning officer with a statement of the ground of exemption, and exemption will then probably be granted; see Territorial Force Regulations, 1912, paragraphs 418—424; titles CORONERS, Vol. VIII., p. 261; JURIES, Vol. XVIII., p. 232. Scotland is specially dealt with in the Territorial Force Regulations, 1912, paragraphs 425—427.

(*g*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 23 (1); Territorial Force Regulations, 1912, paragraph 115. For the Isle of Man, see Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 40 (2) (d).

(*h*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 23 (3), (4); see, generally, title SHERIFFS AND BAILIFFS.

(*i*) Army Act, s. 181 (5); see, generally, title SHERIFFS AND BAILIFFS.

(*k*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 43 (1); applied to the Territorial Force by Order in Council dated 19th March, 1908, made under the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 28 (3) (Territorial Force Regulations, 1912, Appendix VIII.); see title FRIENDLY SOCIETIES, Vol. XV., pp. 150, 182; and as to friendly societies generally, see *ibid.*, pp. 119 *et seq.* Members of the Territorial Force are persons in the military service of the Crown within the meaning of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 9 (Territorial Force Regulations, 1912, paragraph 797); for the effect of this, see *ibid.*, and title MASTER AND SERVANT, Vol. XX., p. 157. Members of the Territorial Force who, at the commencement of their training, are insured persons under the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), while training and in receipt of army pay, are deemed to be in the sole employment of the Crown within *ibid.*, Part I. (*ibid.*, s. 46 (8)). The provisions relating to the regular army relate also to the Territorial Force when embodied (*ibid.*, s. 46 (7)). For the provisions of the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), generally, see title WORK AND LABOUR.

SECT. 1.

Organisa-
tion.

Tolls.

Railways.

162. The provisions of the Army Act relating to duties, tolls, and ferries (*l*), and all other enactments relating to the same, apply to officers and men of the Territorial Force, when going to or returning from any place for non-attendance at which they are liable to be punished, in all respects as though they were officers and men of the regular forces on duty (*m*).

Railway companies may be required to provide for the conveyance of officers and men of the Territorial Force by rail at certain limited charges. When the Territorial Force is embodied, the Crown, by order under the hand of a Secretary of State, may claim precedence in traffic over the railways of the United Kingdom (*n*).

SUB-SECT. 11.—*Imperial and Special Service Sections.*

In general.

163. The Crown may organise sections of the Territorial Force by voluntary agreement with any parts or individuals of the force who offer through their commanding officer to serve—

(1) In any place outside the United Kingdom ;

(2) For purposes of defence at such places within the United Kingdom as may be specified in their agreement, whether the Territorial Force is embodied or not.

The first section is named the Imperial Service section and the second the Special Service section. The offer must in every case be voluntary, and cannot be certified until the commanding officer has explained its voluntary nature to every person making it (*o*).

Imperial
Service
section.

164. Members of the Imperial Service section are required to sign an agreement in the presence of the officer commanding their unit undertaking to serve abroad in time of national emergency with their unit or part of their unit. Unless a notification to the contrary is received, the agreement holds good until the termination of the man's engagement. In other respects members of the Imperial Service section continue as members of the Territorial Force (*p*).

Special
Service
section.

165. Members of the Special Service section must engage to serve in case of national emergency, when called on to do so under the authority of the Secretary of State, for not more than one month in the coast defences or other places specified in their agreement,

(*l*) Army Act, s. 143; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 66; as to the Army Act, see note (*s*), p. 30, *ante*.

(*m*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 28 (2).

(*n*) Railway Regulation Acts, 1842 (5 & 6 Vict. c. 55), s. 20; 1844 (7 & 8 Vict. c. 85), s. 12; National Defence Act, 1888 (51 & 52 Vict. c. 31), s. 4; applied to the Territorial Force by Order in Council dated 19th March, 1908. The Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 6, applies to the Territorial Force when subject to military law; see p. 52, *ante*; and see title RAILWAYS AND CANALS, Vol. XXIII., pp. 699, 700.

(*o*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 13 (2), (3); Territorial Force Regulations, 1912, paragraph 8.

(*p*) Territorial Force Regulations, 1912, paragraphs 10—12, 123, 163, 163A. A person making this agreement cannot be drafted as an individual to another unit except at his own written request (*ibid.*, paragraph 11). The members of this section may wear a prescribed badge on the right breast (Territorial Force Regulations, 1912, paragraph 495).

although no order calling out the Territorial Force for actual military service is in force at the time. They may terminate their agreement by giving three calendar months' notice in writing to their commanding officer; but, if called out for special service before the notice has expired, must complete their agreed period of service. They may be discharged at any time by authority of the general officer commanding in chief, and from that time revert to the ordinary conditions of service in the Territorial Force (g).

SECT. 1.
Organisa-
tion.

Members of the Special Service section receive an annual retaining fee of 10s. In the event of their being called out for special service a gratuity of £5 5s. is paid to them as soon as possible after they report themselves for duty. While on special service they retain the rank which they held in the Territorial Force, and receive the pay and allowances of the corresponding rank in the corresponding arm of the regular army. Pensions are granted under the same conditions as though the Territorial Force were mobilized (r).

Retaining fee
and pay.

SUB-SECT. 12.—*Reserves.*

166. The Crown has power by orders and regulations (s) to form a reserve division of the Territorial Force (t), and, in the application of the Territorial and Reserve Forces Act, 1907 (u), to the reserve division may relax or dispense with the provisions relating to training, and may authorise the transfer of a man from one corps to another of the same arm without his consent.

Reserves.

SECT. 2.—*Administration: County Associations.*

SUB-SECT. 1.—*In General.*

167. The administration of the Territorial Force at all times other than those of training, actual military service, or embodiment is carried out by county associations (v). The provisions relating to county associations are contained in the Territorial and Reserve

County
associations.

(g) Territorial Force Regulations, 1912, paragraphs 9, 123, 163. Applicants must be certified as fit at a medical examination before joining and in at least every third year afterwards (*ibid.*, paragraphs 9, 47). Members of the Territorial Force employed in a Royal dockyard may not join the Special Service section (*ibid.*, paragraph 9A).

(r) *Ibid.*, paragraphs 9 (b), 611—613, 615.

(s) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 7 (6).

(t) The organisation of the Territorial Reserve is in three parts: (1) Territorial Force Reserve, including many classes of ex-soldiers who have not served in the Territorial Force; (2) Technical Reserve, composed of skilled and expert workers without qualifications of previous service in any of the military forces of the Crown; (3) National Reserve, composed of officers and men who have served in any of the military forces, subject to certain conditions of eligibility. See Provisional Regulations for the Territorial Reserve, issued with Special Army Order dated 21st May, 1910, and National Reserve Regulations, 1911, issued with Special Army Order of the 7th March, 1913. As to the duties of county associations in connexion with the Territorial Reserve, see note (g), p. 87, *post*.

(u) 7 Edw. 7, c. 9.

(v) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), ss. 1 (1), 2 (1); Territorial Force Regulations, 1912, paragraphs 692, 730, 732, 828. Training includes annual training in camp, training in a fortress, and attendance at manœuvres (*ibid.*, paragraph 691).

SECT. 2.
Adminis-
tration:
County
Associa-
tions.

Forces Act, 1907 (*a*), Part I. Subject to the provisions of that Act the Army Council may make regulations for carrying that part of the Act into effect, and by such regulations may apply for the purposes of that part of the Act any provision in any Act of Parliament dealing with similar matters, with the necessary adaptations. Such regulations must be laid before both Houses of Parliament as soon as possible after they are made (*b*).

Establish-
ment and
constitution.

168. An association may be established for any county or riding of a county in the United Kingdom for which a lieutenant is appointed, and also for the City of London and for the Isle of Man (*c*).

Each county association is constituted, and its members are appointed, in accordance with a scheme made by the Army Council (*d*). A scheme must be laid before both Houses of Parliament within forty days after it is made, if Parliament is then sitting, or, if not, within forty days after the commencement of the next session. If within the next subsequent forty days an address is presented to the Crown by either House praying that the scheme may be annulled, the Crown may annul it by Order in Council, and the scheme is thenceforth void, but any proceedings taken under it meanwhile remain valid (*e*). A scheme may be varied or revoked at any time by a subsequent scheme under the same conditions (*f*).

Contents of
scheme.

169. Every scheme must provide, among other matters, for the date of establishment and for the incorporation of the association, for the appointment of its president, chairman and vice-chairman, members, officials, committees, and other matters connected therewith. It may also contain any consequential supplemental or transitory provisions necessary or proper for its purposes and, if specially desirable, provisions which might otherwise be made by regulation under the Territorial and Reserve Forces Act, 1907 (*g*).

If on account of its size and population it is desirable to divide a

(*a*) 7 Edw. 7, c. 9.

(*b*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 4. Regulations are applicable to all associations unless it is otherwise stated.

(*c*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), ss. 1 (1), 38, 40 (2). *Ibid.*, Sched. II., contains a list of counties of cities and towns in England and Ireland which are to be deemed to form part of other counties and are to be administered by the associations of those counties (*ibid.*, s. 38). *Ibid.*, Sched. III., enumerates four counties of cities in Scotland for which separate associations may be established, unless on their representation or with their consent they are included in certain other counties named in the Schedule (*ibid.*, s. 40 (1) (*a*)). The Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 59, dealing with the boundaries of counties, is applied to the Territorial Force by Order in Council dated 19th March, 1908, made under the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 28 (3) (Territorial Force Regulations, 1912, App. VIII.).

(*d*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 1 (2); Territorial Force Regulations, 1912, paragraph 729.

(*e*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), ss. 1 (5), 37 (1).

(*f*) *Ibid.*, s. 37 (2).

(*g*) 7 Edw. 7, c. 9, s. 1 (3), (4). A model scheme, which with a few variations has been adopted by all counties, is given in the Territorial Force Regulations, 1912, App. II., 1.

county, the scheme may provide for its division and constitute sub-associations for the several parts, and may further provide for apportioning powers and duties and regulating the relations between the sub-associations and the association of the county which has been so divided (*h*).

SECT. 2.
Adminis-
tration:
County
Associa-
tions.

SUB-SECT. 2.—*Conditions of Membership.*

170. The president of an association is the lieutenant for the time being of the county (*i*) for which the association is formed; but failing him the Army Council may appoint such other person as they think fit (*k*). If present at a meeting of the association, the president is entitled to preside. His office is not vacated by continued absence or other delinquency, unless such as to deprive him of the office of lieutenant (*l*). He has a right to recommend persons for first appointment to the lowest rank of officer in the units in his county, provided that he exercises the right within thirty days after receiving notice of the vacancy (*m*). He may no longer recommend persons for first appointment to a commission as quartermaster (*n*). A guard of honour or escort may be provided for him on his arrival at the headquarters of a unit, if the officers and men volunteer for the duty. When present in uniform at a review, field day, or inspection consisting solely of Territorial Force units of his county or association, he is entitled to the salute on coming to the ground and at the march past, wherever the parade may be held, but he has no share in the military command (*o*). President.

171. The chairman and vice-chairman are elected by the association (*p*). They hold office for one year, but are eligible for re-election. On a casual vacancy occurring in these offices the person newly elected holds office until the time when his predecessor would have gone out of office, but is then eligible for re-election. A chairman or vice-chairman whose term of office has expired by effluxion of time must, if he is a member of the association, continue to hold office until a successor is appointed. If the president Chairman and vice-chairman.

(*h*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 1 (3) (1).

(*i*) The Lord Mayor of the City of London is *ex officio* president of the City of London Association. In the Isle of Man the Governor is in the position of a lieutenant of a county (Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), ss. 39 (3), 40 (2) (a)). For the appointment of lords lieutenants of counties, and deputy lieutenants, and other provisions relating thereto, see Militia Act, 1882 (45 & 46 Vict. c. 49), ss. 29—36; these provisions are now the only true operative parts of that Act.

(*k*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 1 (3) (c).

(*l*) Territorial Force Regulations, 1912, App. II., ss. 10 (a), 12.

(*m*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 8, which also provides for the case in which a unit comprises men of two or more counties; see, further, p. 65, *ante*. For the general procedure, see Territorial Force Regulations, 1912, paragraphs 51A—51D.

(*n*) See *ibid.*, paragraph 86; recommendations for appointment to a commission as quartermaster are forwarded by commanding officers through the usual channels to the War Office (*ibid.*).

(*o*) *Ibid.*, paragraphs 543, 546.

(*p*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 1 (3) (g). The president is eligible for election as chairman. For procedure in a year in which all the ordinary members are newly appointed, see Territorial Force Regulations, 1912, App. II., 1, s. 8.

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tration :
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tions.

Military
members.

is absent from a meeting of the association or does not exercise his right to preside, the chairman presides. If the chairman is absent, the vice-chairman presides; in the absence of both, the members present choose a member to preside (g).

172. Military members are appointed by the Army Council on the recommendation of the general officer commanding in chief of the command. On the occurrence of a vacancy the association through its secretary must inform the general officer commanding in chief, and may at the same time suggest how the vacancy should be filled. The military members must be officers representative of all arms and branches of the Territorial Force raised within the county. The number of the military members must be specified in each scheme and must not be less than one-half of the whole members of the association (r). The term of office is for three years, but the Army Council may at any time cancel the appointment of a military member and appoint another in his place, if in its opinion the military members have ceased to represent fairly the arms and branches of the Territorial Force within the county. Membership is also terminated when the qualification as an officer ceases to exist (s).

Representa-
tive members.

173. The Army Council may, if it appears desirable, appoint representatives of county and county borough councils and of universities wholly or partly within the county to serve on a county association. Before making an appointment the Army Council must consult with and receive the recommendation of the body to be represented (t). The number of representatives to be granted is fixed in each scheme. Representative members hold office for three years, but are eligible for re-election (a).

Co-opted
members.

174. An association may further co-opt such number of other members as its scheme provides, and the scheme may provide that they shall include representatives of the interests of employers and of workmen (b). In a year in which all the ordinary members of the association are newly appointed the first business at the first meeting of the association must be the appointment of the co-opted members. Their term of office is for three years, but they are eligible for re-election (c).

Isle of Wight ;
Cinque Ports ;
Stannaries.

175. The Governor or Deputy Governor of the Isle of Wight is *ex officio* a member of the association for the county of Southampton. The schemes constituting the associations for the counties of Kent

(g) Territorial Force Regulations, 1912, App. II., 1, ss. 5, 12.

(r) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 1 (3) (d). For detailed instructions as to the filling of vacancies, see Territorial Force Regulations, 1912, App. II., 2. The president, chairman and vice-chairman, if otherwise qualified, may be appointed as military members. For the definition of "officer," see Army Act, s. 190 (4); as to the Army Act, see note (s), p. 30, *ante*.

(s) Territorial Force Regulations, 1912, App. II., 1, ss. 9, 10 (b).

(t) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 1 (e). As to county boroughs in Scotland, see *ibid.*, s. 40 (1) (b). The schemes in force provide for representation in every case permitted by the Act.

(a) Territorial Force Regulations, 1912, App. II., 1, ss. 7, 9.

(b) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 1 (3) (f).

(c) Territorial Force Regulations, 1912, App. II., 1, ss. 8, 9.

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tions.

and Sussex may provide that the Lord Warden of the Cinque Ports shall *ex officio* be a member of either or both of those associations. A similar provision applies to the Warden of the Stannaries in the cases of Cornwall and Devon (*d*). Any scheme may enable specified general officers of any part of His Majesty's forces, or officers deputed by them, not being members of an association, to attend its meetings and to speak, but not to vote (*e*).

176. A member other than the president vacates his office as such if absent from meetings for more than six months, except for some reason approved by the association, or if sentenced to imprisonment with hard labour without the option of a fine, or if adjudged bankrupt or compelled to make an arrangement with his creditors (*f*).

Vacation of office.

177. No person may become or continue to be a member of an association if he holds any paid office under the association, or is concerned in any bargain entered into with the association, or participates in the profit of such bargain or of any work done under the authority of the association, except in the case of the sale or lease of land to the association; agreements as to compensation under the Military Manœuvres Act, 1897 (*g*); interest in a newspaper in which the association advertises; contracts with the association as a shareholder in a joint stock company; bargains specially excepted by the Army Council (*h*).

Disability of members.

178. An association is subject to the liabilities attaching to a corporate body, but the individual members are exempt from pecuniary liability for acts done by them in the proper performance of their duties as members of the association (*i*).

Liabilities.

179. The secretary, treasurer, and other officers of an association are appointed by the association subject to the approval of the Army Council (*k*).

Officers.

SUB-SECT. 3.—Committees.

180. Every association has a general purposes committee to which it may, and by request of the Army Council must, delegate any of its powers. It may further appoint such other special committees as it thinks fit, and may delegate to them any of its powers. No order for any payment can be made except on a

Committees.

(*d*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 39 (1), (2) (4). As to the Lord Warden of the Cinque Ports and of the Stannaries of Devon and Cornwall, see title COURTS, Vol. IX., pp. 127, 128, 204.

(*e*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 1 (3) (*k*); Territorial Force Regulations, 1912, App. II., 1, s. 24.

(*f*) *Ibid.*, App. II., 1, s. 10 (a). For military members, see p. 84, *ante*.

(*g*) 60 & 61 Vict. c. 43; see pp. 101, 102, *post*.

(*h*) Territorial Force Regulations, 1912, App. II., 1, s. 10 (c). In these excepted cases a member may not vote on the question in which he is interested.

(*i*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 3 (7); Territorial Force Regulations, 1912, paragraph 817. For the reference of legal questions to the War Office, see *ibid.*, paragraph 737; and for the travelling expenses of members, *ibid.*, paragraph 808.

(*k*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 1 (3) (*i*). For the salary and accountability of officers, see Territorial Force Regulations, 1912, paragraphs 808, 811, App. II., 1, ss. 21, 22; for the duties of the secretary so far as defined, see *ibid.*, paragraphs 51c, 703, 759 (2).

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tions.

Joint
committees.

resolution of the association passed on the recommendation of the general purposes committee. No liability exceeding £50 can be incurred except on a resolution of the association passed on an estimate submitted by the general purposes committee (*l*).

181. Associations may from time to time appoint joint committees out of their respective bodies for any purpose in which they are jointly interested, the costs to be defrayed in such proportions as may be agreed. Subject to the terms of its delegation, a joint committee may exercise all or any of the powers of the appointing associations (*m*).

SUB-SECT. 4.—Powers and Duties.

In general.

182. The powers and duties which may be assigned to county associations in respect of the organisation (*n*) and administration (*o*) of the military forces include any powers or duties vested in the Crown or conferred or imposed on the Army Council or a Secretary of State by statute or otherwise (*p*). Assignment is made by order of the Crown under the hand of a Secretary of State, or, subject thereto, by regulations under the Territorial and Reserve Forces Act, 1907 (*q*). The Army Council may also make regulations concerning the manner in which the powers are to be exercised and duties performed (*r*).

Special
powers and
duties.

183. The following powers and duties are specifically stated to be appropriate to county associations (*s*):—the organisation, maintenance, and administration of the units of the Territorial Force (*t*); recruiting and the definition of recruiting areas for the Territorial Force (*a*); the provision and maintenance of ranges, buildings, and sites of camps for the Territorial Force, of accommodation for the safe custody of arms and equipment, and of areas for

(*l*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 1 (3) (*j*); Territorial Force Regulations, 1912, App. II., 1, ss. 15—17, which also deal with the procedure of committees.

(*m*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 5 (1), (4). Such committees may also be made the subject of regulation under *ibid.*, s. 4 (1) (*e*). For other provisions as to the procedure of associations, see the Territorial Force Regulations, 1912, App. II., 1:—ss. 13 (quorum), 14 (decision of questions), 18, 19 (evidence of proceedings), 20 (regulation of general procedure); and also Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 1 (3) (*j*).

(*n*) Territorial Force Regulations, 1912, paragraphs 1—17.

(*o*) Power of command or training is expressly excluded by the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 2 (1); see also Territorial Force Regulations, 1910, paragraphs 25, 730.

(*p*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 2 (2).

(*q*) 7 Edw. 7, c. 9, s. 2 (1).

(*r*) *Ibid.*, s. 4 (1) (*a*). For the delegation of powers by an association, see Territorial Force Regulations, 1912, paragraph 818; for the conditions under which contracts may be made, *ibid.*, paragraphs 740—742; for the promotion of parliamentary bills and provisional orders, *ibid.*, paragraph 738; and see generally, title PARLIAMENT, Vol. XXI., pp. 702 *et seq.*, 727 *et seq.*

(*s*) The Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 2 (2), gives a list of these particular powers and duties.

(*t*) This does not apply to the periods of training, actual military service, or embodiment; see Territorial Force Regulations, 1912, paragraphs 692, 730, 782, 818, 828.

(*a*) Territorial Force Regulations, 1912, paragraphs 126, 127.

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manœuvres (b); arranging with employers of labour as to holidays for training, and ascertaining the times of training best suited to the circumstances of civil life; the provision of horses for the peace requirements of the Territorial Force and the registration in conjunction with the military authorities of horses for any of the military forces (c); establishing and assisting cadet corps and rifle clubs (d); the supply of the requirements of the Territorial Force on mobilization (e); the payment of separation and other allowances to the families of men of the Territorial Force when embodied or called out on actual military service (f); the care of reservists and discharged soldiers (g).

Every association on incorporation has power to hold land without licence in mortmain for the purposes of the Territorial Force (h).

184. It is the duty of every county association to make itself acquainted with and conform to the plan of the Army Council for the organisation of the Territorial Force within the county, to ascertain the military resources and capabilities of the county, and to give aid and advice to the Army Council and to such officers as it may direct (i).

Duty to Army
Council.

(b) Territorial Force Regulations, 1912, paragraphs 731, 808. The acquisition of land and borrowing therefor are governed by the Military Lands Acts, 1892—1903 (Territorial Force Regulations, 1912, paragraph 731, App. XVI.); see p. 99, *post*.

(c) Territorial Force Regulations, 1912, paragraphs 686, 731. For the duties of county associations in respect of the registration of carriages and animals liable to impressment, see Army Act, s. 114; pp. 49, 50, *ante*. The duty of furnishing the carriages, animals, and vessels required on mobilization for the regular and auxiliary forces may be assigned to the county associations (Army Act, s. 115 (9); see p. 51, *ante*). As to compensation for loss of horses, see Territorial Force Regulations, 1912, paragraphs 798—800A. As to the Army Act, see note (s), p. 30, *ante*.

(d) This is subject to the restriction that no grant out of public funds may be made in respect of persons less than sixteen years of age in the corps of a school in receipt of a parliamentary grant (Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 2 (2) (f)). Regulations may be made under *ibid.*, s. 4 (1) (f), for affiliating these bodies to the Territorial Force. For the duties to be performed by county associations in connection with cadet units, see Regulations governing the Formation, Organisation and Administration of Cadet Units by County Associations, 1912; Territorial Force Regulations, 1912, paragraph 314.

(e) *Ibid.*, paragraphs 805—805B; Regulations for Mobilization, 1912, paragraphs 64, 314; and Army Act, s. 115 (9).

(f) Territorial Force Regulations, 1910, paragraphs 16, 551—731.

(g) For duties in connexion with the Territorial Reserve (p. 81, *ante*), see Provisional Regulations for the Territorial Reserve, issued with Special Army Order dated 21st May, 1910, paragraphs 2, 14, 19, 29; and National Reserve Regulations, 1911, paragraphs 1—4, 8—10. County associations grant admittance to, and during peace decide the conditions of discharge from, the Territorial Force Reserve. Powers over the Territorial Reserve are to be gradually delegated to them. Except in Ireland and the Channel Islands, where no county associations exist, they alone are authorised to register names for the National Reserve and to frame rules for its formation and organisation.

(h) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), ss. 1 (3) (b), 4 (1) (b), (h). For the conditions under which associations may acquire or sell land or borrow for those purposes, see Territorial Force Regulations, 1912, Apps. XV., XVI., and paragraphs 731, 763—773.

(i) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 2 (1); Territorial Force Regulations, 1912, paragraph 6.

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Grants.

SUB-SECT. 5.—Finance.

185. To enable a county association to meet the necessary expenditure connected with the discharge of its duties, grants to an amount determined by the Army Council are made out of Army funds (*k*).

The services to which the grants may be applied are specified in regulations made by the Army Council, subject to the consent of the Treasury (*l*). The grants paid under the head of lands and buildings (*m*) may not be expended on any other object without the written consent of the Army Council (*n*). With that exception a county association has full discretion to apply its public funds (*o*) to any of certain approved services (*p*), to select among the approved services the objects to which they shall be devoted, and to allocate them in such proportions as it thinks fit among the various units. Before they can be employed for purposes outside the approved services the written consent of the Army Council is required (*q*).

Voluntary
subscriptions.

Apart from its public funds a county association may receive moneys from private sources. These private funds, when not

(*k*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 3 (1). With respect to four of these grants, namely, (A) establishment grants; (B) clothing and personal equipment grants, and grants for upkeep of harness and saddlery; (C) travelling grants for drills etc. outside the training period; (D) grants for rent, for structural repairs, for payment of fees and other duties (see Territorial Force Regulations, 1912, paragraphs 743—733), the county association must submit to the Army Council, not later than the 1st December in each year, an estimate of the amount anticipated to be earned during the ensuing financial year. Payment is made to the association on the basis of this estimate when approved (Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 3 (2); Territorial Force Regulations, 1912, paragraphs 774, 775). The remaining grants are made without an annual estimate (*ibid.*, paragraphs 779—796). For the general principles of county association finance and the power of the Army Council to withhold portions of grants in the event of units or parts of units failing to prove themselves efficient, see *ibid.*, paragraphs 734—736; for the case of a deficit, see *ibid.*, paragraph 816; and compare *ibid.* paragraph 747A. The funds of the county association must be kept absolutely distinct from the funds allotted to the General Officer Commanding in Chief, which are credited to him annually for the training of the Territorial Force, for which he alone is responsible (*ibid.*, paragraphs 692—732). For the regulations governing the allocation of various expenses to the fund by which they are to be borne, see *ibid.*, paragraphs 679—691.

(*l*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), ss. 3 (6), 4 (1) (a).

(*m*) This is called item D in the annual estimate; see Territorial Force Regulations, 1912, paragraphs 763—773.

(*n*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 3 (3); Territorial Force Regulations, 1912, paragraph 807.

(*o*) The expression "public funds" also includes sums paid by a man of the Territorial Force under the rules of his county association and fines recovered on prosecution under the Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9) (Territorial Force Regulations, 1912, paragraph 801).

(*p*) For the list of approved services, see *ibid.*, paragraph 808; for certain payments specifically prohibited, see *ibid.*, paragraphs 642, 751, 751A, 813.

(*q*) Territorial Force Regulations, 1912, paragraph 808. The grants are the property of the county association, and not of any unit or individual (*ibid.*, paragraphs 806—808). For extraordinary expenditure, see *ibid.*, paragraph 815.

received for any specific purpose, may be employed for the purposes of any of its powers and duties (*r*).

186. Every county association must cause its accounts to be made up annually and audited by a professional auditor approved by the Army Council. Copies of the accounts as audited, together with the auditor's report, must be sent to the Army Council. The Army Council have the right to investigate the financial position and administration of any county association, and to call for any vouchers relating to the accounts of its public funds (*s*).

SECT. 2.
Adminis-
tration:
County
Associa-
tions.
—
Accounts.

Part VIII.—Provisions Relating to both Navy and Army.

SECT. 1.—*Courts of Law in Relation to Naval and Military Jurisdiction.*

187. Persons subject to naval or military law are not exempt from the jurisdiction of the civil courts in respect of offences against the ordinary law of the land (*t*). It therefore follows that such persons may be tried by a civil court even though they have already been dealt with by a court-martial, but in the case of a military prisoner the civil court must have regard to any military punishment which the offender may have undergone (*u*). On the other hand, persons who have been acquitted or convicted of an offence by a civil court may not be tried over again by a military court-martial for the same offence (*v*). It is the duty of commanding officers to hand over offenders to the civil power (*w*).

Supremacy
of the civil
courts.

(*r*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), ss. 3 (4), 4 (1) (d); Territorial Force Regulations, 1912, paragraph 814. The public and private funds must be kept in separate accounts (*ibid.*, paragraph 820). The trophy tax, a rate originally levied in the City of London to defray the expenses of the City of London militia (stat. (1662) 14 Car. 2, c. 3, s. 25; Militia (City of London) Act, 1820 (1 Geo. 4, c. 100), s. 35), is now applicable to the Royal London Militia Battalion (now the 7th Battalion Royal Fusiliers), and, at the discretion of the Commissioners of Lieutenancy of the City of London, to the purposes of any of the powers and duties of the City of London Territorial Association (Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 39 (5)); for the powers and duties of county associations, see pp. 86, 88, *ante*. The trophy tax is now collected as part of the general rate of the City (see title RATES AND RATING, Vol. XXIV., p. 131), upon a precept of the Lieutenants for the City of London addressed to the Common Council (City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxi.) s. 16 (1)); the Common Council has no control over the expenditure of the tax (*ibid.*, s. 16 (2)); see also title METROPOLIS, Vol. XX., p. 423, note (*a*).

(*s*) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 3 (5); Territorial Force Regulations, 1912, paragraphs 820—828.

(*t*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 101; Army Act, s. 162. As to the Army Act, see note (*a*), p. 30, *ante*.

(*u*) Army Act, s. 162 (1); as to evidence of conviction by court-martial, see *ibid.*, s. 165.

(*v*) Army Act, s. 162 (6). The expression "civil court" is defined by *ibid.*, s. 190 (31). As to evidence of civil conviction or acquittal, see *ibid.*, s. 164.

(*w*) Army Act, s. 162 (3); and see King's Regulations and Admiralty

SECT. 1.

**Courts of
Law in
Relation to
Naval and
Military
Jurisdiction.**

Jurisdiction
of the civil
courts over
courts-
martial.
Certiorari.

Prohibition.

*Habeas
corpus.*

188. Courts-martial, like the inferior civil courts, are subject to the supervision and control of the civil courts of higher degree (*x*). This jurisdiction is not exercised by way of appeal from courts-martial; nor is it operative where only questions of military status are at issue. The intervention of the civil courts takes the form of the issue of one of the prerogative writs (*y*).

189. Where an order or a sentence of a court-martial affects civil rights, and the court-martial has acted without jurisdiction or in an irregular manner, application may be made to the High Court of Justice for a writ of *certiorari* calling upon the court-martial to certify and return the record of the proceedings (*a*). If the order or sentence is found to be invalid it will be quashed by the High Court (*a*). The writ will not issue where the only matter involved is a question of military regulations or status (*b*).

190. Excess of jurisdiction, as distinct from irregularity of procedure, on the part of a court-martial may be restrained by a writ of prohibition issuing out of the High Court of Justice (*c*); the writ will not issue merely on the ground that the evidence establishing a military offence also discloses a civil crime of higher degree over which a court-martial would have no jurisdiction (*d*).

191. Persons who are aggrieved by being illegally detained in naval or military custody can avail themselves of the remedy afforded by the writ of *habeas corpus* (*e*), provided that they are not alien enemies (*f*). It is the duty of the officer detaining the complainant to make a return to the writ (*g*), and it will, generally speaking, be a sufficient return that the complainant is a person subject to naval or military law. Thus, where the complainant is in custody under the sentence of a competent naval or military court, it is unnecessary to set forth the particular circumstances warranting the sentence or order (*h*).

The civil courts are reluctant to interfere in matters of discipline, but the writ may issue where the necessary formalities have not been complied with (*i*), or where the proceedings of the naval or

Instructions, arts. 799, 800, clauses 3, 6. Military officers who neglect or refuse to hand over offenders, or wilfully obstruct or refuse to assist the civil power in apprehending offenders, are guilty of a misdemeanour (Army Act, s. 162 (3); as to the Army Act, see note (*s*), p. 30, *ante*).

(*x*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 271.

(*y*) See Manual of Military Law, 1907 ed., pp. 122—124; and see, generally, title CROWN PRACTICE, Vol. X., pp. 39, 77, 128, 141, 155.

(*a*) See, generally, title CROWN PRACTICE, Vol. X., pp. 155 *et seq.*

(*b*) *Re Mansergh* (1861), 1 B. & S. 400; *Re Roberts* (1875), *Times*, 11th June.

(*c*) See Manual of Military Law, 1907 ed., pp. 120—122; and see, generally, title CROWN PRACTICE, Vol. X., pp. 141 *et seq.*

(*d*) *Grant v. Gould* (1792), 2 Hy. Bl. 69; *Re Poe* (1833), 5 B. & Ad. 681; *E. v. McCarthy* (1866), 14 W. R. 918.

(*e*) See Manual of Military Law, 1907 ed., pp. 124—128; and see, generally, title CROWN PRACTICE, Vol. X., pp. 39 *et seq.*

(*f*) *E. v. Schiever* (1759), 2 Burr. 765; *The Three Spanish Sailors* (1779), 2 Wm. Bl. 1324.

(*g*) *E. v. Gavin* (1850), 15 Jur. 329, n.

(*h*) *E. v. Suddis* (1801), 1 East, 306.

(*i*) *E. v. Cuming, Ex parte Hall* (1887), 19 Q. B. D. 13; *Re Allen* (1860), 3 E. & E. 338; *Re Douglas* (1842), 3 Q. B. 825; *Porret's Case* (1844), *Perry's Oriental Cases*, 414. Informalities or errors in orders or warrants

military authorities are oppressive (*k*). The civil courts have no jurisdiction to grant the writ for the purpose of charging in execution a debtor who is in military custody (*l*).

192. Offences triable in a civil court under the Army Act which are not misdemeanours or punishable on indictment must be dealt with by a court of summary jurisdiction (*m*) having jurisdiction in the place where the offence was committed, or where the offender may be for the time being (*n*). The proceedings are to be regulated by the Summary Jurisdiction Acts so far as applicable (*o*).

SECT. I.
Courts of
Law in
Relation to
Naval and
Military
Jurisdic-
tion.
—
Summary
jurisdiction.

SECT. 2.—Civil Rights and Liabilities of Sailors and Soldiers.

193. Officers and men of the royal forces, by becoming subject to naval or military law, do not divest themselves of the civil rights and duties of citizens (*p*) in general, though they enjoy certain privileges and are subject to certain disabilities created for the purpose of enabling them to discharge their duty to the Crown with greater efficiency (*q*). Otherwise they are in all respects amenable to, and entitled to claim the protection of, the civil tribunals and the ordinary law of the land (*r*).

The status
of sailors
and soldiers.

194. Members of courts-martial and naval and military authorities generally are responsible as individuals to any person injured by reason of their having acted either without, or in excess of, their jurisdiction (*s*). Even if they are acting within their

Actions for
damages.

or procedure generally appear, however, to be cured by the operation of the Army Act, ss. 165, 172 (4).

(*k*) *Blake's Case* (1814), 2 M. & S. 428; *Wade's Case* (1784), 2 M. & S. 429, n.

(*l*) *Jones v. Danvers* (1839), 5 M. & W. 234.

(*m*) Defined by the Army Act, s. 190 (35).

(*n*) *Ibid.*, s. 166 (1). As to summary proceedings in Ireland, see *ibid.*, s. 166 (5); in Scotland, *ibid.*, s. 167; in the Isle of Man, Channel Islands, and the colonies, *ibid.*, s. 168; in India, *ibid.*, s. 169. As to offences by militiamen triable both by court-martial and a court of summary jurisdiction, see Militia Act, 1882 (45 & 46 Vict. c. 49), s. 26. As to summary procedure generally, see title MAGISTRATES, Vol. XIX., pp. 589 *et seq.*

(*o*) Army Act, s. 166 (2). The minimum fine imposed by the Army Act need not be imposed where it is more than can be imposed by a summary court sitting in an occasional court-house (see title MAGISTRATES, Vol. XIX., p. 568) in England, but the justices, if required by either party, must adjourn the case to the next practicable petty sessional court (Army Act, s. 166 (4)). A portion of a fine not exceeding one-half may be paid to the informer (*ibid.*, s. 166 (3)).

(*p*) *Burdett v. Abbot* (1812), 4 Taunt. 401; see p. 42, *ante*.

(*q*) Compare *Wood v. Victoria Pier and Pavilion (Colwyn Bay) Co., Ltd.* (1913), 29 T. L. R. 317. For privileges and exemptions, see pp. 94 *et seq.*, *post*; as to pay and pension, see pp. 33 *et seq.*, 47 *et seq.*, *ante*.

(*r*) See Army Act, s. 41 (b); Jurisdiction in Homicides Act, 1862 (25 & 26 Vict. c. 65); title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 289. A subject of the Crown does not, by entering and remaining in the naval or military services of the Crown, change his previously acquired domicile, whether the same be of origin or of choice; see title CONFLICT OF LAWS, Vol. VI., p. 189; and see also *Re Barne, Ex parte Barne* (1886), 16 Q. B. D. 522, C. A.; *Re Macreight, Paxton v. Macreight* (1885), 30 Ch. D. 165; *Re Steer* (1858), 3 H. & N. 594; *Craigie v. Lewin* (1843), 3 Curt. 435; *Forbes v. Forbes* (1854), Kay, 341; *Somerville v. Somerville (Lord)* (1801), 5 Ves. 750; *Bremer v. Freeman* (1857), 10 Moo. P. C. C. 306; *Hodgson v. De Beauchamps* (1858), 12 Moo. P. C. C. 285.

(*s*) As to illegal sentences, see *Frye v. Ogle* (1746), 1 McArthur on Naval

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CIVIL
Rights and
Liabilities
of Sailors
and
Soldiers.

jurisdiction, they will be liable if they are guilty of any abuse of their authority by way of undue severity, oppression or otherwise (t); but where the act complained of is done within the limits of naval or military authority or jurisdiction, it would seem that no action will lie, merely because it is done maliciously and without probable cause (a), and the same principle applies to defamatory statements made by naval and military officers in discharge of their duty (b). Complaints made to the proper authorities for the purpose of obtaining redress would seem to be absolutely privileged if made *bonâ fide* (c). The evidence of witnesses given before a military court cannot be made the subject-matter of an action (d). But it is in general no defence to an action for negligence that the act complained of was done in obedience to the orders of some superior naval or military authority (e).

Criminal
liability.

195. Where death or injury to the person results from the illegal exercise of naval or military authority, or from acts done by naval or military authorities without jurisdiction, it would seem that the responsible parties are liable to criminal proceedings (f), whether the offence be committed within or out of the realm (g).

and Military Courts-Martial, 4th ed., Appendix No. xxiv., p. 436; illegal imprisonment, *Warden v. Bailey* (1811), 4 Taunt. 67; *More v. Bastard* (1806), cited in *Warden v. Bailey supra*, at p. 70; interference with civilians, *Comyn v. Sabine* (1737), cited 1 Smith, L. C., 11th ed., 600; *Glynn v. Houston* (1841), 2 Man. & G. 337; *Goodes v. Wheatly* (1808), 1 Camp. 231; *Sutherland v. Murray* (1783), cited in *Johnstone v. Sutton* (1786), 1 Term Rep. 510, 538, Ex. Ch.; see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 324, 327.

(t) *Tonyn's Case* (undated), cited in *Warden v. Bailey supra*, at p. 71; *Wall v. Macnamara* (1779), cited in *Johnstone v. Sutton supra*, at pp. 510, 536; *Swinton v. Molloy* (1783), cited in *Johnstone v. Sutton supra*, at p. 537; *Grant v. Shard* (1784), cited in *Warden v. Bailey supra*, at p. 85.

(a) *Sutton v. Johnstones* (1785), 1 Term Rep. 493; *Barwis v. Keppel* (1766), 2 Wils. 314; *Marks v. Frogley*, [1898] 1 Q. B. 888, C. A.; *Oliver v. Bentinck* (1811), 3 Taunt. 456; *Burns v. Nowell* (1820), 5 Q. B. D. 444, C. A.; *Edmondson v. Rundle* (1903), 19 T. L. R. 356; and see title MALICIOUS PROSECUTION AND PROCEDURE, Vol. XIX., p. 672.

(b) *Dawkins v. Paulet (Lord)* (1869), L. R. 5 Q. B. 94; *Jekyll v. Moore* (1806), 2 Bos. & P. (N. R.) 341; *Home v. Bentinck* (1820), 2 Brod. & Bing. 130, Ex. Ch.; but see *Dickson v. Wilton (Earl)* (1859), 1 F. & F. 419; *Dickson v. Combermere (Viscount)* (1863), 3 F. & F. 527; *Dawkins v. Saxe Weimar (Prince Edward)* (1876), 1 Q. B. D. 499; *Keighly v. Bell* (1866), 4 F. & F. 763; *Freer v. Marshall* (1865), 4 F. & F. 485; and see title LIBEL AND SLANDER, Vol. XVIII., p. 684.

(c) *E. v. Baillie* (1779), 21 State Tr. 1, per Lord MANSFIELD, C.J., at p. 69; *Fairman v. Ives* (1822), 5 B. & Ald. 642. It is otherwise where the complaint is not directed to the proper quarter (*Harwood v. Green* (1827), 3 C. & P. 141).

(d) *Dawkins v. Rokeby (Lord)* (1873), L. R. 8 Q. B. 255, Ex. Ch.; affirmed (1875), L. R. 7 H. L. 744; and see titles EVIDENCE, Vol. XIII., pp. 572, 573; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 325.

(e) *Weaver v. Ward* (1616), Hob. 134; *The Volcano* (1844), 2 Wm. Rob. 337; as to negligence generally, see title NEGLIGENCE, Vol. XXI., pp. 357 *et seq.*

(f) *E. v. Wall* (1802), 23 State Tr. 51; *E. v. Thomas* (1815), 4 M. & S. 442; and see *Warden v. Bailey* (1811), 4 Taunt. 67, per HEATH, J., at p. 77; see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 488.

(g) Criminal Jurisdiction Act, 1802 (42 Geo. 3, c. 85); and see also the

196. Actions, prosecutions, or other proceedings against naval and military officers acting in performance of their statutory duties, or of their public duty or authority, must be commenced within six months. The defendant in any such action may plead tender of amends in addition to other defences, and if successful is entitled to costs as between solicitor and client (*h*).

197. Officers and men of the royal forces may vote at parliamentary elections and may be elected to Parliament, though the acceptance of a first commission in the regular forces by a member of the House of Commons will vacate his seat (*i*). Soldiers who are not electors are excluded from places of election, except in Ireland (*k*).

198. A soldier may marry without the consent of the military authorities, and is liable to contribute to the maintenance of his wife and children and illegitimate children, but execution in respect of such liability is restricted, and the soldier is not punishable for the offences of deserting or neglecting to maintain his wife or family or any member thereof, or of leaving them chargeable to any union, parish, or place (*l*).

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Civil
Rights and
Liabilities
of Sailors
and
Soldiers.

Protection of
naval and
military
authorities.
Parlia-
mentary
elections.
Maintenance
of wife and
family.

East India Company Acts, 1784 (24 Geo. 3, sess. 2, c. 25), s. 64, and 1786 (26 Geo. 3, c. 57), as regards India; *R. v. Picton* (1812), 30 State Tr. 226. See title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 351.

(*h*) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), which should be considered in the case of the military authorities in conjunction with the Army Act, s. 170, and the Militia Act, 1882 (45 & 46 Vict. c. 49), s. 46; see also Aerial Navigation Act, 1913 (2 & 3 Geo. 5, c. 22), s. 2; title STREET AND AERIAL NAVIGATION; as to the protection of public authorities generally, see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 339 *et seq.* It seems that in the case of the military authorities the action must be brought in one of the superior courts of the United Kingdom, or, where the matter complained of occurred in India or a colony, in a Supreme Court in India, or a Supreme Colonial Court, as the case may be. As to the Army Act, see note (*s*), p. 30, *ante*.

(*i*) Succession to the Crown Act, 1707 (6 Anne, c. 41), s. 28. As to the right to vote in respect of quarters, see, generally, title ELECTIONS, Vol. XII., pp. 172 *et seq.*; and see *ibid.*, pp. 165, 311, note (*l*). The acceptance of a commission in the Territorial Force, Reserve of Officers, Militia, or Volunteers does not vacate the seat of any member returned to Parliament (Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), ss. 23 (1), 36; Militia Act, 1882 (45 & 46 Vict. c. 49), s. 38); and see pp. 73, 74, *ante*. Officers of the regular army on the active list elected to Parliament are put on half-pay (Army Order 252 of 1906). A person in the Militia is not liable to any penalty or punishment for absence for the purpose of voting (Militia Act, 1882 (45 & 46 Vict. c. 49), s. 39). As to members of the Territorial Force, see p. 73, *ante*. As to Volunteer officers, see Volunteer Act, 1863 (26 & 27 Vict. c. 65), s. 5. As to the removal of electoral disabilities arising by reason of the absence on military service of members of the reserve or the auxiliary forces, see Electoral Disabilities (Military Service) Removal Act, 1900 (63 & 64 Vict. c. 8).

(*k*) Parliamentary Elections (Soldiers) Act, 1847 (10 & 11 Vict. c. 21). As to the assembling of the Territorial Force at elections, see p. 74, *ante*.

(*l*) Army Act, s. 145. Execution may not issue against the soldier's person, pay, arms, ammunition, equipments, regimental necessities, or clothing (*ibid.*, s. 145 (1)). A copy of the order for payment of maintenance must be sent to the Army Council or an officer deputed by them, and if satisfied that the soldier has left his wife or children, these authorities may order deductions to be made from his pay in liquidation of the amount ordered to be paid. In the case of a

SECT. 2.

Civil
Rights and
Liabilities
of Sailors
and
Soldiers.Immunity
from arrest
for debt:

(i.) Soldiers.

(ii.) Seamen
and Marines.

199. Soldiers of the regular forces are not liable to be arrested or compelled to appear in person before any court of law (*m*) in respect of any debt, damages, or sum of money under £30 (*n*).

200. No petty officer or seaman of the Royal Navy, or non-commissioned officer or man of the Royal Marines can be arrested for debt in any part of the dominions of the Crown unless (1) the debt was contracted when the debtor did not belong to the service, (2) an affidavit was made to this effect before the writ, process, or warrant was issued, and (3) the writ, process, or warrant bears on its back a memorandum of this affidavit (*o*). Contravention of these provisions entitles the court or judge from which the process issued to order the immediate discharge of, and to award costs to, a complainant (*p*).

SECT. 3.—*Privileges and Exemptions, Sailors and Soldiers.*Testamentary
privileges.

201. Soldiers (*q*) on actual military service (*r*) may dispose of their personalty by will made without the formalities required by

non-commissioned officer, not under the rank of serjeant, such deductions are limited to 1s. per day, and in other cases to 6d. The maximum amounts deductible in respect of bastard children are 7d. and 4d. respectively (Army Act, s. 145 (2); Army (Annual) Act, 1912 (2 & 3 Geo. 5, c. 5), s. 5 (1)). As to service of process and payment of costs, see Army Act, s. 145 (3); Army (Annual) Act, 1911 (1 & 2 Geo. 5, c. 3), s. 5; see also County Court Rules, Ord. 7, rr. 18 (amended County Court Rules, 1913), 19; title COUNTY COURTS, Vol. VIII., p. 470; and, generally, title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 114 *et seq.*, 176 *et seq.* Where a soldier is under orders for service beyond the sea, no process can be served (Army Act, s. 145 (3)); see also titles BASTARDY, Vol. II., pp. 444, 447, 451; POOR LAW, Vol. XXII., pp. 572, 607, note (*h*), 610, note (*b*). As to the Army Act, see note (*s*), p. 30, *ante*.

(*m*) Including a court of summary jurisdiction and any magistrate; see title MAGISTRATES, Vol. XIX., pp. 531 *et seq.*

(*n*) Army Act, s. 144. The amount of the debt, damages, or sum of money must be proved by the affidavit of the creditor before any process or order can be issued against a soldier (*ibid.*, s. 144 (4)). All proceedings in contravention of this enactment are void, and must be discharged on complaint being made by the soldier or his commanding officer to the court in question or a superior court. Costs may be given to the complainant (*ibid.*, s. 144 (5)). The section does not exempt a soldier from being sued, and a creditor may, after due notice in writing given to the soldier or left at his quarters, proceed to judgment and issue execution against the soldier's property other than his pay, arms, ammunition, equipment, and regimental necessities or clothing (*ibid.*, s. 144 (1)); see also title EXECUTION, Vol. XIV., pp. 49, 85.

(*o*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 97. A British warship is within the jurisdiction of the High Court for purposes of service (*Fraser v. Akers* (1891), 35 Sol. Jo. 447; *Seagrove v. Parks*, [1891] 1 Q. B. 551). As to witnesses' allowances for seamen, see title COUNTY COURTS, Vol. VIII., p. 596.

(*p*) Naval Discipline Act (29 & 30 Vict. c. 109), s. 98.

(*q*) The expression "soldier," used in this connection, includes minors (*In the Goods of Hiscock*, [1901] P. 78; *In the Goods of Farquhar* (1846), 4 Notes of Cases, 651; and see title INFANTS AND CHILDREN, Vol. XVII., p. 104), persons in the military service of the East India Company (*In the Goods of Donaldson* (1840), 2 Curt. 386), and officers (*Drummond v. Parish* (1843), 3 Curt. 522); see also title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 161, 162.

(*r*) A soldier is on actual military service when he is on an expedition,

law (s). Sailors being at sea (t) enjoy a like privilege (a), subject, however, to certain restrictions in the case of seamen and marines of the Royal Navy (b). Wills made in pursuance of this privilege may consist either of oral declarations before witnesses (c) or of informal documents (d), and since they are exempt from the Wills Act, 1837 (e), they are in some respects governed by the law as it was in operation prior to that statute (f). The collection and realisation of deceased sailors' and soldiers' effects, and the payment thereof of their debts, and disposal of the surplus or residue are provided for by statute (g).

SMO. 3.
Privileges
and Exemptions
of
Sailors and
Soldiers.

202. Probate of the informal will of a soldier or sailor will be granted on satisfactory proof being given of the making of the oral will or informal document in question, and of the fact that the circumstances entitled the testator to make such a will (h). Probate of

Probate and
administra-
tion.

i.e., when a state of war exists and he has taken some step towards joining the field forces (*In the Goods of Hiscock*, [1901] P. 78; *Gatward v. Knee*, [1902] P. 99; *May v. May*, [1902] P. 103, n.; *In the Goods of Gordon* (1905), 21 T. L. R. 653; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 161). The mere fact that a soldier is in barracks is insufficient (*Drummond v. Parish* (1843), 3 Curt. 522; *White v. Repton* (1844), 3 Curt. 818; *In the Goods of Johnson* (1839), 2 Curt. 341; *In the Goods of Phipps* (1840), 2 Curt. 368; *In the Goods of Hill* (1845), 1 Rob. Eccl. 276; *Herbert v. Herbert* (1855), Dea. & Sw. 10).

(s) See Statute of Frauds (29 Car. 2, c. 3), s. 23; Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 11; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 161.

(t) The expression "sailor" used in this connection includes officers, surgeons, pursers and minors (*In the Goods of Saunders (Daniel)* (1865), L. R. 1 P. & D. 16; *Re Hayes* (1839), 2 Curt. 338; *In the Goods of Rae* (1891), 27 L. R. Ir. 116; *In the Goods of M'Murdo* (1867), L. R. 1 P. & D. 540); and see title INFANTS AND CHILDREN, Vol. XVII., p. 104. The meaning of the expression "at sea" was considered in the following cases:—*In the Goods of Austen (Admiral)* (1853), 2 Rob. Eccl. 611; *In the Goods of Corby* (1854), 18 Jur. 634; *In the Goods of Lay* (1840), 2 Curt. 375; *In the Goods of Saunders (Daniel)*, *supra*; *In the Goods of M'Murdo*, *supra*; *In the Goods of Rae*, *supra*; *In the Goods of Patterson* (1898), 79 L. T. 123. It is not necessary that the testator should be at sea at the time of his death (*In the Goods of Lay*, *supra*).

(a) Statute of Frauds, 1837 (29 Car. 2, c. 3), s. 23; Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 11.

(b) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 162.

(c) *In the Goods of Scott*, [1903] P. 243.

(d) *Gatward v. Knee*, *supra*. Alterations will be presumed to have been made in the course of actual military service (*In the Goods of Tweedale* (1875), L. R. 3 P. & D. 204).

(e) 7 Will. 4 & 1 Vict. c. 26; see p. 94, *ante*, and the text, *supra*.

(f) See, generally, title WILLS. As to the execution by a nuncupative will of a general power of appointment over personal estate, see title POWERS, Vol. XXIII., p. 19, note (b).

(g) Regimental Debts Acts, 1893 (56 & 57 Vict. c. 5), and Regulations made thereunder by Royal Warrants, dated 30th August, 1893, 29th October, 1904, and 23rd May, 1906; Navy and Marines (Property of Deceased) Act, 1865 (28 & 29 Vict. c. 111); Navy and Marines (Wills) Act, 1865 (28 & 29 Vict. c. 72); Navy and Marine (Wills) Act, 1897 (60 & 61 Vict. c. 15); and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 250, 251.

(h) *In the Goods of Scott*, *supra*; *In the Goods of Neville* (1859) 4 Sw. & Tr. 218; *In the Goods of Hackett* (1859), 4 Sw. & Tr. 220; *In the*

SECT. 8.
Privileges
and Exemp-
tions of
Sailors and
Soldiers.

the wills of common seamen, marines, or soldiers slain in action or dying in the service of the Sovereign, and letters of administration granted to their representatives, are exempt from stamp duty (i).

It is not necessary to take out probate or administration in respect of certain small sums due to deceased officers, sailors and soldiers by way of pay, pension, or prize money (k). The estates of persons killed in war are also privileged in respect of estate and death duty (l).

Municipal
and other

203. Officers of the Royal Navy and Army on full or half pay are exempt from liability to undertake any parochial or municipal office or duty (m), and officers of the regular forces on the active list are debarred from being nominated or elected to any such office (n), with the exception of membership of a county council (o); but an officer of the auxiliary forces is both competent and liable to be nominated or elected to, and to hold, municipal office, although the battalion or corps to which he belongs is assembled for annual training at the time (p). Reservists, including special reservists, are exempt from liability to serve in the office of constable or in any parochial or municipal office (q). Officers and men of the Territorial Force are exempt from serving as peace or parish officers, and field officers of the Territorial Army cannot be required to serve in the office of high sheriff (r). Persons in the Militia cannot be

Goods of Thorne (1865), 4 Sw. & Tr. 36. As to the procedure, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 162.

(i) Stamp Act, 1815 (55 Geo. 3, c. 184), Sched., Part III.; and see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 201, 311.

(k) I.e., pension, prize money, and pay not exceeding £100 of officers and men of the Army (Army Pensions Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 41), s. 5); pay, pension allowances not exceeding £32, and prize money not exceeding £20 of officers and men of the Royal Navy (Admiralty Act, 1832 (2 & 3 Will. 4, c. 40), s. 12); prize money of officers and men of the Army (Army Prize Money Act, 1832 (2 & 3 Will. 4, c. 53), s. 25), and foreign soldiers in British service (*ibid.*, s. 26); see also title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 191.

(l) See title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 182.

(m) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 253; and see title LOCAL GOVERNMENT, Vol. XIX., pp. 297, 308.

(n) Army Act, s. 146; as to the Army Act, see note (s), p. 30, *ante*; and see title LOCAL GOVERNMENT, Vol. XIX., pp. 297, 308.

(o) Army Act, s. 146, proviso.

(p) *Ibid.*, s. 181 (5); and see title LOCAL GOVERNMENT, Vol. XIX., p. 307. Where a sheriff is a Militia officer or officer of the Territorial Force he is discharged on embodiment from personal performance of the office, the duties of which devolve on the under-sheriff, and the securities given by the latter and his pledges to the high sheriff stand as security for the due performance of the office during such embodiment (Militia Act, 1882 (45 & 46 Vict. c. 49), s. 40; Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 23 (3)); see title SHERIFFS AND BAILIFFS, pp. 800, 801, *post*. Absence on active service will not act as a disqualification for members of local authorities (Local Authorities Relief Act, 1900 (63 & 64 Vict. c. 46).

(q) Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), s. 7; applied to the Special Reserve by Order in Council of the 9th April, 1908 (Stat. R. & O., 1908, p. 878), s. 4.

(r) Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 23 (4); see title POLICE, Vol. XXII., p. 464, note (t); SHERIFFS AND BAILIFFS, p. 795, *post*.

compelled to serve as peace or parish officers(s), nor can Naval Volunteers (t).

204. Officers of the Royal Navy, Army, Militia and Yeomanry on full pay (u), soldiers of the regular forces (a), and officers and men of the Territorial Force (b), are exempt from jury service (c). In Scotland (d) and Ireland (e) this privilege is unqualified, but in England it is conditional on the person claiming exemption taking steps to have his name removed from the jury lists (f).

205. Officers in the Royal Navy and Army are relieved from the payment of licence duty for sailor or soldier servants employed by them in accordance with the regulations (g). Officers of the Army Motor Reserve, whose cars have been used for the purposes of the Army Motor Reserve for at least six days in any year, are entitled to a proportionate rebate from the excise duty for carriages (h). Property in the occupation of the Crown and used exclusively for naval or military purposes is exempt from rating (i). Firearms, when used exclusively for military purposes, require no licence (k). King's ships are exempt from pilotage dues (l).

The letters of commissioned officers of the regular forces, Special Reserve, warrant officers of the regular forces, midshipmen and masters' mates of the Royal Navy, and, up to half an ounce in weight, letters of non-commissioned officers of the regular forces

SECT. 3.
Privileges
and Exemptions of
Sailors and
Soldiers.

Jury service.

Taxation.

Postal
privileges.

(s) Militia Act, 1882 (45 & 46 Vict. c. 49), s. 41; see title LOCAL GOVERNMENT, Vol. XIX., p. 297; and as to officers and others employed in dockyards etc., see *ibid*.

(t) Royal Naval Reserve (Volunteer) Act (22 & 23 Vict. c. 40), s. 7.

(u) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 9, Schedule.

(a) Army Act, s. 147.

(b) See p. 78, *ante*.

(c) See title JURIES, Vol. XVIII., p. 232.

(d) Sheriff Courts (Scotland) Act, 1825 (6 Geo. 4, c. 23).

(e) Juries Procedure (Ireland) Act, 1876 (39 & 40 Vict. c. 78).

(f) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 12; see note (f), p. 78, *ante*. As to coroner's juries, see *Re Dutton*, [1892] 1 Q. B. 486; and see titles CORONERS, Vol. VIII., p. 261; JURIES, Vol. XVIII., pp. 229 *et seq*.

(g) Revenue Act, 1869 (32 & 33 Vict. c. 14), s. 19 (5).

(h) See title REVENUE, Vol. XXIV., p. 691.

(i) *Pearson v. Holborn Union Assessment Committee*, [1893] 1 Q. B. 389; *Rayner v. Drewitt* (1900), 82 L. T. 718; *Lewis v. Durham Union* (1904), 90 L. T. 383; and see *Westminster Vestry v. Hoskins*, [1899] 2 Q. B. 474; *Wixon v. Thomas* (No. 2), [1912] 1 K. B. 690, C. A.; titles RATES AND RATING, Vol. XXIV., pp. 14, 15; SEWERS AND DRAINS, note (b), p. 755, *post*.

(k) Gun Licence Act, 1870 (33 & 34 Vict. c. 57), s. 9; and see title GAME, Vol. XV., pp. 251, 253.

(l) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 591, 741; as to pilotage generally, see title SHIPPING AND NAVIGATION. "King's ship" includes a coaling transport not commanded or manned by the Royal Navy (*Symons v. Baker*, [1905] 2 K. B. 723). As to exemption of troops from tolls, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 65; and see *London and South Western Rail. Co. v. Reeves* (1866), L. R. 1 C. P. 580; *Toomer v. Reeves* (1867), L. R. 3 C. P. 62 (as to contractor's waggons). The exemption does not extend to canal dues (Army Act, s. 143 (1), *provis o*; see *Ward v. Gray* (1865), 6 B. & S. 345), except for vessels impressed in case of emergency (see p. 50, *ante*). As to the exemption of canteens from licences, see p. 96, *post*.

SECT. 3.
Privileges
and Exemptions of
Sailors and
Soldiers.
 —
Miscellaneous
privileges and
exemptions.

and Special Reserve, may be redirected free of charge (*m*). The enjoyment of these privileges is subject to the fulfilment of certain conditions (*n*).

206. Provision is made by statute for the establishment of savings banks for the benefit of officers and men of the Royal Navy and Regular Army respectively (*o*).

A soldier of the regular forces cannot during the period of his service change the parish of his settlement (*p*).

Explosive factories and stores established for naval or military purposes and the carriage of explosives destined for such purposes are exempt from the requirements of the law relating to explosives (*q*).

It is not necessary for persons holding naval or military canteens to obtain excise licences for the purpose of selling intoxicating liquor (*r*).

The royal forces are exempt from the provisions of the Workmen's Compensation Act, 1906 (*s*).

Marriages solemnised on board a man-of-war on a foreign station by a commanding officer who is a marriage officer, or within the lines of a British army serving abroad by a chaplain or officer or other person officiating under the orders of the commanding officer, are valid (*t*). Provision is made for the registration of deaths, marriages and births occurring out of the United Kingdom among officers and men of the royal forces and their families (*u*).

SECT. 4.—Offences Relating to both Navy and Army (*v*).

Wearing
uniform.

207. The wearing of naval or military uniform is the privilege of persons serving in the naval or military forces; and the wearing of it or any similar dress or any distinctive part of it by a person not so serving, or the employment of anyone so to do, in such a way as to

(*m*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 6 (3), (4); and see, further, title **POST OFFICE**, Vol. XXII., pp. 641, 642.

(*n*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 6 (1), (2); see, further, title **POST OFFICE**, Vol. XXII., pp. 641, 642; see also **King's Regulations**, and **Orders**, for the Army, 1912, paragraphs 1367—1371.

(*o*) Military Savings Banks Act, 1859 (22 & 23 Vict. c. 20); **Naval Savings Banks Act**, 1866 (29 & 30 Vict. c. 43). As to members of friendly societies, see p. 79, *ante*; title **FRIENDLY SOCIETIES**, Vol. XV., pp. 150, 182.

(*p*) See title **POOR LAW**, Vol. XXII., p. 580.

(*q*) See title **EXPLOSIVES**, Vol. XIV., p. 363.

(*r*) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 111; and see title **INTOXICATING LIQUORS**, Vol. XVIII., p. 106; 77 J. P. (Journal) 112.

(*s*) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 9 (1); and see title **MASTER AND SERVANT**, Vol. XX., pp. 157, 205, 216.

(*t*) Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), ss. 12, 22; and see title **CONFLICT OF LAWS**, Vol. VI., pp. 260, 261.

(*u*) Registration of Births, Deaths and Marriages (Army) Act, 1879 (42 & 43 Vict. c. 8); and see titles **HUSBAND AND WIFE**, Vol. XVI., p. 314; **REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS**, Vol. XXIV., pp. 454, note (*d*), 458.

(*v*) As to inciting to mutiny, see title **CRIMINAL LAW AND PROCEDURE**, Vol. IX., pp. 464, 465; *R. v. Bowman* (1912), 76 J. P. 271. As to the offences of destroying naval or military magazines or stores, see titles **CONSTITUTIONAL LAW**, Vol. VI., p. 357; **CRIMINAL LAW AND PROCEDURE**, Vol. IX., p. 773.

bring contempt upon that uniform, is an offence punishable by fine or imprisonment (*w*).

No person, unless serving in the military forces of the Crown, may wear the uniform of those forces, nor any dress having the appearance or distinctive marks of such uniform, except in the course of a stage play in a duly licensed place, or in a music hall or circus performance, or in the course of a *bond fide* military representation (*x*).

SECT. 4.
Offences
Relating
to both
Navy and
Army.

208. The use of a forged or counterfeit or false statement as to character or previous employment when entering the naval, military, or marine forces of the Crown is punishable on summary conviction with a fine not exceeding £20; and anyone making a written statement of a similar kind which he allows or intends to be used for the same purpose is liable to a similar fine (*y*).

False state-
ments or
certificates.

Forging the certificate of service or discharge of any man who has served in the naval, military, or marine forces of the Crown, or knowingly uttering or using such a forged certificate, or personating the holder of a certificate of service or discharge, is an offence punishable on summary conviction (*z*).

SECT. 5.—*Acquisition and User of Lands by Naval and Military Authorities.*

SUB-SECT. 1.—*Military Lands Acts.*

209. Lands (*a*) for military purposes (*b*) may be acquired by the Secretary of State for War (*c*), a volunteer corps, a county

Acquisition
by Secretary
of State,
volunteer
corps, or
county
association.

(*w*) Uniforms Act, 1894 (57 & 58 Vict. c. 45), s. 3. For the definition of naval and military forces, see *ibid.*, s. 4. The offence is punishable on summary conviction by a fine not exceeding £10 or imprisonment not exceeding one month (*ibid.*, s. 3); see title COURTS, Vol. IX., p. 80.

(*x*) Uniforms Act, 1894 (57 & 58 Vict. c. 45), s. 2. The penalty is a fine on summary conviction of not exceeding £5 (*ibid.*).

(*y*) Seamen's and Soldiers' False Characters Act, 1906 (6 Edw. 7, c. 5), s. 2.

(*z*) *Ibid.*, s. 1. The penalty for the first offence is not more than one month's imprisonment with or without hard labour, or a fine of not more than £20; for a second or subsequent offence, imprisonment with or without hard labour for not more than three months (*ibid.*); as to summary procedure, see title MAGISTRATES, Vol. XLX., pp. 589 *et seq.* For other offences connected with forgery of documents relating to naval and military service, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 750 *et seq.*

(*a*) See title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 512, note (*o*). As to the exemption of lands in the occupation of the Crown from rates, see title RATES AND RATING, Vol. XXIV., pp. 14, 15; from building restrictions, see title METROPOLIS, Vol. XX., p. 474. As to the meaning of occupation within the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 202, see *Dellar Brothers, Ltd. v. Drury*, [1912] 2 K. B. 209.

(*b*) See title COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 512, note (*p*). As to the provision of alignment marks, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 159, 160; as to acquisition by the Admiralty, see p. 100, *post*; as to naval and military tramways, see title TRAMWAYS AND LIGHT RAILWAYS.

(*c*) Military Lands Act, 1892 (55 & 56 Vict. c. 43), s. 1 (1); see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 159.

SECT. 5.
Acquisition
of Lands
by Naval
and Military
Authorities.

Acquisition
by county or
borough
council.
Expenses.

association (*d*) by purchase (*e*), or, in the case of lands forming part of the possessions of the Crown, Duchy of Lancaster, or Duchy of Cornwall (*f*), royal parks or gardens (*g*), by lease for a period not exceeding twenty-one years (*h*).

210. A county or borough council have a similar power of purchase exercisable at the request of one or more volunteer corps or county associations (*i*), and may also, on a like request, hire or join with another council in hiring land for military purposes for a period of not less than twenty-one years (*k*).

The expenses of a county or borough council are to be defrayed out of the county fund or borough fund or rate respectively (*l*), or, in the case of volunteer corps, county associations (*m*), or borough councils, by borrowing (*n*).

Acquisition
by Admiralty.

211. The Admiralty has the same powers of acquiring land compulsorily for naval purposes (*o*), and of making bye-laws (*p*) for

(*d*) Military Lands Act, 1892 (55 & 56 Vict. c. 43), s. 1 (2). By the Territorial Force Regulations, 1910, paragraph 731, on the authority of Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), s. 2, certain provisions of the Military Lands Act, 1892—1903 (55 & 56 Vict. c. 43; 60 & 61 Vict. c. 6; 63 & 64 Vict. c. 56; 3 Edw. 7, c. 47), relating to volunteer corps have been applied to county associations; see Territorial Force Regulations, 1912, Appendix XVI.; Stat. R. & O., 1912, No. 1814. As to county associations generally, see pp. 81 *et seq.*, *ante*.

(*e*) Military Lands Act, 1892 (55 & 56 Vict. c. 43), s. 1. The Secretary of State may make bye-laws for the management of lands so acquired (see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 512, 513; Military Lands Act, 1892 (55 & 56 Vict. c. 43), ss. 17, 18), including, in certain circumstances, the adjacent sea, tidal water or shore (Military Lands Act, 1900 (63 & 64 Vict. c. 56), s. 2 (2)—(5)), and may close or divert footpaths or highways (see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 80, 81); see, as to acquisition under statutory powers, title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 158 *et seq.*

(*f*) Leases of such property cease to have effect if the property ceases to be used for military purposes (Military Lands Act, 1892 (55 & 56 Vict. c. 43), s. 10 (1)); and see, as to when land ceases to be so used, *ibid.*, s. 12; and see Military Lands Act, 1900 (63 & 64 Vict. c. 56), s. 1 (3).

(*g*) Leases of such property of those Crown possessions under the management of the Commissioners of Works are revocable at any time (Military Lands Act, 1892 (55 & 56 Vict. c. 43), s. 10 (3)).

(*h*) *Ibid.*, s. 10; and see title CONSTITUTIONAL LAW, Vol. VII., pp. 201, 202. Land held for ecclesiastical or public purposes may, subject to certain conditions, be similarly leased to the Secretary of State for War or a volunteer corps (Military Lands Act, 1892 (55 & 56 Vict. c. 43), s. 11 (1)); see also note (*d*), *supra*; Military Lands Act, 1892 (55 & 56 Vict. c. 43), s. 11 (2).

(*i*) *Ibid.*, s. 1 (3); and see note (*d*), *supra*.

(*k*) Military Lands Act, 1903 (3 Edw. 7, c. 47); and see title LOCAL GOVERNMENT, Vol. XIX., p. 364.

(*l*) Military Lands Act, 1892 (55 & 56 Vict. c. 43), s. 4.

(*m*) See note (*d*), *supra*.

(*n*) Military Lands Act, 1892 (55 & 56 Vict. c. 43), ss. 5, 6. The Public Works Loan Commissioners have power to lend for this purpose (*ibid.*, s. 7); and see title MONEY AND MONEY-LENDING, Vol. XXI., pp. 58 *et seq.*

(*o*) See titles COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 513; COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 6, 7, 10, 158 *et seq.*

(*p*) Military Lands Act, 1900 (63 & 64 Vict. c. 56), s. 2.

land so acquired, as has the Secretary of State for War for military purposes (*q*).

SUB-SECT. 2.—*Military Manœuvres Acts.*

212. The Crown may, by Order in Council after due notice (*r*), authorise manœuvres to be held within certain limits for a period not exceeding three months and not oftener within the same limits than once in five years (*s*), except by consent of the local authorities (*t*). When such an order is in force the authorised forces (*u*) may, within the specified limits and period, and subject to certain provisions relating to excepted premises, remains of antiquarian or historical interest or features of natural interest or beauty, and interference with public rights (*a*), pass over, encamp, construct temporary military works, and execute military manœuvres on any authorised land and, within certain limits, supply themselves with water from any authorised source, and dam up running water (*b*). The power of deciding what lands, roads, and sources of water are authorised rests with a specially appointed commission (*c*).

SECT. 5.
Acquisition
and Order
of Land
by Naval
and Military
Authorities.
Manœuvre
areas.

213. Any person unlawfully interfering with the manœuvres or without authority entering or remaining in any camp may be removed by a constable or by order of a commissioned officer of the authorised forces, and is liable, on summary conviction, to a fine not exceeding £2 (*d*).

Offences.

Any person, without authority, moving any flag or mark distinguishing lands for the purposes of the manœuvres, maliciously damaging any telegraph wire laid by or for the use of the authorised forces, or erecting or displaying any notice or mark representing that any authorised land or source of water is not authorised is liable on summary conviction to a fine not exceeding £5 (*e*).

214. Two justices of the peace, not being military officers in command of the forces (*f*), may, by order, authorise any general or

(*q*) As to naval tramways, see title *TRAMWAYS AND LIGHT RAILWAYS*.

(*r*) Military Manœuvres Act, 1897 (60 & 61 Vict. c. 43), s. 1 (2), (3).

(*s*) *Ibid.*, s. 1 (1). If a district is included in an Order in Council, but manœuvres are not in fact held there, the district may be included again as though no such order had been made (Military Manœuvres Act, 1911 (1 & 2 Geo. 5, c. 44), s. 1 (2)).

(*t*) *Ibid.*, s. 1 (1).

(*u*) *I.e.*, the persons engaged in the manœuvres under the authority of the Crown (Military Manœuvres Act, 1897 (60 & 61 Vict. c. 43), s. 2).

(*a*) *Ibid.*, s. 2, proviso; Military Manœuvres Act, 1911 (1 & 2 Geo. 5, c. 44), s. 2. As to the power of stopping up a highway, see title *HIGHWAYS, STREETS, AND BRIDGES*, Vol. XVI., p. 81; Military Manœuvres Act, 1911 (1 & 2 Geo. 5, c. 44), s. 3.

(*b*) Military Manœuvres Act, 1897 (60 & 61 Vict. c. 43), s. 2 (a), (b).

(*c*) *Ibid.*, s. 4. As to compensation, see p. 102, *post*; title *COMPULSORY PURCHASE OF LAND AND COMPENSATION*, Vol. VI., p. 160.

(*d*) Military Manœuvres Act, 1897 (60 & 61 Vict. c. 43), s. 7 (1); as to summary procedure, see title *MAGISTRATES*, Vol. XIX., pp. 589 *et seq.*

(*e*) Military Manœuvres Act, 1897 (60 & 61 Vict. c. 43), s. 7 (2); Military Manœuvres Act, 1911 (1 & 2 Geo. 5, c. 44), s. 4.

(*f*) Military Manœuvres Act, 1897 (60 & 61 Vict. c. 43), s. 3. Where the road is a county or main or parish road the order can only be made by

Sect. 5.
Acquisition
and User
of Lands
by Naval
and Military
Authorities.
Compensa-
tion.

field officer in command of the authorised forces, or any part of the same, to make an order suspending the use of any specified roads or footpaths within the specified limits for not more than six hours on any one day (*g*).

215. Full compensation must be made out of public funds for any damage done to person or property, or for any interference with rights or privileges by reason of the enforcement of the Military Manœuvres Acts (*h*). Compensation officers are to be appointed by the Military Manœuvres Commission with the concurrence of the Treasury for the purpose of dealing with claims (*i*). Where no agreement can be arrived at as to amount, the difference must be referred to arbitration (*k*).

at least two justices sitting in petty sessions in the petty sessional division or divisions affected, and only for a time not exceeding twelve hours, and only after seven days' notice of the intended application has been published in at least one newspaper circulating generally in the district, and subject to such terms as the justices may consider necessary for the protection of individuals, or the public, or public bodies (Military Manœuvres Act, 1897 (60 & 61 Vict. c. 43), s. 3 (1)). The officer in command must in every case give not less than twelve hours' public notice before the order comes into force, and must give all reasonable facilities for traffic whilst the order is in force (*ibid.*, s. 3 (2)). As to justices of the peace generally, see title MAGISTRATES, Vol. XIX., pp. 535 *et seq.*, and as to petty sessions, *ibid.*, pp. 565 *et seq.*

(*g*) Military Manœuvres Act, 1911 (1 & 2 Geo. 5, c. 44), s. 3. The officer making the order must take such steps as he may consider practicable in the circumstances to give publicity to his intention to make the order, and must give all reasonable facilities for traffic, but he need not in this instance give the public notice required by the Military Manœuvres Act, 1897 (60 & 61 Vict. c. 43), s. 3 (2); see note (*f*), p. 101, *ante*; see, further, title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 81.

(*h*) Military Manœuvres Act, 1897 (60 & 61 Vict. c. 43), s. 6 (1). Compensation is payable whether the injury is occasioned by the acts or defaults of the authorised forces or not, and must include all expenses reasonably incurred in protecting person, property, rights, and privileges. It also includes damage to highways caused by excessive weight or extraordinary traffic (*ibid.*).

(*i*) *Ibid.*, s. 6 (2). The commission may make regulations as to procedure in making and determining claims, and for limiting the time within which claims must be made, and for regulating the mode of payment (*ibid.*, s. 6 (3)).

(*k*) *Ibid.*, s. 6 (4).

ROYAL MARRIAGES.

See CONSTITUTIONAL LAW.

ROYAL PREROGATIVE.

See CONSTITUTIONAL LAW.

ROYALTIES.

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RURAL DISTRICT COUNCIL.

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See LOCAL GOVERNMENT.

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SALE OF GOODS.

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Part I.—Introductory.

SECT. 1.—Sale in General.

SECT. 1.
Sale in
General.Sale,
exchange,
or barter.

216. Sale (a) being the transfer of the ownership of a thing from one person to another for a money price, where the consideration for the transfer consists of other goods, or some other valuable consideration, not being money, the transaction is called exchange or barter (b); but in certain circumstances it may be treated as one of sale (c).

The law relating to contracts of exchange or barter is undeveloped, but the courts seem inclined to follow the maxim of the civil law, *permutatio vicina est emptioni*, and to deal with such contracts as analogous to contracts of sale (d). It is clear, however, that statutes relating to sale would have no application to transactions by way of barter (e).

(a) As to alienation of personal property, see title PERSONAL PROPERTY, Vol. XXII., pp. 402 *et seq.*; as to bailment, see title BAILMENT, Vol. I., pp. 523 *et seq.*; as to pawns, see title PAWNS AND PLEDGES, Vol. XXII., pp. 233 *et seq.*

(b) *Read v. Hutchinson* (1813), 3 Camp. 352 (goods to be exchanged for bill of third party without recourse); *Harrison v. Luke* (1845), 14 M. & W. 139. For the purposes of the Stamp Act, 1891 (54 & 55 Vict. c. 39), transfers in exchange for money's worth are "conveyances on sale" (*Inland Revenue Commissioners v. Maple & Co (Paris), Ltd.*, [1908] A. C. 22); see title REVENUE, Vol. XXIV., p. 728.

(c) If the goods are to be paid for by money and other goods, on which a fixed value is put, the contract may be treated as one of sale for the aggregate sum as the price (*Hlands v. Burton* (1808), 9 East, 349; followed, *Sarty v. Wilkin* (1843), 11 M. & W. 622; *Aldridge v. Johnson* (1857), 7 E. & B. 885; see also *Harmun v. Reeve* (1856), 18 C. B. 587). If the goods on either side are delivered, any money balance payable may be recovered as on a contract of sale (*Sheldon v. Cox* (1824), 3 B. & C. 420; *Bull v. Parker* (1842), 7 Jur. 282; see also *Ingram v. Shirley* (1816), 1 Stark. 185 (balance struck payable in money), as explained in *Harrison v. Luke*, *supra*; *Garey v. Pyke* (1839), 10 Ad. & El. 512 (no balance struck)). If the party liable to deliver goods in exchange refuses to do so, or disables himself from doing so, the other party may recover on a *quantum valebant* the value of the goods given in exchange, under the general principle stated in title CONTRACT, Vol. VII., p. 440 (*Forsyth v. Jervis* (1816), 1 Stark. 437; *Keys v. Harwood* (1846), 2 C. B. 905).

(d) See *Fairmaner v. Budd* (1831), 7 Bing. 574; *Emanuel v. Dane* (1812), 3 Camp. 299 (warranty); *La Neuville v. Nourse* (1813), 3 Camp. 351 (*caveat emptor*); *Power v. Wells* (1778), 2 Cowp. 818; *Emanuel v. Dane*, *supra* (property passes on delivery). Lord BLACKBURN says (Contract of Sale, 1st ed., Introduction, p. 3) that the legal effect of contracts of sale and of barter is the same; see the Indian Transfer of Property Act, 1882 (Act No. IV. of 1882), ss. 118 *et seq.*

(e) Thus, *e.g.*, the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4 (see p. 125, *post*), would not apply, while the Statute of Frauds (29 Car. 2, c. 3), s. 4 (agreements not to be performed within the year), would apply. So, again, the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 14, 15 (see pp. 157 *et seq.*, *post*), relating to implied conditions, would, as such, be equally inapplicable. So, too, the contract, if in writing and exceeding £5 in value, would require to be stamped according to its terms, as not falling under the exemption of contracts of sale (Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., title "Agreement"). As to stamps on contracts of sale, see pp. 165, 166, *post*.

SMCT. 1.

Sale in
General.

Mortgage.

217. A mortgage is sometimes called a conditional sale, but a sale subject to a condition for resale to the original seller is distinguishable from a mortgage (*f*). The essence of a mortgage of goods is the transfer of the general property in the goods from mortgagor to mortgagee in order to secure a debt (*g*). It is a question of substance, not form, whether a given transaction is really a mortgage or a sale (*h*).

The Sale of Goods Act, 1893 (*i*), has no application to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security (*i*).

Assignments
of contract
of sale.

218. The rights and obligations under a contract of sale may be assigned under the like conditions and qualifications as in the case of other contracts (*j*).

(*f*) See the distinction stated by CAVE, J., in *Beckett v. Tower Assets Co.*, [1891] 1 Q. B. 1, at p. 25. For instances of conditional sales, see *Williams v. Burgess* (1839), 10 Ad. & El. 499; *Shaw v. Jeffery* (1860), 13 Moo. P. C. C. 432.

(*g*) *Keith v. Burrows* (1876), 1 C. P. D. 722, 731; *Re Hardwick, Ex parte Hubbard* (1886), 17 Q. B. D. 690, 698, C. A.; *Re Morritt, Ex parte Official Receiver* (1886), 18 Q. B. D. 222, 232, C. A.; see, further, title BILLS OF SALE, Vol. III., p. 5.

(*h*) Compare title MORTGAGE, Vol. XXI., p. 72.

(*i*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 61 (4). The governing word of this clause is "intended." If the intention be to create a mortgage, the form is immaterial, and conversely in the case of a sale; see, generally, *Re Watson, Ex parte Official Receiver in Bankruptcy* (1890), 25 Q. B. D. 27, C. A. (bill of sale); *Madell v. Thomas & Co.*, [1891] 1 Q. B. 230, C. A. (bill of sale); *Maas v. Pepper*, [1905] A. C. 102, H. L. (bill of sale); *Lawrence v. Lawrence's Trustee, Lawrence v. Sievright and Miller* (1899), 6 Scots Law Times 435 (genuine sale intended: motive security); *Cushing v. Dupuy* (1880), 5 App. Cas. 409, P. C. (pledge under guise of sale). In view of the explicit provisions of the Act, cases decided before it, where it was held that the transaction was sale, not mortgage, must be looked into rather critically; see, e.g., *M'Bain v. Wallace & Co.* (1881), 6 App. Cas. 588, where it was held that, if the intention is to create a sale, the existence of an ulterior object that the transaction should operate so as to give security for a loan is immaterial. In the two following cases it was held (Lord Young dissenting) that *M'Bain v. Wallace & Co.*, *supra*, has been overridden by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71):—*Jones & Co.'s Trustee v. Allan* (1901), 4 F. (Ct. of Sess.) 374; *Bennett v. Mathieson* (1903), 40 Sc. L. R. 421. See generally, titles BILLS OF SALE, Vol. III., pp. 1 *et seq.*; MORTGAGE, Vol. XXI., p. 129; PAWNS AND PLEDGES, Vol. XXII., pp. 234 *et seq.*

(*j*) *Tolhurst v. Associated Portland Cement Manufacturers* (1900), [1903] A. C. 414 (contract to supply a certain quantity of chalk every year for fifty years); *E. Clemens Horst Co. v. Biddell Brothers*, [1912] A. C. 18 (assignment by buyers of c.f.i. contract for hops); *Cole v. Handasyde & Co.*, [1910] S. C. 68; *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608; compare *Doe d. Calvert v. Reid* (1830), 10 B. & C. 849 (agreement to take beer from brewer); *Cooper v. Micklefield Coal and Lime Co.* (1912), 107 L. T. 457 (sale of coal by instalments during two years; specially low prices to buyer). As to the general principle, see *per curiam* in *Arkansas Valley Smelting Co. v. Belden Mining Co.* (1887), 127 United States Reports, 379, 387; title CONTRACT, Vol. VII., pp. 494 *et seq.* As the price when payable constitutes an ordinary debt, the seller's right to it may be assigned like any other book debt, even although the contract itself be not assignable (*Crouch v. Martin* (1707), 2 Vern. 595; followed in *Russell & Co., Ltd. v. Austin Fryers* (1909), 25 T. L. R. 414 (personal service); *International Fibre Syndicate v. Dawson* (1901), 84 L. T. 803, H. L.); compare title CHOSES IN ACTION, Vol. IV., pp. 368 *et seq.*, 402, 403.

219. The transfer of the property in goods under sales made in foreign countries is in general regulated by the law of the place where the goods are situate at the time of the sale, the rule being that, if personal property be disposed of in a manner binding according to the *lex situs*, that is, the law of the country where it is at the time, that disposition is binding everywhere (*k*).

SECT. 1.
Sale in
General.

Conflict of
laws.

But the construction of a contract of sale, in so far as it creates mutual rights *in personam*, is determined by the *lex contractus*, that is to say, the law which the parties contemplated as governing the contract; *prima facie*, this law is the law of the place where the contract is made, the *lex loci* (*l*). Questions as to the admissibility of evidence, or as to the enforceability of the contract by action in this country, belong to the *lex fori*, that is, the law of the country in which the action is brought (*m*).

SECT. 2.—The Sale of Goods Act, 1893.

SUB-SECT. 1.—In General.

220. The law relating to the sale of goods has been codified by the Sale of Goods Act, 1893 (*a*), in this title frequently referred to as "the Act." The Act, which must be construed like any other statute (*b*), applies to the whole of the United Kingdom, uniform rules being laid down for England and Ireland, but certain special rules of Scottish law being either saved or re-enacted as applicable to Scotland (*c*). Speaking broadly, the English law of sale has developed on lines of its own, while Scottish law has been founded on, and has closely adhered to, the rules of the civil law. Hence, apart from mere nomenclature, the divergences between the two systems.

Sale of Goods
Act, 1893.

221. The Act (*a*) deals only with those rules of law which are peculiar to the law of sale: if the whole law of contract were codified, the Act would form merely a chapter in that code; and does not, therefore, deal with questions common to the whole law of contract (*d*). If then, for example, any question arises on a contract of sale as to what constitutes a valid offer or acceptance of the offer (*e*), or whether there has been a sufficient *consensus in idem*

Relation of
Act to
general law.

(*k*) *Cammell v. Sewell* (1860), 5 H. & N. 728, Ex. Ch.; *Todd v. Armour* (1882), 9 R. (Ct. of Sess.) 901; and see title CONFLICT OF LAWS, Vol. VI. pp. 213, 214.

(*l*) See, generally, title CONFLICT OF LAWS, Vol. VI., pp. 238 *et seq.*

(*m*) *E.g.*, under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4; see title CONFLICT OF LAWS, Vol. VI., pp. 236, 237. As to the laws governing the assignment of a contract, see *ibid.*, pp. 217, 218.

(*a*) 56 & 57 Vict. c. 71.

(*b*) As to the canon of construction of a codifying statute, see *Bank of England v. Vagliano Brothers*, [1891] A. C. 107; approved by the Privy Council in *Robinson v. Canadian Pacific Rail. Co.*, [1892] A. C. 481, P. C.; and see title STATUTES.

(*c*) See, *e.g.*, Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 4 (4), 11 (2), 22 (3), 24 (3), 26 (3), 40, 49 (3), 52, 53 (5), 59, 61 (5), and the Scottish definitions in *ibid.*, s. 62.

(*d*) *Ibid.*, s. 61 (2) (see pp. 281, 282, *post*), expressly saving the rule of the common law. The law of bankruptcy, the Bills of Sale Acts, and Acts relating to the sale of goods which are not expressly repealed, *e.g.*, certain provisions of the Merchandise Marks Acts, are also saved (*ibid.*).

(*e*) See title CONTRACT, Vol. VII., pp. 345 *et seq.*; and, as to contracts for

SECT. 2.
The Sale
of Goods
Act, 1893.

as to the subject-matter or the personality of the parties (*f*), or whether the contract has been validly rescinded or performed by substitution (*g*), reference must be made to the general law of contract. So, again, quite apart from contract, the seller of goods may be liable *ex delicto* if he sells dangerous goods without fair warning to the buyer (*h*), or commits any act infringing the buyer's right of property in the goods, as by converting them (*i*).

"Goods"
 defined.

222. The Sale of Goods Act, 1893 (*k*), relates only to goods as thereby defined, and the sale or transfer of other personal chattels is left to be regulated by ordinary law (*l*).

For this purpose, unless the context or subject-matter otherwise requires, "goods" include all chattels personal other than things in action and money (*m*). The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale (*n*).

sale at auction, see title AUCTION AND AUCTIONEERS, Vol. I., pp. 504, 505, 510; *Franklin v. Lamond* (1847), 4 C. B. 637 (contracts for several lots treated as entire).

(*f*) See title CONTRACT, Vol. VII., pp. 354 *et seq.*

(*g*) See *ibid.*, pp. 421 *et seq.*

(*h*) *Clarke v. Army and Navy Co-operative Society*, [1903] 1 K. B. 155, C. A.; *Blacker v. Lake and Elliot, Ltd.* (1912), 106 L. T. 533; see also p. 163, *post*; title NEGLIGENCE, Vol. XXI., p. 371, note (*e*).

(*i*) *Martindale v. Smith* (1841), 1 Q. B. 389; see, generally, title TORT.

(*k*) 56 & 57 Vict. c. 71.

(*l*) See, for example, the common law warranty of title when a negotiable instrument payable to bearer is sold, i.e., transferred for value by mere delivery (*Raphael & Sons v. Burt & Co.* (1884), ('ab. & El. 325; *Westropp v. Solomon* (1849), 8 C. B. 345, 373; *Meyer v. Richards* (1895), 163 United States Reports, 385, 405). As to alienation of personal property generally, see title PERSONAL PROPERTY, Vol. XXII., pp. 402 *et seq.*

(*m*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1). As to "personal chattels," see title PERSONAL PROPERTY, Vol. XXII., pp. 388-390. As to "choses" or "things in action," see title CHOSSES IN ACTION, Vol. IV., pp. 359 *et seq.* As to goods constituting an interest in land, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 238, 241; compare *Marshall v. Green* (1875), 1 C. P. D. 35; *Morgan v. Russell & Sons*, [1909] 1 K. B. 357. An undivided portion of goods may be "goods" for the purpose of sale (*Marson v. Short* (1835), 2 Bing. (N. C.) 118 (half a horse); see also *Cochrane v. Moore* (1890), 25 Q. B. D. 57, 73, C. A. (same: gift). Money, that is to say, current money, is necessarily excluded, because in sale the goods and the price are contrasted. If a man changes a sovereign for another the contract is exchange, not sale. But a Jubilee £5 gold piece, bought as a curiosity, may be treated as goods, and not as money (*Moss v. Hancock*, [1899] 2 Q. B. 111). As to the sale of ships and undivided shares in ships, see title SHIPPING AND NAVIGATION.

(*n*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1). As to "emblements," that is to say, vegetable products which are the annual result of agricultural labour, see title AGRICULTURE, Vol. I., pp. 282, 283. The term "industrial growing crops" was added when the Bill was extended to Scotland; but there seems to be nothing to confine the words to Scotland, and the effect may be to put all industrial crops, such as grass, clover etc., on the same footing as emblements for the purposes of the Act, and to override such cases as *Graves v. Weld* (1833), 5 B. & Ad. 105 (clover not included in emblements); see also *Kingsbury v. Collins* (1827), 4 Bing. 202 (teazles). The concluding words of the definition appear to give a general rule for dealing with all things attached to the

223. A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price (o). It may be between one part owner and another (p) and may be absolute or conditional (q).

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land, other than emblements and industrial growing crops, and to get rid of subtleties as to whether they were to be severed by buyer or seller, or whether they were to get any benefit from remaining attached to the land before severance. Under the Act the sole test appears to be whether the thing attached to the land has become by agreement goods, by reason of the contemplation of its severance from the soil: compare the cases cited in titles AGRICULTURE, Vol. I., pp. 293, 294; LANDLORD AND TENANT, Vol. XVIII., p. 426. The cases before the Act arose mainly on the construction of the words "goods, wares, and merchandises" in the Statute of Frauds (29 Car. 2, c. 3), s. 17. Obviously decisions on these words must be applied with caution to the present definition, which relates not only to the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4, reproducing the Statute of Frauds (29 Car. 2, c. 3), s. 17, but to the whole Act. As regards growing products of the soil, other than emblements, see title AGRICULTURE, Vol. I., pp. 293, 294; *Teal v. Auly* (1820), 2 Brod. & Bing. 99 (growing poles); but compare *Morgan v. Russell & Sons*, [1909] 1 K. B. 357 (slack attached to land).

(o) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 1 (1); for the statutory definitions of "goods" and "property," see p. 112, *ante*, p. 120, *post*; as to continuing offers, see title CONTRACT, Vol. VII., p. 346. The essence of sale is the transfer of ownership from one person to another for a price, *i.e.*, in exchange for a price as a *quid pro quo*. It is not every payment of money on a transfer of property that constitutes a sale. Thus, the payment may be the motive of a gift by the person transferring the property (*Denn d. Manifold v. Diamond* (1825), 4 B. & C. 243; *Massy v. Nanney* (1837), 3 Bing. (N. C.) 478). Again, a tender of money, even in pursuance of an award, will not transfer the property as on a sale, unless the owner of the property agrees to receive it as the price (*Hunter v. Rice* (1812), 15 East, 100). On the other hand, a delivery of goods previously made for other reasons may be subsequently treated as a sale (*Coles v. Bulman* (1848), 6 C. B. 184). English law always regards the substance and not the form of a transaction (*Re Watson, Ex parte Official Receiver in Bankruptcy* (1890), 25 Q. B. D. 27, C. A.). A contract may be clothed with the form of a contract of sale, or may contain terms implying that it is a contract of sale, but if, on its true construction, it appears to be some other kind of contract, effect will be given to it as such, and the provisions of the Act do not apply. Thus, a seller may, unless he is estopped, show that the sale was a pretended one, and that no property was intended to pass, but that a mere bailment was in fact intended (*Bowes v. Foster* (1858), 2 H. & N. 779; approved, *Lee v. Lancashire and Yorkshire Rail. Co.* (1871), 6 Ch. App. 527, 535); or the alleged buyer may show that delivery was made to him only as an agent to sell (*Miller v. Newman* (1842), 4 Man. & G. 646). For the general principle, see *Weiner v. Harris*, [1910] 1 K. B. 285, C. A., where goods were sent nominally on sale or return, but the contract on its true construction was held to be merely a contract of agency for sale. See, further, *Cobbold v. Custon* (1824), 1 Bing. 399 (sale or agency to procure goods); *Grizewood v. Blane* (1851), 11 C. B. 526, 538 (wager under guise of sale); *Re Nevill, Ex parte White* (1871), 6 Ch. App. 397 (sale or *del credere* agency); compare *Re Smith, Ex parte Bright* (1879), 10 Ch. D. 566, C. A. (agency); title AGENCY, Vol. I., pp. 204 *et seq.*; *South Australian Insurance Co. v. Randell* (1869), L. R. 3 P. C. 101; see title BAILMENT, Vol. I., pp. 524, 525 (sale or bailment); *Hutton v. Lippert* (1883), 8 App. Cas. 309, P. C. (sale or guarantee); *Lee v. Griffin* (1861), 1 B. & S. 272 (sale or work and materials); *Isaacs v. Hardy* (1884), Cab. & El. 287 (picture: sale, not work); see also p. 114, *post*; title WORK AND LABOUR; *Re Woodward, Ex parte Huggins* (1886), 3 Morr. 75; see titles AGRICULTURE, Vol. I.,

(p), (q). For notes (p), (q), see pp. 114, 115, *post*.

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p. 276; **ANIMALS**, Vol. I., p. 387; **BANKRUPTCY AND INSOLVENCY**, Vol. II., p. 180 (sale or agistment); *Senécal v. Pausé* (1889), 14 App. Cas. 637, P. C. (sale or financial arrangement); *McEntire v. Crossley Brothers*, [1895] A. C. 457; see titles **BAILMENT**, Vol. I., pp. 554 *et seq.*; **BILLS OF SALE**, Vol. III., p. 12 (sale called hire); *Re Watson, Ex parte Official Receiver in Bankruptcy* (1890), 25 Q. B. D. 27, C. A.; see title **BILLS OF SALE**, Vol. III., p. 12 (hire-purchase or bill of sale); *Brooks v. Beirnsstein*, [1909] 1 K. B. 98 (sale or hire-purchase); *Re Gieve*, [1899] 1 Q. B. 794, C. A. (gambling contract, with buyer's option to buy); *Pye v. British Automobile Commercial Syndicate, Ltd.*, [1906] 1 K. B. 425 (sale to agent called agency); *Lavalette v. Riches & Co.* (1907), 24 T. L. R. 2 (sale or agency); *Morgan v. Russell & Sons*, [1909] 1 K. B. 357 (sale of goods, or licence to get mineral products from land); compare title **MINES, MINERALS, AND QUARRIES**, Vol. XX., pp. 567, 568. As to mortgages see p. 110, *ante*. As to sale compared and contrasted with gifts, see *Cochrane v. Moore* (1890), 25 Q. B. D. 57, C. A.; title **GIFTS**, Vol. XV., pp. 398, 399, 404; and with pledge, see *Burdick v. Sewell* (1884), 13 Q. B. D. 159, 175, C. A.; title **PAWNS AND PLEDGES**, Vol. XXII., pp. 243, 244.

It is noticeable that no mention is made in the definition of any buying or agreement to buy on the part of the buyer. An agreement to sell does generally, but not always, connote an agreement to buy. For the buyer may have only an option to buy (*Helby v. Matthews*, [1895] A. C. 471, *per* Lord HERSHELL, L.C.; *Grande Maison d'Automobiles, Ltd. v. Beresford* (1909), 25 T. L. R. 522, C. A.). Similarly the seller may have only an option to sell (*Manders v. Williams* (1849), 4 Exch. 339; *Bianchi v. Nash* (1836), 1 M. & W. 545). In such cases an actual sale arises when the option is exercised. In neither case can the person having a mere option be treated as liable under an agreement to buy or sell, as the case may be, *i.e.*, under an executory contract. It is sometimes difficult to distinguish a contract of sale from a contract for work and labour, and the distinction is important, as, *e.g.*, under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4 (see p. 127, *post*), and under the Factors Act, 1889 (52 & 53 Vict. c. 45). A contract of sale is a contract whose main object is the transfer of the property in, and the delivery of the possession of, a chattel, as a chattel, to the buyer (*Lee v. Griffin* (1861), 1 B. & S. 272; *Dixon v. London Small Arms Co.* (1876), 1 App. Cas. 632). Where the main object of a contract for work is not the transfer of a chattel *quâ* chattel, the contract is one for work and labour (*Clay v. Yates* (1856), 1 H. & N. 73; *Grafton v. Armitage* (1845), 2 C. B. 336). Thus, where there is a contract to affix a chattel to land or to another chattel before the property passes, there is no contract of sale either of the chattel or of the separate materials (*Clark v. Bulmer* (1843), 11 M. & W. 243; *Anglo-Egyptian Navigation Co. v. Rennie* (1875), L. R. 10 C. P. 271; *Reid v. Macbeth and Gray*, [1904] A. C. 223); compare title **BAILMENT**, Vol. I., pp. 556 *et seq.* *A fortiori*, where a contract for work and labour is not concerned with a chattel at all, the fact that it involves the transfer of the property in the materials does not constitute a contract of sale of the materials, which are merely accessory to the work (*Clark v. Mumford* (1811), 3 Camp. 37; *Grafton v. Armitage*, *supra*); see, generally, title **WORK AND LABOUR**. For various forms of contract relating to the sale of goods, see *Encyclopædia of Forms and Precedents*, Vol. XI., pp. 575—609; Vol. XVI., p. 558.

(p) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 1 (1); *Beed v. Blandford* (1828), 2 Y. & J. 278; *Nicol v. Hennessy* (1896), 1 Com. Cas. 410. The ownership of personal property may be indefinitely subdivided, *e.g.*, one person may sell to another an undivided moiety of a chattel (*Nyberg v. Handelsaar*, [1892] 2 Q. B. 202, C. A.; see title **PERSONAL PROPERTY**, Vol. XXII., pp. 403, 404); so, too, ownership may be split up, as in the case of a pledge, where the pledgor retains the general property, but the pledgee acquires a special property, with a right of sale in certain events; see title **PAWNS AND PLEDGES**, Vol. XXII., p. 244. Hence the necessity for this provision in the Act, having regard to the rule that seller and buyer must be different persons. A partner may sell goods to his firm, or a firm may sell goods to one of its partners (*Re McLaren, Ex parte*

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Cooper (1879), 11 Ch. D. 68, C. A.; see, generally, title PARTNERSHIP, Vol. XXII., pp. 48, 53). As a general rule a man cannot buy his own goods, for there is nothing to buy (3 Bl. Com. 450; *Scotson v. Pegg* (1861), 6 H. & N. 296, 298). For example, at common law there could be no contract of sale between husband and wife, since in contemplation of law husband and wife were but one person; but this is no longer the case since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75); see title HUSBAND AND WIFE, Vol. XVI., p. 432; and a number of persons may sell to themselves as a company, for a company is a different person in the eye of the law; see title COMPANIES, Vol. V., p. 12. Again, it may happen that one person is invested by common law or statute with powers to sell the goods of another, as, for instance, where goods are sold under a distress (see title DISTRESS, Vol. XI., pp. 180 *et seq.*), or execution (see title EXECUTION, Vol. XIV., pp. 56 *et seq.*), or by a pledgee (see title PAWNS AND PLEDGES, Vol. XXII., p. 244), or a trustee in bankruptcy (see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 119 *et seq.*). In such cases the owner may purchase his own goods, since in fact the buyer and seller are different persons (*Kitson v. Hardwick* (1872), L. R. 7 C. P. 473, 478 (bankrupt)). But the seller in such cases cannot as a rule be the purchaser, though he is selling goods in which he has no proprietary right, being debarred from so doing on grounds of public policy, because of his fiduciary position (*ibid.*; *Moore, Nettlefold & Co. v. Singer Manufacturing Co.*, [1904] 1 K. B. 820, C. A.; *Plasycoed Collieries Co., Ltd. v. Partridge, Jones & Co., Ltd.*, [1912] 2 K. B. 345).

(g) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 1 (2). As to conditional sales, see, further, pp. 144, 145, *post*. As a contract of sale includes a sale as well as an agreement to sell (see p. 117, *post*), the enactment set out in the text means that there may be a conditional agreement to sell, or a conditional sale. As a contract of sale is a consensual contract, it follows that the parties may import into it any such conditions as may be mutually agreed on (*Walley v. Montgomery* (1803), 3 East, 585; *Calcutta and Burmah Steam Navigation Co. v. De Mattos* (1863), 32 L. J. (Q. B.) 322, 328). For example, goods may be sold on condition that the buyer retires certain outstanding acceptances of the sellers (*Bishop v. Shillito* (1819), 2 B. & Ald. 329, n.), or approves of the quality of the goods (*Humphries v. Carvalho* (1812), 16 East, 45), or that the buyer (being the hirer) should pay for the goods if damaged while in his possession (*Bianchi v. Nash* (1836), 1 M. & W. 545); so, too, a person may agree to hire goods on the terms that he shall become owner on full payment of the hire (*Re Robertson. Ex parte Crawcour* (1878), 9 Ch. D. 419, C. A.; *Lee v. Butler*, [1893] 2 Q. B. 318, C. A.); compare *Helby v. Matthews*, [1895] A. C. 471 (conditional sale: option to buy); see title BAILMENT, Vol. I., p. 554. A contract of sale may, it seems, be dependent on a state of facts assumed by the parties as the basis of the contract, but not stated in the contract (*Bannerman v. White* (1861), 10 C. B. (N. S.) 844; compare title CONTRACT, Vol. VII., pp. 433, 521, 523 *et seq.*); and a contract may be conditional on something within the control of the promisor: thus, goods may be contracted for which are to be to the satisfaction of the buyer (*Andrews v. Belfield* (1857), 2 C. B. (N. S.) 779; *Repetto v. Friary Steamship Co.* (1901), 17 T. L. R. 265; *Haegerstrand v. Anna Thomas Steamship Co.* (1905), 10 Com. Cas. 67, C. A.; *Shoolbred (James) & Co. v. Wyndham and Albery* (1908), *Times*, 1st December); and see, generally, title CONTRACT, Vol. VII., pp. 433, 434. It depends on the construction of the contract whether the promisor has or has not contracted to do nothing to hinder the occurrence of any event on which performance depends, e.g., his doing so might cause a failure of consideration; see and consider *Beswick v. Swindells* (1835), 3 Ad. & El. 868, Ex. Ch. (no absolute promise); *Mineral Residues Syndicate v. Levant Mine Adventurers* (1891), 7 T. L. R. 654, C. A. (no absolute promise: sale of "mine leavings"); *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q. B. 488, C. A. (no absolute promise: sale of grains "made by brewers"); *Parker v. Cunliffe* (1899), 15 T. L. R. 335, C. A. (price contingent on event within buyer's control); *Bealey v. Stuart* (1862), 7 H. & N. 753; *Ogdens, Ltd. v. Nelson, Ogdens, Ltd. v. Telford*, [1905] A. C. 199 (absolute contract); and, for the general

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principle and other cases, see title CONTRACT, Vol. VII., pp. 430, 512. The conditions in a contract of sale may be classified in various ways. Conditional contracts of sale may be divided into (a) contingent contracts, and (b) contracts containing reciprocal promises. In the case of a contingent contract the obligations of one or both of the parties are dependent on the happening or not happening of some specified event, e.g., contracts dependent on the safe arrival of the goods. The non-fulfilment of such conditions gives no right of action to the other party, but such party is discharged from liability (*Jackson v. Union Marine Insurance Co.* (1874), L. R. 10 C. P. 125, per BRAMWELL, B., at pp. 144, 145, Ex. Ch.). In the case of a contract consisting of reciprocal promises, where the due performance of his promise by one party is the entire consideration for the promise by the other party, performance of the first-mentioned promise is a condition precedent; see rule 4 in the notes to *Pordage v. Cole* (1669), 1 Wms. Saund., 1871 ed., pp. 548, 556. For example, the obligation of the buyer to accept and pay for the goods may be dependent on delivery by the seller on a particular day, or on the seller shipping them by a particular ship, or the performance of some other like term (*Graves v. Legg* (1854), 9 Exch. 709; *Reuter v. Sala* (1879), 4 C. P. D. 239, 246, 249, C. A. (declaration of name of vessel)). So, again, pre-payment of the price may be made a condition of the seller's obligation to deliver (rule 2 in notes to *Pordage v. Cole*, *supra*). Secondly, conditions may be divided into conditions precedent, concurrent conditions, and conditions subsequent. A condition precedent, or suspensive condition, suspends the obligations of one party until the fulfilment of the condition by the other party, and discharges the first-mentioned party in case of non-fulfilment, as, for example, where there is a sale of goods by description, and goods of the description stipulated for are not supplied; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 13; p. 154, *post*; title CONTRACT, Vol. VII., pp. 432 *et seq.* Concurrent conditions are those reciprocal promises which must be performed by both parties at the same time. For example, in a contract of sale, delivery and payment, unless otherwise agreed, are concurrent conditions; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 28; p. 205, *post*; title CONTRACT, Vol. VII., p. 434. Conditions subsequent, or resolutive conditions, are those which provide for the dissolution of the contract on the happening of a specified event; see title CONTRACT, Vol. VII., p. 432. For example, goods may be sold by auction with a condition that they may be resold if not paid for within twenty-four hours (*Lamond v. Davall* (1847), 9 Q. B. 1030), or may be returned if not approved of (*Head v. Tattersall* (1871), L. R. 7 Exch. 7; and see p. 276, *post*). Again, conditions may be divided into express conditions and implied conditions: in *Jones v. Gibbons* (1853), 8 Exch. 920, POLLOCK, C.B., at p. 922, says that in contracts of sale "every reasonable condition is implied," but this is rather too wide a statement. The law will not make a contract for the parties, but where they have expressed themselves insufficiently or ambiguously it will endeavour to put a reasonable interpretation on the language used; compare *Morgun v. Ravey* (1861), 6 H. & N. 265; *The Moorcock* (1889), 14 P. D. 64, 68, C. A. Implied conditions may also, like express ones, be precedent or subsequent; see title CONTRACT, Vol. VII., p. 527. Thus, for example, on a sale by sample there is an implied condition precedent that the bulk shall conform to the sample (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 15(2)(a); pp. 160, 161, *post*). So, where perishable goods are to be despatched by a carrier, the buyer may, under an implied condition subsequent, reject the goods and re-vest the property in the seller if the goods arrive in an unmerchantable condition; see p. 224, *post*. So, also, if the goods are deliverable by instalments, and the full quantity is not made up, the buyer may sometimes reject instalments received (*Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.* (1886), 12 App. Cas. 128, P. C.). As to the conditions implied by law on the part of the seller, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 10—15; pp. 152 *et seq.*, *post*; and as to negating implied conditions by express agreement or usage, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 55; p. 279, *post*. Express conditions may be subdivided into conditions in writing and conditions not in writing. In the construction of

224. The term "contract of sale" in the Act includes, where the context admits, both actual sales and agreements to sell (*r*).

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Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a "sale"; but where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called an "agreement to sell" (*s*).

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An agreement to sell becomes a sale when the time elapses, or the conditions are fulfilled, subject to which the property in the goods is to be transferred (*t*).

225. An agreement to sell, or, as it is often called, an executory contract of sale, is a contract pure and simple, whereas a sale, or, as it is called for distinction, an executed contract of sale, is a contract plus a conveyance. Thus, by an agreement to sell a mere *jus in personam* is created, by a sale a *jus in rem* is transferred. Where goods have been sold, and the buyer

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to sell
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such conditions there is nothing peculiar to the contract of sale. For example, where a condition is expressed in writing, parol evidence of usage is not admissible to reduce it to a mere warranty (*Re North Western Rubber Co., Ltd. and Huttenbach & Co.*, [1908] 2 K. B. 907, C. A.); or to extend its scope (*Dickson v. Zizinia* (1851), 10 C. B. 602); see, further, titles CONTRACT, Vol. VII., pp. 520 *et seq.*; EVIDENCE, Vol. XIII., p. 566. The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), contains no express definition of the term "condition," but it is defined by implication (*ibid.*, s. 11) as a term a breach of which entitles the other party to treat the contract as repudiated by the party committing the breach; see *per* FLETCHER MOULTON, L.J., in *Wallis, Son and Wells v. Pratt and Haynes*, [1910] 2 K. B. 1003, C. A. The term is in reality not ambiguous. "Warranty" is, however, defined by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1) (see p. 122, *post*), and a sharp distinction is drawn between conditions and warranties; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 11, 53; pp. 150, 273, *post*; and see the discussion of "warranty," note (*d*), p. 122, *post*. For the distinction between conditional sales and mortgages, see p. 110, *ante*.

(*r*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1).

(*s*) *Ibid.*, s. 1 (3). By *ibid.*, s. 62 (1), "sale" includes a bargain and sale as well as a sale and delivery; see p. 121, *post*, see "goods" defined p. 112, *ante*, and "property," p. 120, *post*. As to "conditions," see note (*q*), p. 115, *ante*. The definition in the text is applicable only where there is a contract of sale. Therefore any transaction whereunder the property may pass, although there is originally no mutual agreement binding the parties to sell and buy, must be governed by some other provision, or by the common law.

(*t*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 1 (4). The rules for determining when an agreement to sell becomes a sale transferring the property in the goods are contained in *ibid.*, ss. 16—19; see pp. 167 *et seq.*, *post*. According to the civil law, which with some statutory modifications was followed in Scotland before the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71) (compare *M'Bain v. Wallace & Co.* (1881), 6 App. Cas. 588, 605, 608), the property in goods sold did not pass to the buyer until delivery. But English law has rejected the test of delivery, and has adopted the rule that the ownership of the goods may be transferred by the contract itself, if the parties so intend. If the parties express their intention clearly no difficulty arises; but in many cases the parties either form no intention as to the precise time when the property is to pass, or fail to express it. To meet these cases the law has worked out a series of more or less artificial canons, which are now embodied in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18. For the history of the English rule, which is as old as the Year Books, see *Cochrane v. Moore* (1890), 25 Q. B. D. 57, C. A. (comparing sale and gift).

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makes default in payment, the seller may sue for the contract price (*u*), but where an agreement to buy is broken, usually the seller's only remedy is an action for unliquidated damages (*v*). Similarly, if an agreement to sell be broken by the seller, the buyer has only a personal remedy against the seller (*w*). The goods are the property of the seller and he can dispose of them. They may be taken in execution for his debts (*a*), and if he becomes bankrupt they pass to his trustee in bankruptcy (*b*). But if there has been a sale, and the seller breaks his engagement to deliver the goods, the buyer has not only a personal remedy against the seller (*c*), but also the usual proprietary remedies in respect of the goods themselves, such as the actions for conversion and detinue (*d*). Again, if there be an agreement for sale and the goods perish, the loss as a rule falls on the seller, while if there has been a sale the loss as a rule falls upon the buyer (*e*).

SUB-SECT. 2.—Definitions.

Ancillary
statutory
definitions.

226. Unless the context or subject-matter otherwise requires, the following terms and expressions have the meanings hereinafter assigned to them (*f*), namely:—

"Action" includes counterclaim and set-off (*g*).

"Buyer" means a person who buys or agrees to buy goods (*h*).

(*u*) See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 49; p. 266, *post*.

(*v*) See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 50; p. 267, *post*; compare *Atkinson v. Bell* (1828), 8 B. & C. 277; *Boswell v. Kilborn* (1862), 15 Moo. P. C. C. 309. For an exception, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 49 (2); see p. 267, *post*. As to the meaning of unliquidated damages, see title DAMAGES, Vol. X., pp. 304, 305.

(*w*) See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 51; p. 268, *post*. In the case of specific or ascertained goods the buyer may sue for specific performance; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 52; p. 272, *post*. As to specific performance generally, see title SPECIFIC PERFORMANCE.

(*a*) See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 26; p. 203, *post*.

(*b*) *Reid v. Maebeth and Gray*, [1904] A. C. 223; *Hayman & Son v. M'Lintock*, [1907] S. C. 936; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 163.

(*c*) See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 51, 52; pp. 268, 272, *post*.

(*d*) As to detinue, see *Langton v. Higgins* (1859), 4 H. & N. 402; and as to conversion, see *Chinery v. Viall* (1860), 5 H. & N. 288; compare *Hollins v. Fowler* (1875), L. R. 7 H. L. 757; see, generally, title TROVER AND DETINUE.

(*e*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 20; see p. 188, *post*.

(*f*) These definitions apply throughout this title, so far as founded on the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), but they do not apply to other Acts, nor to the terms used by the parties in making their contracts. For example, a stipulation in a contract may be a condition although the parties refer to it as a warranty (*ibid.*, s. 11 (1) (b)); see p. 150, *post*. In one case the Act construes a term used in contracts of sale by providing that "month" in a contract of sale means *prima facie* a calendar month; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 10 (2); p. 153, *post*. For the definition of "contract of sale," see p. 113, *ante*.

(*g*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1). The definition is merely inclusive. For a substantive definition, see title ACTION, Vol. I., pp. 2, 3. As to counterclaim and set-off generally, see title SET-OFF AND COUNTERCLAIM, pp. 481 *et seq.*, *post*. For the actions available for breach of contract of sale, see pp. 266 *et seq.*, *post*.

(*h*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1). Buyer and

"Deliverable state" used in reference to goods means such a state that the buyer would under the contract be bound to take delivery of them (i).

"Delivery" means voluntary transfer of possession from one person to another (k).

"Document of title to goods" has the same meaning as it has in the Factors Act, 1889 (l).

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seller must be different persons, but in certain cases a man may buy his own goods when another person sells them; see note (p), p. 114, *ante*. The definition does not apply to cases under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 4, the context of that rule showing that the "buyer" there mentioned is only a bailee with an option to purchase; see note (n), p. 178, *post*.

(i) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (4).

(k) *Ibid.*, s. 62 (1). The transfer must be voluntary. If B. steals goods from A. there is no delivery from A. to B., though possession is transferred. It was necessary to define "delivery" for the purposes of sale, because of the confused use of the term in the decided cases. When possession is voluntarily transferred from one person to another there is always a delivery, which is either at once absolute or, if it be subject to a condition, absolute on the fulfilment of the condition. A delivery effectual for one purpose may be ineffectual for another purpose, and then it is frequently said that there has been no delivery: for instance, when the seller of goods delivers them to a carrier to convey them to the buyer, it is in general as effectual as a delivery to the buyer himself for the purpose of passing the property and risk (see *ibid.*, s. 18, r. 5; p. 170, *post*), and in discharge of the seller's duty to deliver (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 32; see p. 222, *post*), and to divest his lien (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 43 (1) (a); see p. 244, *post*), but it is ineffectual for the purpose of defeating the seller's right of stoppage *in transitu*. To defeat this there must be a further delivery from the carrier to the buyer; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 45 (1); p. 248, *post*. The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), makes no attempt to define "possession," and the term is probably too elusive for the purpose of a statutory definition; see, however, the illuminating judgment of FLETCHER MOULTON, L.J., in *Lord's Trustee v. Great Eastern Railway*, [1908] 2 K. B. 54, 61, C. A. As to possession generally, see title PERSONAL PROPERTY, Vol. XXII., pp. 391 *et seq.*; as to possession on alienation, see *ibid.*, pp. 404 *et seq.*; and compare *Farina v. Home* (1846), 16 M. & W. 119 (warehouseman); *Swanwick v. Sothorn* (1839), 9 Ad. & El. 895; as to "symbolic" delivery, see title GIFTS, Vol. XV., pp. 432, 433; as to possession by bailors and bailees, see title BAILMENT, Vol. I., pp. 523 *et seq.*; and by pawnors and pawnees, title PAWNS AND PLEDGES, Vol. XXII., pp. 239 *et seq.* As to transfer of ownership by delivery of bill of lading, see pp. 184 *et seq.*, *post*; as to transfer of a ship at sea, see *Atkinson v. Maling* (1788), 2 Term Rep. 462; title SHIPPING AND NAVIGATION. As to the effect of the transfer of delivery orders, warrants etc., see pp. 185, 193, 225, *post*.

When the buyer takes possession of goods under a licence to seize, the transaction operates as a delivery of the goods by the seller. Here delivery is effected pursuant to a previously given consent, so that the buyer is really acting under the seller's authority (*Congreve v. Evetts* (1854), 10 Exch. 298, 308). It may also be noted that, for certain purposes, part delivery may operate as if it were a delivery of the whole; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 42, 45 (7); pp. 243, 255, *post*.

(l) 52 & 53 Vict. c. 45, s. 1 (4); Sale of Goods Act, 1893 (56 & 57 Vict. c. 71) s. 62 (1); see title AGENCY, Vol. I., p. 205, note (u). For the purposes of the Factors Act, 1889 (52 & 53 Vict. c. 45) (including the provisions of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 25, 47, which reproduce certain provisions of the Factors Act, 1889 (52 & 53 Vict. c. 45), ss. 8—10), all the documents enumerated are put on the same footing as bills of lading. But this extended operation is strictly confined to the purposes of the Factors Act, 1889 (52 & 53 Vict. c. 45) (see ss. 2, 8—10)—

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"Fault" means wrongful act or default (*m*).

"Future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale (*n*).

A thing is deemed to be done "in good faith" when it is in fact done honestly, whether it be done negligently or not (*o*).

A person is deemed to be "insolvent" who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not (*p*).

"Plaintiff" includes a defendant counterclaiming (*q*).

"Property" means the general property in goods, and not merely a special property (*r*).

that is to say, to dispositions, as affecting the title of third persons, of goods or documents by (1) mercantile agents in possession with the consent of the owner; (2) sellers left in possession after sale; and (3) buyers, being transferees of the documents of title, or being in possession of the goods or documents with the seller's consent; see *Inglis v. Robertson*, [1898] A. C. 616, 630; *Lamb v. Attenborough* (1862), 1 B. & S. 831; *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q. B. 643, C. A.; and, generally, title AGENCY, Vol. I., pp. 152, 205. As between buyer and seller a warehouse certificate, dock warrant or delivery order, or any similar document, does not, like a bill of lading, represent the goods themselves, and so does not *per se* transfer possession; it operates merely as an authority to receive the goods referred to in the document; an attornment by the person in possession to the buyer is necessary (*Farina v. Home* (1846), 16 M. & W. 119, 123 (dock warrant); *Gunn v. Bolckow, Vaughan & Co.* (1875), 10 Ch. App. 491 (warehouse certificate); *M'Ewan v. Smith* (1849), 2 H. L. Cas. 309 (delivery order)); and this is the rule, for whatever purpose a delivery of the goods has to be proved. Even in cases within the Factors Act, 1889 (52 & 53 Vict. c. 45), the question whether any document is a document of title will depend upon whether its nature and operation falls within the concluding words of the definition; see *Gunn v. Bolckow, Vaughan & Co.*, *supra*. As to the mode of transfer of a document of title, see Factors Act, 1889 (52 & 53 Vict. c. 45), s. 11; see p. 200, *post*. See, further, as to the effect of bills of lading and other documents of title, pp. 185, 193, 225, *post*; title SHIPPING AND NAVIGATION.

(*m*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1). As to "default," see note (*o*), p. 190, *post*.

(*n*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1) · see *ibid.*, s. 5 (1). As a seller may contract to sell future goods, so he may in the absence of agreement to the contrary advertise them for sale and at any price, although he may thereby injure the manufacturer, subject to a liability for any fraudulent misrepresentation causing damage to the manufacturer or buyer (*Ajello v. Worsley*, [1898] 1 Ch. 274, 280). The definition will doubtless include the future product of specific land and similar future products; compare note (*c*), p. 121, *post*.

(*o*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (2); compare Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 90; see title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 550, note (*r*).

(*p*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (3); see *Parker v. Gossage* (1835), 2 Cr. M. & R. 617 (general inability to pay debts); *Biddlecombe v. Bond* (1835), 4 Ad. & El. 332 (same); *Re Phoenix Bessemer Steel Co.*, *Ex parte Carnforth Hematite Iron Co.* (1876), 4 Ch. D. 108, C. A. (avowed inability to pay); *Nixon v. Verry* (1885), 29 Ch. D. 196 (petition for liquidation etc.); *R. v. Saddlers' Co.* (1863), 10 H. L. Cas. 404, *per WILLES, J.*, at p. 425. As to acts of bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 13 *et seq.*

(*q*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1).

(*r*) *Ibid.*, s. 62 (1); see "the" property, *i.e.*, the general property in goods distinguished from "a" property, *i.e.*, merely a special property, in

"Quality of goods" includes their state or condition (a).

"Sale" includes a bargain and sale as well as a sale and delivery (a).

"Seller" means a person who sells or agrees to sell goods (b).

"Specific goods" means goods identified and agreed upon at the time a contract of sale is made (c).

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Burdick v. Sewell (1884), 13 Q. B. D. 159, 175, C. A.: 10 App. Cas. 74, 93. The general property may be in one person while a special property is in another, as in the case of a pledge; see title PAWNS AND PLEDGES, Vol. XXII., pp. 236, 239 *et seq.*, 243 *et seq.* Again, the general property may be transferred to one person subject to a special property in another (*Franklin v. Neate* (1844), 13 M. & W. 481 (sale by pawner); *Jenkyns v. Brown* (1849), 14 Q. B. 496 (pledgee of bill of lading); *Dodsley v. Varley* (1840), 12 Ad. & El. 632 (special property in seller)); compare title PAWNS AND PLEDGES, Vol. XXII., p. 241. The right of property in goods may be distinct from the right to their present possession, as in the case of a lien; see *Mulliner v. Florence* (1878), 3 Q. B. D. 484, C. A. (innkeeper); *Milgate v. Kebble* (1841), 3 Man. & G. 100 (seller); and see, generally, titles INNS AND INNKEEPERS, Vol. XVII., pp. 323 *et seq.*; LIEN, Vol. XIX., pp. 1 *et seq.* Again, property in goods may be divided between different owners, but the right to possession may be in one alone (*Nyberg v. Handelaar*, [1892] 2 Q. B. 202, C. A.). As to sale from one part-owner to another, see p. 113, *ante*.

(a) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1); see note (k), p. 159, *post*.

(n) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1). Under the common law system of pleading before the Judicature Acts, the claim for goods bargained and sold and that for goods sold and delivered were regarded as distinct causes of action (*Forbes v. Smith* (1863), 11 W. R. 574), but counts for goods bargained and sold, and for goods sold and delivered, together with any other appropriate money counts, could be joined together as of right in the same declaration; it is now ordinarily sufficient in any action for the price of goods sold to show that the property has passed and the price is payable. The old common law distinction, however, embodies principles of substantive law, so that a seller cannot even now recover the price if he has not delivered the goods, where delivery was an essential part of the cause of action. *Primâ facie* the delivery of the goods and the payment of the price are concurrent conditions (see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 28; p. 204, *post*), but there are many cases where the property has passed, and the price is payable, although the goods have not been delivered, as where the price is payable irrespective of delivery (see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 49 (2); p. 267, *post*), or delivery has been excused. In such cases the price could have been recovered on a count for goods bargained and sold; see, e.g., *Hankey v. Smith* (1796), Peake, 57 [42], n. (delivery refused by buyer), *Kymer v. Suwercropp* (1807), 1 Camp. 109 (payment to precede delivery); *Alexander v. Gardner* (1835), 1 Bing. (N. C.) 671 (loss of goods at buyer's risk); *Scott v. England* (1844), 14 L. J. (Q. B.) 43; *Forbes v. Smith* (1863), 11 W. R. 574 (delivery no condition precedent to payment); see title ACTION, Vol. I., p. 38.

(b) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1). This definition follows from the definition of "contract of sale" given by *ibid.*, s. 1; see p. 113, *ante*. In other statutes the expression "seller" must be construed, literally or not, according to the context and subject-matter; e.g., under the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), the person conducting the sale may be the "seller"; see title MEDICINE AND PHARMACY, Vol. XX., pp. 382, 383.

(c) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1). Specific goods must be distinguished from unascertained or generic goods, i.e., goods defined only by description. Under a contract for specific goods the seller does not fulfil his contract by delivering any goods other than those agreed upon; under a contract for generic goods the seller may deliver any goods which answer to the description. The property in specific goods may be

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"Warranty" means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated (*d*).

SECT. 3.—*Quasi-Contracts of Sale.*

Quasi-
contracts
of sale.

227. In certain transactions, independently of the volition of the parties, the law annexes consequences similar to those which result from a sale, which presupposes a contract express or implied (*e*). Such transactions may be called *quasi-contracts of sale*.

transferred by the contract itself, but no property can be transferred so long as the goods are unascertained; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 16—18; pp. 167, 168, *post*. Again, specific goods may be the subject of an action for specific performance (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 52; see p. 272, *post*). So where there is a contract for specific goods, and the goods have perished at the date of the contract, or subsequently perish before the risk passes to the buyer, the contract is void or is avoided respectively; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 6, 7; pp. 145, 146, *post*. As regards unascertained goods the maxim *genus nunquam perit* would apply. It is conceived that the term "specific" includes the unascertained product of what is specific, and is not confined to actually existing goods, so that *Howell v. Coupland* (1876), 1 Q. B. D. 258, C. A. (future crop of particular land), is still law; compare note (*f*), p. 146, *post*.

(*d*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1); *Chanter v. Hopkins* (1838), 4 M. & W. 399, 404; *Wallis, Son and Wells v. Pratt and Haynes*, [1911] A. C. 394. A definition of warranty was required, because, before the Act, the term had no settled meaning; compare *Parker v. Palmer* (1821), 4 B. & Ald. 387; *Heyworth v. Hutchinson* (1867), L. R. 2 Q. B. 447, 451; *Behn v. Burness* (1863), 3 B. & S. 751, 755, Ex. Ch. Much of the confusion arose from the fact that, where goods have been accepted by the buyer, terms which in their origin were conditions, the breach of which would entitle the buyer to reject the goods, must be treated, for remedial purposes, *ex post facto* as warranties, for the breach of which compensation can only be sought in damages; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 11 (1) (c), 53 (1); pp. 151, 273, *post*; *Graves v. Legg* (1854), 9 Exch. 709, 717; see also title DAMAGES, Vol. X., pp. 336, 337. The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), throughout contrasts the terms "condition" and "warranty," and further provides that a stipulation may be a condition, though called a warranty in the contract (*ibid.*, s. 11 (1) (b); see p. 150, *post*). Two points are noticeable in the definition of a warranty. Firstly, it must be an agreement, a promise that the representation is, or will be, true (*Behn v. Burness*, *supra*; *Bentzen v. Taylor, Sons & Co.* (2), [1893] 2 Q. B. 274, C. A.). It is therefore distinguished from mere immaterial representations, not intended to be promises; see p. 149, *post*; compare title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 698 *et seq.* Secondly, the agreement must be collateral to the main purpose of the contract, such purpose, fulfilment of which is a condition, being the transfer of the property in, and the possession of, goods of the description contracted for (*Wallis, Son and Wells v. Pratt and Haynes*, [1910] 2 K. B. 1003; reversed, [1911] A. C. 394). The warranty is collateral, because the breach of it, unlike the breach of a condition, is not the breach of the whole consideration moving from the party bound (*ibid.*, *per* VAUGHAN WILLIAMS, L.J., [1910] 2 K. B. at p. 1011). The question is one of construction (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11 (1) (b); see p. 150, *post*); see the distinction between dependent and independent agreements stated in title CONTRACT, Vol. VII., pp. 435, 520, 521. For a comparison of warranty and guarantee, see title GUARANTEE, Vol. XV., p. 440, note (*g*).

(*e*) The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), deals only with,

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Judgment
in trespass.

Thus, where in an action for trespass, conversion, or detinue the plaintiff recovers the full value of the goods as damages, and the defendant satisfies the judgment, the transaction operates as a sale from the plaintiff to the defendant as from the time of the satisfaction of the judgment (*f*). When, however, the judgment against the tortfeasor is in substance for the price of the goods, the judgment transfers the property to the defendant without satisfaction (*g*).

228. When one person has wrongfully obtained possession of, or dealt with, the goods of another, the owner of the goods may waive the tort and recover the value of the goods (*h*), as on a sale by himself to that person (*i*). Tort waived.

contracts of sale; see the definition in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 1 (1); p. 113, *ante*; but by *ibid.*, s. 61 (2), the rules of the common law are expressly saved.

(*f*) *Jenk. Fourth Century*, Case No. 88 (trespass); *Cooper v. Shepherd* (1846), 3 C. B. 266 (conversion); *Marston v. Phillips* (1863), 9 L. T. 289 (conversion); *Brinsmead v. Harrison* (1871), L. R. 6 C. P. 584, 588 (conversion); *Re Scarth* (1874), 10 Ch. App. 234 (detinue); *Re Ware, Ex parte Drake* (1877), 5 Ch. D. 866, 871, C. A. (detinue); per THESIGER, L.J., in *Hort v. London and North Western Rail. Co.* (1879), 4 Ex. D. 188, 199, C. A. (conversion); *Eberle's Hotels and Restaurant Co. v. Jonas* (1887), 18 Q. B. D. 459, 468, C. A. (detinue). A recovery in trover of the difference between the value of the goods and the amount of a debt which the plaintiff owes to the defendant would seem to be equivalent to recovery of full value (*Chinery v. Viall* (1860), 5 H. & N. 288). Expenses necessarily incurred in respect of the goods by the defendant may be deducted from the damages (*Peruvian Guano Co. v. Dreyfus Brothers & Co.*, [1892] A. C. 166, per Lord MACNAGHTEN at pp. 170, n., 174 *et seq.*). If a bailee of goods brings the action and recovers full damages, the rule stated in the text must also apply, for the defendant cannot be subjected to a second action at the suit of the owner (*Turner v. Hardcastle* (1862), 11 C. B. (N. S.) 683; *Swire v. Leach* (1865), 18 C. B. (N. S.) 479; *The Winkfield*, [1902] P. 42, C. A.). The rule is probably an illustration of the principle obtaining in cases of indemnity (*Marine Insurance Act*, 1906 (6 Edw. 7, c. 41), s. 79; *Castellain v. Preston* (1883), 11 Q. B. D. 380, C. A.; *Rankin v. Potter* (1873), L. R. 6 H. L. 83, per BLACKBURN, J., at p. 118).

(*g*) *Bradley and Cohn, Ltd. v. Ramsay & Co.* (1912), 106 L. T. 771, C. A. As to trespass generally, see title TRESPASS. As to trover generally, see title TROVER AND DETINUE.

(*h*) Not necessarily any price which may have been put on the goods (*Nicol v. Hennessey* (1896), 44 W. R. 584).

(*i*) *Hambly v. Trott* (1776), Cowp. 371, 376 (trees cut down); explained in *Foster v. Stewart* (1814), 3 M. & S. 191; *Lee v. Shore* (1822), 1 B. & C. 94 (wrongful appropriation by stranger); *Russell v. Bell* (1842), 10 M. & W. 340 (sale by bankrupt after act of bankruptcy); *Birmingham and Staffordshire Gas Co. v. Ratcliff* (1871), L. R. 6 Exch. 224 (fraudulent abstraction of gas); *Nicol v. Hennessey, supra* (wrongful sale by co-owner: rule stated); *Rice v. Reed*, [1900] 1 Q. B. 54, C. A. (wrongful sale by servant); and see title CONTRACT, Vol. VII., p. 464. The owner must prove his title (*Lee v. Shore, supra*). Where the person having wrongful possession of the goods has bought them from the owner's mercantile agent, the owner's right to recover the price is expressly reserved by the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 12 (3). As to waiver of a tort by suing for money had and received, see *Rice v. Reed, supra*; *Cowern v. Nield*, [1912] 2 K. B. 419 (fraudulent infant seller); and title CONTRACT, Vol. VII., p. 484. Another illustration of the principle stated in the text is the case where a person fraudulently induces a sale to an insolvent or infant, and then obtains possession of the goods. Such a case is explainable on the principle that the person in possession cannot by his own wrong set up a sale to

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Estoppel.

So, too, there may be a sale by estoppel. A person may so conduct himself as to be precluded from denying that he intended to be a buyer or a seller, as the case may be, though in fact he had no such intention (*k*).

Part II.—Formation of the Contract.

SECT. 1.—Capacity of Parties.

In general.

229. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property (*l*).

Necessaries.

230. Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor (*m*).

the insolvent or infant, who is thus treated as the fraudulent person's agent to buy (*Selway v. Fogg* (1839), 5 M. & W. 83, *per PARKE, B.*, at p. 84); see *Biddle and Loyd v. Levy* (1815), 1 Stark. 20 (sale to infant); *Hill v. Perrott* (1810), 3 Taunt. 274; *Wilson v. Hart* (1817), 7 Taunt. 295; *Abbotts v. Barry* (1820), 2 Brod. & Bing. 369 (sale to insolvent). Where the fraud consists in a representation as to the credit, ability etc. of another, the representation must be in writing under the Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 6; see *Haslock v. Fergusson* (1837), 7 Ad. & El. 86.

(*k*) *Cornish v. Abington* (1859), 4 H. & N. 549 (buyer); see also *Williamson v. Barton* (1862), 7 H. & N. 899 (buyer at auction), where the court was divided; see, generally, title ESTOPPEL, Vol. XIII., pp. 376 *et seq.* If a man sells goods to one person and the documents of title relating to those goods to another, obviously he is liable to both; see *Covenhy v. Great Eastern Rail. Co.* (1883), 11 Q. B. D. 776, C. A. (two delivery orders for same goods); *Seton v. Lafone* (1886), 18 Q. B. D. 139 (warrant for goods, previously delivered to another, treated as good). Certain cases of sale by estoppel may be referred to the rule that a contract of sale may be implied from the conduct of the parties; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 3; p. 126, *post.* See, further, *Gillett v. Hill* (1834), 2 Cr. & M. 530; *Henderson & Co. v. Williams*, [1895] 1 Q. B. 521, C. A.; *Farquharson Brothers & Co. v. King & Co.*, [1902] A. C. 325.

(*l*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 2. As to capacity, generally, see title CONTRACT, Vol. VII., pp. 341, 342. As to persons under disability, see titles CONTRACT, Vol. VII., pp. 341, 342; ECCLESIASTICAL LAW, Vol. XI., pp. 557, 558; HUSBAND AND WIFE, Vol. XVI., pp. 359 *et seq.*, 411 *et seq.*; INFANTS AND CHILDREN, Vol. XVII., pp. 59, 61, 63 *et seq.*; LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 396 *et seq.*; as to corporations, see title CORPORATIONS, Vol. VIII., pp. 379 *et seq.*; compare title LOCAL GOVERNMENT, Vol. XIX., pp. 304 *et seq.*; and, as to the distinction between capacity and authority, see titles AGENCY, Vol. I., pp. 148 *et seq.*, 160 *et seq.*; BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 489 *et seq.*

(*m*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 2 (proviso); *Cowern v. Nield*, [1912] 2 K. B. 419 (trading contract). As to infants, see title INFANTS AND CHILDREN, Vol. XVII., pp. 67 *et seq.*; as to lunatics, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 398, 441. A contract made by a drunken man, known to be drunk, is as a rule voidable, but a drunkard is liable when sober for necessaries supplied to him when drunk (*Gore v. Gibson* (1845), 13 M. & W. 623, *per POLLOCK, C.B.*, at p. 626); see title CONTRACT, Vol. VII., p. 342. The obligation to pay for necessaries supplied to an incompetent person really arises

231. In relation to sales to infants or other incompetent persons, "necessaries" means goods suitable to the condition of life of the infant or other incompetent person, and to his actual requirements at the time of the sale and delivery (*n*).

Mere luxuries can never be necessaries, but luxurious articles of utility may come under the definition of "necessaries" in the special circumstances of a particular case (*o*). The standard is always relative (*p*).

SECT. 1.
Capacity
of Parties.

Definition of
"necessaries."

quasi ex contractu; see title INFANTS AND CHILDREN, Vol. XVII., p. 67, note (*o*). It should be noticed that the obligation is only to pay a "reasonable price," not necessarily the price mentioned in the contract; and that the obligation arises on the delivery of the necessaries. There would seem to be, therefore, no obligation on an infant to accept goods, being necessaries, under an executory contract. The liability is on simple contract only: thus, an infant is not liable on an instrument as such, given to secure the price of necessaries, but he must pay a reasonable price for them; see title INFANTS AND CHILDREN, Vol. XVII., p. 69. As to contracts with infants other than for necessaries, see *ibid.*, pp. 63, 67, 73, 74. As to contracts for necessaries other than goods, see *Roberts v. Gray* (1913), 108 L. T. 232, C. A. For a form of contract to supply an infant with necessaries, with a guarantee, see *Encyclopædia of Forms and Precedents*, Vol. VI., p. 555.

(*n*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 2; as to necessaries generally, see title INFANTS AND CHILDREN, Vol. XVII., pp. 67 *et seq.*; compare *West Ham Union Guardians v. Pearson* (1890), 62 L. T. 638 (expenses incurred by guardians in looking after a man suffering from *delirium tremens*, as being necessary expenses, can be recovered from him afterwards), see also *Re Clabbon (an Infant)*, [1904] 2 Ch. 465 (maintenance of infant pauper); title CUSTOM AND USAGES, Vol. X., p. 278.

(*o*) *Chapple v. Cooper* (1844), 13 M. & W. 252, 258; see title INFANTS AND CHILDREN, Vol. XVII., p. 68. The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), lays down a uniform rule for all incompetent persons, but the cases naturally have mainly arisen with regard to infants. Up to the passing of the Act the tendency of the decisions was to restrict the liability of infants, and the older cases, in which infants were held liable, must be tested with reference to the language of the Act.

(*p*) *Peters v. Fleming* (1840), 6 M. & W. 42, *per* PARKE, B., at p. 47 ("articles fit to maintain the particular person in the state, station and degree in life in which he is"). The following have been held to be necessaries, namely, silk dresses ordered by infant in her mother's presence (*Dalton v. Gib* (1839), 5 Bing. (N. C.) 198); great-coat for attorney's articulated clerk (*Brayshaw v. Eaton* (1839), 5 Bing. (N. C.) 231); horse supplied to infant under medical direction (*Hart v. Prater* (1837), 1 Jur. 623); harness and horse clothing sold to infant manager of a farm (*Hill v. Arbon* (1876), 34 L. T. 125); necessaries for family of married infant (*Turner v. Trisby* (1719), 1 Stra. 168); see also *Chapple v. Cooper*, *supra* (funeral for husband of infant widow); and the cases cited in title INFANTS AND CHILDREN, Vol. XVII., p. 68, note (*a*). The following have been held not to be necessaries, namely, clothes for infant already sufficiently supplied (*Steedman v. Rose* (1842), Car. & M. 422 (naval officer)); and see the cases cited in title INFANTS AND CHILDREN, Vol. XVII., p. 67, note (*p*)); hunter worth £150 supplied to infant member of hunt (*Skrine v. Gordon* (1875), 9 I. R. C. L. 479); betting books (*Jenner v. Walker* (1868), 10 L. T. 398); silver goblet to give to friend, and other jewellery (*Eyder v. Wombwell* (1868), L. R. 4 Exch. 32, Ex. Ch.); goods supplied to infant to trade with (*Whywall v. Champion* (1737), 2 Stra. 1083); curios in quantities (*Stocks v. Wilson* (1913), 29 T. L. R. 352 (infant's equitable liability for fraudulent representation of full age); and see the cases cited in title INFANTS AND CHILDREN, Vol. XVII., p. 68, note (*f*); but compare *Tuberville v. Whitehouse* (1823), 1 C. & P. 94).

SECT. 2.
Formal-
ties of the
Contract.
How made.

SECT. 2.—*Formalities of the Contract.*

SUB-SECT. 1.—*General Rule as to Form.*

232. Subject to the provisions of the Sale of Goods Act, 1893 (*g*), and any other statutory provisions (*r*), a contract of sale may be made in writing, either with or without seal, or by word of mouth, or partly in writing and partly by word of mouth (*s*), or may be implied from the conduct of the parties (*t*).

(*g*) 56 & 57 Vict. c. 71, s. 4; see p. 127, *post*.

(*r*) As to contracts not to be performed within a year, see title CONTRACT, Vol. VII., pp. 365, 366; as to the sale of horses in fairs and markets, see title MARKETS AND FAIRS, Vol. XX., p. 54; as to the sale of sculpture with copyright, see title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., p. 207; as to the sale of British ships and shares therein, see title SHIPPING AND NAVIGATION; and as to the sale of specific goods, see pp. 174—176, *post*. The law affecting corporations is expressly excepted from the operation of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 3 (*ibid.*); see titles COMPANIES, Vol. V., pp. 299 *et seq.*; CORPORATIONS, Vol. VIII., pp. 380 *et seq.*

(*s*) *E.g.*, a written offer to sell goods may be verbally accepted, or a verbal offer may be accepted in writing; see *Watkins v. Rymill* (1883), 10 Q. B. D. 178, 188. So, again, goods may be ordered by letter and supplied without further communication (*Taylor v. Jones* (1875), 1 C. P. D. 87); or goods may be ordered by letter with subsequent verbal alterations, and supplied accordingly (*Hoadly v. M'Laine* (1834), 10 Bing. 482); and see title CONTRACT, Vol. VII., p. 527. "Writing" *prima facie* includes "printing, lithography, photography, and other modes of representing or reproducing words in a visible form" (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 20); see title STATUTES.

(*t*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 3; see "contract of sale," defined p. 113, *ante*. A contract of sale may be implied from conduct (1) as an inference of fact, that is to say, when the parties really intend a sale, but do not express it in words, as, for example, when a man takes up an article in a shop and pays for it, or otherwise appropriates it with the consent of the owner; or where an unsigned contract is acted on by the parties according to its terms (*Brogden v. Metropolitan Rail. Co.* (1877), 2 App. Cas. 666): in such cases there is in fact "an understanding between the parties," which may be called an implied contract (*Falcke v. Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234, C. A., *per* Bowen, L.J., at p. 249); see title CONTRACT, Vol. VII., pp. 334, 463 *et seq.*; or (2) as an inference of law; "In such a case the law does not require an actual agreement, but implies a contract from the circumstances; in fact, the law itself makes the contract" (*Gore v. Gibson* (1845), 13 M. & W. 623, *per* Pollock, C.B., at p. 626; and see *Rumsey v. North Eastern Rail. Co.* (1863), 14 C. B. (N. S.) 641 (contract implied against express intention)); see title CONTRACT, Vol. VII., p. 334. As to the case of a party so conducting himself as to be precluded from denying that he intended to be a buyer or seller, as the case may be, see p. 124, *ante*. Again, a new contract may be implied by law from acts done in part performance of a contract of sale, as, for example, where the buyer retains part of the goods delivered (*Hart v. Mills* (1846), 15 M. & W. 85; *Bartholomew v. Markwick* (1863), 15 C. B. (N. S.) 711 (repudiation of a contract by buyer); *Ozen-dale v. Wetherell* (1829), 9 B. & C. 386; *Mavor v. Pyne* (1825), 3 Bing. 285 (contract not performable within a year); Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 30 (1); see p. 212, *post*), or has consumed the goods before a valuation of the price (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 9; see p. 148, *post*). For quasi-contracts, see p. 122, *ante*; as to implied contracts generally, see title CONTRACT, Vol. VII., pp. 334, 463 *et seq.* For various forms of contract for the sale of goods, see *Encyclopædia of Forms and Precedents*, Vol. XI., pp. 575—609, Vol. XVI., p. 558.

SUB-SECT. 2.—*Construction.*SECT. 2.
Formal-
ties of the
Contract.Interpreted
like other
contracts.

233. A contract of sale reduced into writing must be construed and given effect to like any other written contract (*u*).

In both written and verbal contracts any right, duty, or liability which would arise under a contract of sale by implication of law may be negatived or varied by express agreement, or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract (*v*).

SECT. 3.—*Contracts for £10 or Upwards.*SUB-SECT. 1.—*In General.*

234. A contract for the sale (*w*) of any goods (*x*) of the value of £10 or upwards is not enforceable by action (*y*) unless the buyer accepts (*a*) part of the goods so sold and actually receives the same, or gives something in earnest (*b*) to bind the contract, or in part payment (*b*); or unless some note or memorandum in writing of the contract is made and signed (*c*) by the party to be charged or his agent (*d*) in that behalf (*e*).

Statutory
formalities.

(*u*) *Coddington v. Paleologo* (1867), L. R. 2 Exch. 193, 200; compare *Honck v. Muller* (1881), 7 Q. B. D. 92, 103, C. A. The ordinary rules also with regard to the admissibility of oral evidence apply; see titles CONTRACT, Vol. VII., pp. 509 *et seq.*; DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 433 *et seq.*; EVIDENCE, Vol. XIII., pp. 566 *et seq.* An invoice is not *per se* a written contract: it is only evidence of a contract, and may be contradicted according to the fact (*Holding v. Elliott* (1860), 5 H. & N. 117).

(*v*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 55; see p. 279, *post*. See also titles CUSTOM AND USAGES, Vol. X., pp. 260 *et seq.*; DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 442, commenting on the maxim *expressum facit cessare tacitum* and *expressio unius est exclusio alterius*.

(*w*) See p. 113, *ante*. For the distinction between contracts of sale and contracts for work and labour, see note (*o*), p. 113, *ante*; title WORK AND LABOUR.

(*x*) See p. 112, *ante*.

(*y*) See p. 118, *ante*. "Action" also includes proceedings under an arbitration (*Re Cox, McEuen & Co. and Hoare, Marr & Co.* (1907), 96 L. T. 719, C. A.). For the effect of the words "is not enforceable," see p. 143, *post*.

(*a*) See pp. 129 *et seq.*, *post*.

(*b*) See p. 133, *post*.

(*c*) As to signature, see title CONTRACT, Vol. VII., pp. 375 *et seq.* As to writing, see note (*s*), p. 126, *ante*. The contract must be complete at the time the memorandum is made (*Munday v. Asprey* (1880), 13 Ch. D. 855).

(*d*) See p. 137, *post*.

(*e*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4 (1). The assimilation of the language of *ibid.* to that of the Statute of Frauds (29 Car. 2, c. 3), s. 4, makes it clear that the rule is part of the *lex fori* (*Leroux v. Brown* (1852), 12 C. B. 801). The defence that these provisions have not been complied with must be specially pleaded, both in the High Court and county court (*Bruton v. Branson*, [1898] 2 Q. B. 219). As to second actions on the contract after waiver of the defence in the first, see *Humphries v. Humphries*, [1910] 2 K. B. 531, C. A., under the Statute of Frauds (29 Car. 2, c. 3), s. 4. As to the variation of an enforceable contract by the addition or substitution of new terms, see title CONTRACT, Vol. VII., pp. 373, 422, 424; and, as to its express or implied rescission, see *ibid.*, pp. 373, 422, 423.

SECT. 3. These provisions apply to every such contract notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery (*f*); or that some act may be requisite for the making or completing thereof, or rendering them fit or ready for delivery (*g*).

Contracts included.

235. A contract of sale within the meaning of the aforesaid provisions includes (*h*)—

(1) an entire contract for the sale of goods, and for other objects, where the goods are of the value of £10 or upwards (*i*);

(2) an entire contract for the sale of goods of unascertained value at the date of the contract, which are afterwards ascertained to be of the value of £10 or upwards (*k*);

(3) an entire contract for the sale of a quantity of goods, whether all are in existence or not, each being under the value of £10, but collectively of the value of £10 or upwards (*l*).

Promise to re-sell.

A promise by the buyer to resell the goods to the seller, forming part of an entire and enforceable contract for the sale of the goods to the buyer, is not a contract which requires any further formalities for its enforcement (*m*).

Effect of Statute of Frauds, s. 4.

236. A contract of sale complying with the above requirements must, if it constitutes an agreement which is not to be performed within the space of one year from the making thereof (*n*), or forms part of an entire contract, the consideration for which is an interest in or concerning land (*o*), also comply with the Statute of Frauds (*p*).

(*f*) *I.e.*, "future goods"; see p. 120, *ante*.

(*g*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4 (2), re-enacting the Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 7, repealed by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

(*h*) These propositions are substantially taken from an article by STEPHEN, J., and Professor POLLOCK in the Law Quarterly Review, Vol. I., p. 11.

(*i*) *Astey v. Emery* (1815), 4 M. & S. 262 (price to include carriage); *Harman v. Reeve* (1856), 18 C. B. 587 (sale and agistment of horse for lump sum); *Head v. Baldrey* (1837), 6 Ad. & El. 459 (contract for sale and payment of previous debt).

(*k*) *Watts v. Friend* (1830), 10 B. & C. 446 (sale of produce of ungrown crop).

(*l*) *Baldey v. Parker* (1823), 2 B. & C. 37 (several articles bought at shop); *Elliott v. Thomas* (1838), 3 M. & W. 170 (different kinds of steel); *Scott v. Eastern Counties Rail. Co.* (1843), 12 M. & W. 33 (existing and future goods); *Bigg v. Whisking* (1853), 14 C. B. 195 (purchases at separate places treated as one); compare *Price v. Lea* (1823), 1 B. & C. 156 (where the contract was severable).

(*m*) *Williams v. Burgess* (1839), 10 Ad. & El. 499, distinguishing *Watts v. Friend*, *supra*.

(*n*) *Prested Miners Co., Ltd. v. Gardner, Ltd.*, [1911] 1 K. B. 425, C. A.; *Mavor v. Pyne* (1825), 3 Bing. 285; *Boydell v. Drummond* (1809), 11 East, 142 (both cases of books published in parts); *Re Pentreguinea Fuel Co., Ex parte Acraman* (1862), 8 Jur. (N. S.) 706, C. A. (supply of coal); *Lavallette v. Riches & Co.* (1907), 24 T. L. R. 2; and see title CONTRACT, Vol. VII., p. 365.

(*o*) *Falmouth (Earl) v. Thomas* (1832), 1 Cr. & M. 89 (lease with crops);

(*p*) For note (*p*), see p. 129.

237. An acceptance may precede, be contemporaneous with or subsequent to an actual receipt (*q*).

The question whether there has been an acceptance or an actual receipt is one of fact (*r*). The question whether evidence of acceptance or actual receipt exists is one of law (*s*).

238. Acceptance and actual receipt of a sample of the goods is an acceptance and actual receipt of part of the goods, if the sample is taken as part of the bulk, but not otherwise (*t*).

SUB-SECT. 2.—Acceptance.

239. There is an acceptance (*u*) of goods, where the buyer does any act (*v*) in relation to the goods which recognises a pre-existing (*w*) contract of sale, whether there be an acceptance in performance of the contract or not (*x*).

It is therefore not necessary that the act done by the buyer should amount to an admission of any particular terms of the

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and receipt.
Acceptance
and actual
receipt of
sample.

Definition
and scope of
acceptance.

Harvey v. Graham (1836), 5 Ad. & El. 61 (lease and sale of straw); *Mechelen v. Wallace* (1837), 7 Ad. & El. 49; *Vaughan v. Hancock* (1846), 3 C. B. 766; *Kelly v. Webster* (1852), 12 C. B. 283 (lease with furniture); *Ronayne v. Sherrard* (1877), 11 I. R. C. L. 146 (sale of building materials on surrender of lease); compare *Mayfield v. Wadslcy* (1824), 3 B. & C. 357, where the contracts were held (LITTLEDALE, J., dissenting) to be severable.

(*p*) 29 Car. 2, c. 3; see title CONTRACT, Vol. VII., p. 361.

(*q*) *Cusack v. Robinson* (1861), 1 B. & S. 299.

(*r*) *Edan v. Dudfield* (1841), 1 Q. B. 302, per DENMAN, C.J.; *Bushel v. Wheeler* (1844), 15 Q. B. 442; *Cooper v. Bill* (1865), 3 H. & C. 722.

(*s*) *Page v. Morgan* (1885), 15 Q. B. D. 228, C. A.; *Abbott & Co. v. Wolsey*, [1895] 2 Q. B. 97, C. A. (acceptance); *Castle v. Swooner* (1861), 6 H. & N. 828, Ex. Ch. (actual receipt).

(*t*) *Talver v. West* (1816), Holt (N. P.), 178; *Klinitz v. Surry* (1805), 5 Esp. 267; *Hinde v. Whitehouse* (1806), 7 East, 558; *Gardner v. Grout* (1857), 2 C. B. (N. S.) 340 (sample part of bulk); *Cooper v. Elston* (1796), 7 Term Rep. 14; *Simonds v. Fisher* (1857), cited in *Gardner v. Grout*, *supra* (sample not part of bulk).

(*u*) *I.e.*, within the meaning of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4; this qualification is necessary, as acceptance in performance under *ibid.*, s. 35, is distinguishable; see p. 230, *post*.

(*v*) Intimation in words of an acceptance, without any act, would seem to be ineffectual under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4, though it is otherwise under *ibid.*, s. 35 (*Abbott & Co. v. Wolsey*, *supra*, per RIGBY, L.J., at p. 103).

(*w*) *Cusack v. Robinson*, *supra*, where it was held that an agreement to buy specific goods was at the same time an acceptance, would seem to be no longer authoritative on this point; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4 (3).

(*x*) *Ibid.*; *Abbott & Co. v. Wolsey*, *supra*. Up to the time of the decision in *Kibble v. Gough* (1878), 38 L. T. 204, C. A., at any rate in the earlier cases, an acceptance was considered to be an acceptance of the goods, although such acceptance might be revoked (*Morton v. Tibbett* (1850), 15 Q. B. 428). A rejection of the goods was therefore material to show that there was no acceptance. This view prevailed even as late as *Taylor v. Smith*, [1893] 2 Q. B. 65, C. A. In *Kibble v. Gough*, *supra*, it was first decided that a rejection of the goods was not inconsistent with other acts by the buyer in admission of the contract, constituting an acceptance under the Statute of Frauds (29 Car. 2, c. 3), s. 17. *Kibble v. Gough*, *supra*, was followed by *Page v. Morgan*, *supra*, both cases defining acceptance in terms now adopted by the Act. Many of the cases before *Kibble v. Gough*, *supra*, may therefore be considered as obsolete (see the judgments in *Abbott & Co. v. Wolsey*, *supra*), and the authority of others is doubtful.

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contract, or of their due performance by the seller (a). Accordingly, an act done by way of, or accompanying, a rejection of the goods may amount to an acceptance (b).

An act done by way of acceptance may be ineffectual if it be done against the consent of the seller (c).

Particular
instances.

240. In particular an acceptance takes place (d)—

(1) where the buyer examines the goods, or takes a sample

(a) See the definition of acceptance, p. 129, *ante*; *Tomkinson v. Staight* (1856), 17 C. B. 697.

(b) As being an act done "in relation to the goods which recognises a pre-existing contract of sale" (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4 (3)).

(c) *Taylor v. Wakefield* (1856), 6 E. & B. 765; *Smith v. Hudson* (1865), 6 B. & S. 431; *Crosby v. Wadsworth* (1805), 6 East, 602 (Statute of Frauds (29 Car. 2, c. 3), s. 4). It has been so decided with regard to payment (*Davis v. Phillips, Mills & Co.* (1907), 24 T. L. R. 4), and the effect of acceptance is the same; compare, however, *Taylor v. Great Eastern Railway*, [1901] 1 K. B. 774, *per* BIGHAM, J., at p. 779, where the learned judge says *obiter* that the verbal contract is under the Act perfectly good, whence it should follow that the buyer has a right to accept.

(d) The following cases were decided before the Act, their authority now being dependent upon whether the conduct of the buyer amounted to an act "in relation to the goods which recognises a pre-existing contract of sale." The cases in which it was held that an acceptance did not exist may not be now authoritative; those in which an acceptance was established probably are:—Acceptance: *Chaplin v. Rogers* (1800), 1 East, 192 (resale); *Hinde v. Whitehouse* (1806), 7 East, 558 (retainer of sample as part of bulk); *Coleman v. Gibson* (1832), 1 Mood. & R. 168 (delay in rejection of goods); *Baines v. Jevons* (1836), 7 C. & P. 288 (buyer's declarations as owner); *Bill v. Bament* (1841), 9 M. & W. 36 (direction by buyer as to marking of goods evidence of acceptance); *Bushel v. Wheeler* (1844), 15 Q. B. 442 (silence by buyer for seven months after arrival, then rejection); *Farina v. Home* (1846), 16 M. & W. 119 (long retainer of delivery warrant); *Beaumont v. Brengeri* (1847), 5 C. B. 301 (user and other acts of ownership); see also *Wright v. Percival* (1839), 3 Jur. 1145; *Saunders v. Topp* (1849), 4 Exch. 390 (selection of goods by buyer coupled with subsequent express approval); *Morton v. Tibbett* (1850), 15 Q. B. 428 (resale by buyer before receipt of goods); *Gilliat v. Roberts* (1850), 19 L. J. (ex.) 410 (receipt of part and retention without objection); *Gardner v. Grout* (1857), 2 C. B. (n. s.) 340 (samples asked for and taken as part of bulk); *Currie v. Anderson* (1860), 2 E. & E. 592, Ex. Ch. (long detention of bill of lading); *Simmonds v. Humble* (1862), 13 C. B. (n. s.) 258 (weighing bulk and comparing samples after sale); *Kershaw v. Ogden* (1865), 3 H. & C. 717 (packing and part removal after sale); *Marshall v. Green* (1875), 1 C. P. D. 35 (buyer felling timber sold and reselling part). No acceptance: *Howe v. Palmer* (1820), 3 B. & Ald. 321 (goods set aside by seller at buyer's request: no examination by buyer); *Phillips v. Bistolli* (1824), 2 B. & C. 511 (temporary receipt of goods sold at auction: prompt return); *Maberley v. Sheppard* (1833), 10 Bing. 99 (work done by buyer on unfinished chattel); *Norman v. Phillips* (1845), 14 M. & W. 277 (rejection on arrival: retention of invoice for a month); followed in *Hopton v. McCarthy* (1882), 10 L. R. Ir. 266; compare *Bushel v. Wheeler*, *supra*; *Meredith v. Meigh* (1853), 2 E. & B. 364 (silence by buyer after notice of shipment, and subsequent rejection); *Parker v. Wallis* (1855), 5 E. & B. 21 (spreading out seed bought: doubtful act of ownership); *Simonds v. Fisher* (1857), cited in *Gardner v. Grout*, *supra* (samples not part of bulk asked for after sale, and prices written on labels); see also *Cooper v. Elston* (1796), 7 Term Rep. 14; *Barnett v. Farley* (1864), 11 L. T. 107 (objection by buyer on delivery: rejection shortly after); *Smith v. Hudson* (1865), 6 B. & S. 431 (no examination by buyer on delivery, or other act); *Rickard v. Moore* (1878), 38 L. T. 841,

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thereof, in circumstances showing that he is doing so in order to see whether the goods are in accordance with a contract of sale to him (e);

(2) where he marks the goods as being goods to be delivered under a contract of sale (f);

(3) where he resells, or attempts to resell, the goods, or does any other act in relation to them which amounts to an acceptance thereof in performance of the contract (g);

(4) where, the goods being at the time of the contract in the buyer's possession as the seller's bailee, the buyer acts in relation thereto in a manner inconsistent with the continuance of his former possession as a bailee, so as to show that he has taken to the goods as an owner thereof (h).

241. An act done by the buyer in relation to the goods may, where it is ambiguous, be explained by a contemporaneous declaration on his part, and by the surrounding circumstances, so as to show that the act does or does not amount to the recognition of a pre-existing contract of sale (i); but if the act in itself amounts to such a recognition, its effect as an acceptance is not nullified by a statement by the buyer that he rejects the goods (k).

Declaration
of buyer.

242. The seller is not the buyer's agent to accept the goods (l).

Seller not
buyer's agent.

C. A. (sample: examination and rejection); compare *Page v. Morgan*, (1885), 15 Q. B. D. 228, C. A.; *Hopton v. M'Carthy* (1882), 10 L. R. Ir. 266 (prompt rejection on arrival); *Taylor v. Smith*, [1893] 2 Q. B. 65, C. A. (mere survey of goods coupled with rejection); see on this case, *Taylor v. Great Eastern Railway*, [1901] 1 K. B. 774, per BIGHAM, J., at p. 779.

(e) *Kibble v. Gough* (1878), 38 L. T. 204, C. A.; *Page v. Morgan*, *supra*; *Abbott & Co. v. Wolsey*, [1895] 2 Q. B. 97, C. A. *Kent v. Huskinson* (1802), 3 Bos. & P. 233; *Hunt v. Hecht* (1853), 8 Exch. 814; *Nicholson v. Bower* (1858), 1 E. & F. 172, where after examination the goods were rejected, seem to be no longer law; and *Taylor v. Smith*, *supra*, does not seem to be reconcilable with the principles laid down in *Abbott & Co. v. Wolsey*, *supra*.

(f) *Bill v. Bament* (1841), 9 M. & W. 36, per PARKE, B., at p. 37.

(g) *Taylor v. Great Eastern Railway*, *supra* (attempted resale); *Parker v. Wallis* (1865), 5 E. & B. 21 (spreading out seed thinly). The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4 (3), seems to imply that an act amounting to an acceptance under *ibid.*, s. 35, is also an acceptance under *ibid.*, s. 4; see p. 230, *post*. For example the passive conduct of the buyer, which amounts to an acceptance under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 35, such as silence and delay in rejection of the goods after delivery, would probably be sufficient. But there may be acts recognising a pre-existing contract of sale which do not constitute an acceptance in performance.

(h) *Edan v. Dudfield* (1841), 1 Q. B. 302; followed in *Lillywhite v. Devereux* (1846), 15 M. & W. 285; *Taylor v. Wakefield* (1856), 6 E. & B. 765; *Hazard v. Chew* (1894), 11 T. L. R. 37. See the illustrations given by the Court in *Lillywhite v. Devereux*, *supra*.

(i) *Abbott & Co. v. Wolsey*, *supra*; *Edan v. Dudfield*, *supra*.

(k) *Abbott & Co. v. Wolsey*, *supra*, per Lord ESHER, M.R., referring to *dicta* in *Taylor v. Smith*, *supra*.

(l) It is submitted that sending written instructions to the seller to deal with the goods may be an act of acceptance by the buyer himself. There is no modern decided case on the proposition in the text, but it is submitted that the analogy of agency to sign a memorandum applies (*Wright v. Dannah* (1809), 2 Camp. 203; *Farebrother v. Simmons* (1822), 5 B. & Ald.

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When
receipt
takes place.

SUB-SECT. 3.—*Actual Receipt.*

243. An actual receipt of the goods by the buyer takes place when there is a delivery of the goods to or into the control (*m*) of the buyer so as to divest the seller's right of lien in respect thereof (*n*). Where the goods are, at the time of the contract, in the possession

333: *Sharman v. Brandt* (1871), L. R. 6 Q. B. 720, Ex. Ch.; and see title AGENCY, Vol. I., p. 152, note (*d*).

(*m*) There may be an actual receipt although the sheriff holds the actual custody of the goods (*Union Bank of London v. Lenanton* (1878), 47 L. J. (Ex.) 409, C. A.).

(*n*) *Baldey v. Parker* (1823), 2 B. & C. 37, per HOLROYD, J., at p. 44; *Bill v. Bament* (1841), 9 M. & W. 36; *Cusack v. Robinson* (1861), 1 B. & S. 299, per curiam. As to the divesting of the lien, see pp. 244 *et seq.*, post. Illustrations of actual receipt are *Cooper v. Elston* (1796), 7 Term Rep. 14 (delivery of sample not as part of bulk); *Hinde v. Whitehouse* (1806), 7 East, 558 (sample delivered as part of bulk); *Howe v. Palmer* (1820), 3 B. & Ald. 321 (goods set aside for buyer, but no actual delivery); *Baldey v. Parker*, *supra* (buyer's refusal to receive); *Phillips v. Bistolli* (1824), 2 B. & C. 511 (temporary detention of goods sold at auction); *Bentall v. Burn* (1824), 3 B. & C. 423 (mere acceptance by buyer of delivery order no actual receipt); *Proctor v. Jones* (1826), 2 C. & P. 532 (marking goods with buyer's initials, but no actual delivery); *Holderness v. Shackels* (1828), 8 B. & C. 612 (same); *Maberley v. Sheppard* (1833), 10 Bing. 99 (work done by buyer on unfinished chattel: no actual delivery); *Smith v. Surman* (1829), 9 B. & C. 561 (directions by buyer as to cutting of timber sold, and offer of resale: no actual delivery); compare *Tansley v. Turner* (1835), 2 Bing. (N. C.) 151 (timber on land of third person put at buyer's disposal); and *Marshall v. Green* (1875), 1 C. P. D. 35 (timber on third person's land cut by buyer and resold); *Dodsley v. Varley* (1840), 12 Ad. & El. 632 (special right of seller after delivery analogous to lien); *Bill v. Bament*, *supra* (goods to be paid for on delivery: no actual delivery); *Farina v. Home* (1846), 16 M. & W. 119 (transfer to buyer of warrant without attornment of wharfinger); *Simonds v. Fisher* (1850), cited in *Gardner v. Grout* (1857), 2 C. B. (N. S.) 340 (delivery of samples not as part of bulk); *Gardner v. Grout*, *supra* (sample delivered as part of bulk); *Hunt v. Hecht* (1853), 8 Exch. 814 (delivery to wharfinger by buyer's authority); *Baylis v. Lundy* (1861), 4 L. T. 176 (attornment of warehouseman to buyer); *Kershaw v. Ogden* (1865), 3 H. & C. 717 (loading in buyer's cart); *Abbott & Co. v. Wolsey*, [1895] 2 Q. B. 97, C. A. (delivery by seller's lighterman of receiving note to buyer). Where the seller agrees to hold the goods as the buyer's bailee, some doubt may exist how far the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 41 (2) (see p. 243, post), which preserves the lien in such a case, has modified the law as to actual receipt. Where, at the time of the attornment, no right of lien exists, the attornment seems to amount to an actual receipt, for the fact that the lien may afterwards revive is immaterial (*Castle v. Swooner* (1861), 6 H. & N. 828, Ex. Ch., per WILLIAMS, J., at p. 834); but where there is a lien at the time, the case seems to be doubtful. At common law, however, an attornment *ipso facto* divested the lien, which revived on the buyer's insolvency only; see note (*d*), p. 243, post. The cases on attornment are *Elmore v. Stone* (1809), 1 Taunt. 458 (horse sold left at livery with seller); *Tempest v. Fitzgerald* (1820), 3 B. & Ald. 680; *Carter v. Toussaint* (1822), 5 B. & Ald. 855 (ready money bargain: no waiver of lien); *Re Tate, Ex parte Moffatt* (1841), 2 Mont. D. & De G. 170 (goods by custom left with seller in pledge); *Beaumont v. Brengeri* (1847), 5 C. B. 301 (carriage: buyer's acts of ownership); *Holmes v. Hoskins* (1854), 9 Exch. 753 (ready money bargain), following *Tempest v. Fitzgerald*, *supra*; *Marvin v. Wallis* (1856), 6 E. & B. 726 (seller borrows horse after sale); *Farrer v. Kirkby* (1888), 4 T. L. R. 543 (horse left in stable of third person); *Re Roberts, Evans v. Roberts* (1887), 36 Ch. D. 196 (mere continuance of seller's possession); *Nicholls v. White* (1910), 103 L. T. 800 (stack of hay on seller's land: seller's admission of attornment).

of the buyer as the seller's bailee, the same acts of the buyer which constitute an acceptance of the goods also constitute an actual receipt thereof (o).

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244. A delivery of the goods to a carrier, or other agent for the transmission of the goods to the buyer, is an actual receipt of the goods by the buyer by his agent the carrier (p), except where the seller reserves the right of disposal (a); but such a delivery is not an acceptance of the goods by the buyer, the carrier or such other agent not being the buyer's agent for acceptance (b).

Delivery to
carrier.

SUB-SECT. 4.—*Earnest and Part Payment.*

245. "Earnest" means a coin, or something valuable, given by the buyer to the seller to signify the conclusion of the bargain (c). The thing given does not lose its character of earnest because the parties may agree that it shall afterwards form part of the price (d).

Earnest.

Part payment must be made by some act independent of, or under an agreement collateral to, the contract sought to be enforced. It is not sufficient that it should depend upon a term of the verbal contract itself (e). Subject thereto, part payment may be made in any way which constitutes payment (f); but it must be accepted by the seller (g).

Part pay-
ment.

(o) *Lillywhite v. Devereux* (1846), 15 M. & W. 285, following *Edan v. Dudfield* (1841), 1 Q. B. 302. As to acceptance, see pp. 129 *et seq.*, *ante*.

(p) *Smith v. Hudson* (1865), 6 B. & S. 431, *per* BLACKBURN, J.; *Taylor v. Smith*, [1893] 2 Q. B. 65, C. A., *per* Lord HERSCHELL, L.C. But the goods on delivery to the carrier must be in accordance with the contract, otherwise there is no actual receipt (*Gorman v. Boddy* (1845), 2 Car. & Kir. 145). As to delivery to a carrier, see, further, p. 222, *post*.

(a) On principle, there being no delivery; see, p. 222, *post*.

(b) *Smith v. Hudson*, *supra*, *per* BLACKBURN, J., at p. 448; *Hanson v. Armitage* (1822), 5 B. & Ald. 557 (wharfinger); *Hart v. Bush* (1858), E. B. & E. 494 (wharfinger); *Taylor v. Smith*, *supra*, *per* Lord HERSCHELL, L.C., at p. 70. *Quære* whether an order in writing by the buyer to the carrier to receive the goods from the seller would not be an acceptance by the buyer himself, as being an act recognising a pre-existing contract; see p. 129, *ante*.

(c) Thus a ring may be given (Vinnius on Justinian's Institutes, Bk. 3, tit. 24), or a coin (*Bach v. Owen* (1793), 5 Term Rep. 409; *Goodall v. Skelton* (1794), 2 Hy. Bl. 316). The thing must be given. "Striking the bargain," i.e., drawing a coin across the hand of the seller and taking it back, is insufficient (*Blenkinsop v. Clayton* (1817), 7 Taunt. 597). Further, it must be intended to bind the contract (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4 (1)); the mere delivery of something in the course of the execution of the contract, such as bags sent by the buyer to be filled, is not the giving of earnest (*Sumner and Levesley v. Brown (John) & Co.* (1909), 25 T. L. R. 745).

(d) *Soper v. Arnold* (1889), 14 App. Cas. 420, *per* Lord MACNAGHTEN; *Hall v. Burnell*, [1911] 2 Ch. 551; see the history of earnest and deposit stated by FRY, L.J., in *Howe v. Smith* (1884), 27 Ch. D. 89, C. A., and the subject considered in relation to the civil law in Benjamin, *Sale of Personal Property*, 2nd ed., p. 146; 5th ed., p. 228.

(e) Thus, a term in a verbal contract that an antecedent debt due by the seller (*Walker v. Nussey* (1847), 16 M. & W. 302), or that a sum overpaid to him on a previous sale (*Norton v. Davison*, [1899] 1 Q. B. 401, C. A.), shall be set off against the price is not a part payment, as it does not independently recognise the verbal contract.

(f) As to payment, see title CONTRACT, Vol. VII., pp. 444, 446; p. 233, *post*.

(g) Sending a cheque, even at the seller's request, is not a payment if the

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consist of.SUB-SECT. 5.—*Note or Memorandum*(i.) *Character of the Memorandum.*

246. A note or memorandum (*h*) may consist of any document or number of documents, provided, in the latter case, the documents are physically attached to one another at the time of signature (*i*), or are mutually incorporated by internal evidence (*k*), that is to say, by the signed document expressly or by implication referring to the unsigned (*l*).

Parol
evidence.

247. Parol evidence is admissible to identify any document referred to in the signed document (*m*), or physically attached thereto at the time of signature, although it may have become

cheque is returned (*Davis v. Phillips, Mills & Co.* (1907), 24 T. L. R. 4). The Post Office is not the seller's agent to accept payment (*ibid.*).

(*h*) As to the character of a memorandum, see, generally, title CONTRACT, Vol. VII., pp. 367—370.

(*i*) *Kenworthy v. Schofield* (1824), 2 B. & C. 945, *per* HOLROYD, J.; *Hinde v. Whitehouse* (1806), 7 East, 558; *Jones Brothers v. Joyner* (1900), 82 L. T. 768.

(*k*) As to auctioneers' books, catalogues, conditions of sale etc., see *Fasebrother v. Simmons* (1822), 5 B. & Ald. 333 (book); *Kenworthy v. Schofield*, *supra* (conditions not attached to catalogue); *Bird v. Boulter* (1833), 4 B. & Ad. 443 (sale book); *Hinde v. Whitehouse* (1806), 7 East, 558 (catalogue not attached to conditions); *Reynolds v. Hooper* (1902), 19 T. L. R. 33 (sale catalogue); *Peirce v. Corf* (1874), L. R. 9 Q. B. 210 (catalogue and conditions not referred to in sales ledger); *Dewar v. Mintoft*, [1912] 2 K. B. 373 (letter referring to particulars of sale in same document as conditions); as to seller's bill of parcels, invoice etc., see *Saunderson v. Jackson* (1800), 2 Bos. & P. 238 (coupled with buyer's letter); *Schneider v. Norris* (1814), 2 M. & S. 286; *M'Lean v. Nicholl* (1861), 7 Jur. (N. S.) 999; *Wilkinson v. Evans* (1866), L. R. 1 C. P. 407 (buyer's memorandum on back of invoice); as to plaintiff's order book, see *Allen v. Bennet* (1810), 3 Taunt. 169 (coupled with defendant's letter to his agent); *Jacob v. Kirk* (1839), 2 Mood. & R. 221 (seller's name not mentioned); *Sarl v. Bourdillon* (1856), 1 C. B. (N. S.) 188 (signed by buyer), followed in *Jones Brothers v. Joyner* (1900), 82 L. T. 768 (book detachable from cover); *Ginner v. King* (1890), 7 T. L. R. 140, C. A. (sold note recognised by buyer's forwarding instructions); as to formal memorandum made by buyer, see *Johnson v. Dodgson* (1837), 2 M. & W. 653 (also signed by seller's agent); *Buxton v. Rust* (1872), L. R. 7 Exch. 279, Ex. Ch. (coupled with seller's letters); as to correspondence, see *Jackson v. Lowe* (1822), 1 Bing. 9; *Hoadly v. M'Laine* (1834), 10 Bing. 482; *Ashcroft v. Morrin* (1842), 4 Man. & G. 450 (buyer's written order); *Archer v. Baynes* (1850), 5 Exch. 625; *Bailey v. Sweeting* (1861), 9 C. B. (N. S.) 843 (buyer's letter to seller); *Gibson v. Holland* (1865), L. R. 1 C. P. 1 (buyer's letter to his agent); *Pearce v. Gardner*, [1897] 1 Q. B. 688, C. A. (envelope treated as referred to in enclosed letter); *John Griffiths Cycle Corporation, Ltd. v. Pumber & Co., Ltd.*, [1899] 2 Q. B. 414, C. A. (letters referring to draft agreement); as to carrier's advice notes, see *Taylor v. Smith*, [1893] 2 Q. B. 65, C. A. (with seller's letter, neither referring to invoice); as to subscription lists, see *Boydell v. Drummond* (1809), 11 East, 142 (not connected with prospectus); see also the cases cited in title CONTRACT, Vol. VII., p. 369, note (*u*).

(*l*) *Not vice versa* (*Caton v. Caton* (1867), L. R. 2 H. L. 127, *per* Lord WESTBURY, at p. 144; *Long v. Millar* (1879), 4 C. P. D. 450, C. A., *per* THESIGER, L.J., at p. 450).

(*m*) *Ridgway v. Wharton* (1857), 6 H. L. Cas. 238; *Long v. Millar*, *supra*. Parol evidence may explain a reference, but cannot supply it; see title EVIDENCE, Vol. VIII., pp. 566 *et seq.*; and see, generally, title CONTRACT, pp. 523 *et seq.*

detached (n). It is not admissible to connect an unsigned document with the signed document which does not refer to it (o).

(ii.) *Sufficiency of the Memorandum.*

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248. Any writing (p) embodying the terms of the contract, and signed (q) by the party to be charged, or his agent, is sufficient as a note or memorandum (r). The writing must therefore, either expressly or by necessary implication, contain—

What memorandum must contain.

(1) the names (s) of or description (t) sufficient to identify the parties in their respective characters (a);

(n) Submitted on general principles; see *Pearce v. Gardner*, [1897] 1 Q. B. 688, C. A., *per* Lord ESHER, M.R.

(o) *Boydell v. Drummond* (1809), 11 East, 142 (subscriber's book and prospectus); *Hinde v. Whitehouse* (1806), 7 East, 558 (conditions of sale and catalogue); *Jacob v. Kirk* (1839), 2 Mood. & R. 221 (seller's invoice and buyer's letter); *Peirce v. Corf* (1874), L. R. 9 Q. B. 210 (sales ledger, catalogue, and conditions of sale); *Kenworthy v. Schofield* (1824), 2 B. & C. 945 (catalogue and conditions of sale); *Taylor v. Smith*, [1893] 2 Q. B. 65, C. A. (invoice, carrier's advice note, and buyer's letter); as to letter and envelope, see *Pearce v. Gardner*, *supra*. See the law stated by WILLIAMS, J., in *North Staffordshire Rail. Co. v. Peel* (1860), F. B. & E. 986, Ex. Ch., at p. 1000. As to the admissibility in general of parol evidence in connexion with writings, see title CONTRACT, Vol. VII., pp. 369, 370, 523 *et seq.*

(p) See note (s), p. 126, *ante*.

(q) As to what amounts to a signature, see title CONTRACT, Vol. VII., p. 375; *Brooks v. Billingham* (1912), 56 Sol. Jo. 503 (name not subscribed, when sufficient).

(r) Thus, a recital in a will is sufficient (*Re Hoyle*, *Hoyle v. Hoyle*, [1893] 1 Ch. 84, C. A.), or an affidavit (*Barkworth v. Young* (1856), 4 Drew. 1), a letter to a third party (*Gibson v. Holland* (1865), L. R. 1 C. P. 1), or an entry in a diary (*Re Hoyle*, *Hoyle v. Hoyle*, *supra*, *per* SMITH, L.J., at p. 100). So also, *e.g.*, a receipt (*Evans v. Prothero* (1852), 1 De G. M. & G. 572), a bill of parcels (*Schneider v. Norris* (1814), 2 M. & S. 286), or a telegram (*McBlain v. Cross* (1871), 25 L. T. 804; *Godwin v. Francis* (1870), L. R. 5 C. P. 295); see, generally, title CONTRACT, Vol. VII., p. 367. It is noticeable that, like the Statute of Frauds (29 Car. 2, c. 3), the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), speaks, not of a written contract, but of a memorandum or a verbal one. The former is of course not excluded; see *Law Quarterly Review*, Vol. I., p. 17, n. (4).

(s) *Champion v. Plummer* (1805), 1 Bos. & P. (N. R.) 252; *Williams v. Byrnes* (1863), 1 Moo. P. C. C. (N. S.) 154; *Sarl v. Bourdillon* (1856), 1 C. B. (N. S.) 188 (seller's name on fly-leaf of order book); *Williams v. Lake* (1859), 2 E. & E. 349; *Jones Brothers v. Joyner* (1900), 82 L. T. 768 (seller's name on cover of order book); *Re Cox, McKuen & Co. and Hoare, Marr & Co.* (1907), 96 L. T. 719, C. A. The name of an agent as a contracting party is sufficient, and the undisclosed principal may be identified by parol (*Higgins v. Senior* (1841), 8 M. & W. 834; *Filby v. Hounsell*, [1896] 2 Ch. 737; *Calder v. Dobell* (1871), L. R. 6 C. P. 486, Ex. Ch.); see title CONTRACT, Vol. VII., p. 377; and compare note (t), *infra*. But parol evidence is not admissible to discharge the agent (*Higgins v. Senior*, *supra*). As to the liability of agents on contracts generally, see title AGENCY, Vol. I., pp. 206 *et seq.*, 219 *et seq.*

(t) *Rossiter v. Miller* (1878), 3 App. Cas. 1124, *per* Lords CAIRNS and O'HAGAN, at pp. 1141, 1147; *Potter v. Duffield* (1874), L. R. 18 Eq. 4, *per* JESSE, M.R., at p. 7; *Jarrett v. Hunter* (1886), 34 Ch. D. 182. Parol evidence is admissible to apply the description given to the party; knowledge by one party of the identity of the other is insufficient (*Jarrett v. Hunter*, *supra*). Whether the word "principal" may be shown by parol evidence to mean a particular principal is doubtful; see and compare *Cropper v. Cook* (1868), L. R. 3 C. P. 104, with *Rossiter v. Miller*, *supra*; and see note (s), *supra*.

(a) *Vandenburgh v. Spooner* (1866), L. R. 1 Exch. 316; *Rayner v.*

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- (2) the goods sold (b);
 (3) the price, if a price was agreed upon (c);
 (4) all other substantial terms of the contract (d), not being such as are merely implied by law or usage (e).

Written
contracts.

249. Where a contract of sale is not verbal, but is wholly in writing, the written contract is a sufficient memorandum (f). In such case, other documents passing between the parties are to be disregarded, except that the acceptance by the parties of documents subsequently passing between them is relevant to show a new contract in the terms of such documents (g).

Memorandum
need only
show terms
of contract.

250. A note or memorandum need only show the terms of the contract; it need not show on its face the mutual assent of the parties thereto (h). Thus, a written proposal signed by the party to be charged, verbally accepted (i), is sufficient. But the

Linthorne (1825), Ry. & M. 325 (alleged seller appearing in memorandum as agent); *Caregan v. Richards* (1866), 15 L. T. 252; *Re Cox, McEuen & Co. and Hoare, Marr & Co.* (1907), 96 L. T. 719, C. A.; *Dewar v. Mintoft*, [1912] 2 K. B. 373; compare title AGENCY, Vol. I., p. 207. Parol evidence may be given of the trade or business of the parties, so as to show that one is the seller and the other the buyer (*Newell v. Radford* (1867), L. R. 3 C. P. 52); or of trade usage that a person described as a broker for an undisclosed principal may be treated as principal (*Dale v. Humfrey* (1858), E. B. & E. 1004, Ex. Ch.). As to parol evidence to interpret a contract, see, generally, title CONTRACT, Vol. VII., pp. 523 *et seq.*; EVIDENCE, Vol. XIII., pp. 566 *et seq.*

(b) *Mahalen v. Dublin and Chapelizod Distillery Co.* (1877), 11 I. R. C. L. 83 (quantity).

(c) *Elmore v. Kingscote* (1826), 5 B. & C. 583; *Goodman v. Griffiths* (1857), 1 H. & N. 574; *Hoadly v. M'Laine* (1834), 10 Bing. 482 (no price agreed on); *Ashcroft v. Morrin* (1842), 4 Man. & G. 450 (goods "on moderate terms"); *Mahalen v. Dublin and Chapelizod Distillery Co.*, *supra* (alternative price). Evidence of trade meaning may be given to explain an ambiguous statement of the price (*Spicer v. Cooper* (1841), 1 Q. B. 424 ("18 pockets of hops at 100s.")). As to usages of particular trades generally, see title CUSTOM AND USAGES, Vol. X., pp. 274 *et seq.*; and as to proof of usage, see *ibid.*, pp. 270 *et seq.*

(d) *Pitts v. Beckett* (1845), 13 M. & W. 743; *Archer v. Baynes* (1850), 5 Exch. 625 (quality of goods); *M'Lean v. Nicholl* (1861), 7 Jur. (N. S.) 999 (quality); *McCaul v. Strauss* (1883), 1 Cab. & El. 106 (quality of goods and time of payment). In *Sarl v. Bourdillon* (1856), 6 C. B. (N. S.) 188, the mode of payment for this purpose was held not to be a term of the contract.

(e) *Hoadly v. M'Laine*, *supra*. "The statute requires no more than that the bargain, such as it is, should be reduced to writing" (*ibid.*, *per BOSANQUET, J.*, at p. 490).

(f) *I.e.*, under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4. As was pointed out by STEPHEN, J., and Professor POLLOCK in the Law Quarterly Review, Vol. I., p. 17, the Statute of Frauds (29 Car. 2, c. 3), s. 17, does not in terms contemplate the case of a contract in writing, but it is obvious that such a contract must satisfy the statutory requirements. For various forms of contract for the sale of goods, see *Encyclopædia of Forms and Precedents*, Vol. XI., pp. 575—609; and *ibid.*, Vol. XVI., p. 558.

(g) *Heyworth v. Knight* (1864), 17 C. B. (N. S.) 298; *Hawes v. Forster* (1804), 1 Mood. & R. 368, as explained by PARKE, B., in *Thornton v. Charles* (1842), 9 M. & W. 802. The documents subsequently accepted must of course agree with one another; see p. 140, *post*.

(h) *Reuss v. Pickley* (1866), L. R. 1 Exch. 342, Ex. Ch.; *Re Hoyle*, *Hoyle v. Hoyle*, [1893] 1 Ch. 84, C. A., *per curiam*; *Lever v. Koffler*, [1901] 1 Ch. 543 (alternative offers).

(i) *Reuss v. Pickley*, *supra*; *Smith v. Neale* (1857), 2 C. B. (N. S.) 67;

memorandum must recognise the terms of the contract set up (*k*). If it do so, it is immaterial that it also contains a repudiation of the contract by the party to be charged (*l*).

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SUB-SECT. 6.—Agency for Signature.

(i.) In General.

251. The authority of an agent (*m*) to sign a memorandum need not be given in writing. It may be given in any way in which authority is conferred by law on an agent, and may be constituted by subsequent ratification (*n*).

Authority,
how given.

An agent having authority to enter into a contract of sale has the implied authority of his principal to make and sign a memorandum thereof (*o*).

Watts v. Ainsworth (1862), 1 H. & C. 83. By parity of reasoning a written acceptance containing all the terms of a verbal proposal would be sufficient.

(*k*) *Gibson v. Holland* (1865), L. R. 1 C. P. 1; *Re Queensland Land and Coal Co., Davis v. Martin* (1894), 71 L. T. 115, *per* NORTH, J., at p. 118. Thus, the language of the document must not negative the fact of a contract (*Re Cox, McEuen & Co. and Hoare, Marr & Co.* (1907), 96 L. T. 719, C. A.); nor must the document signed set up any new term, so as to leave the terms of the contract in doubt (*Cooper v. Smith* (1812), 15 East, 103; *Richards v. Porter* (1827), 6 B. & C. 437 (condition as to time set up); *Smith v. Surman* (1829), 9 B. & C. 561; *Archer v. Baynes* (1850), 5 Exch. 625 (condition as to quality); *Haughton v. Morton* (1855), 5 I. C. L. R. 329 (condition of goods arriving); *Caregan v. Richards* (1866), 15 L. T. 252 (sale by sample set up)); compare *Jackson v. Lowe* (1822), 1 Bing. 9 (no conflict as to terms, but quality of goods complained of); *Buxton v. Rust* (1872), L. R. 7 Exch. 279, Ex. Ch. (defendant puts wrong interpretation on admitted terms).

(*l*) *Bailey v. Sweeting* (1861), 6 C. B. (N. S.) 843; *Jackson v. Lowe, supra*; *Buxton v. Rust, supra*; *Wilkinson v. Evans* (1866), L. R. 1 C. P. 407; *Elliott v. Dean* (1884), 1 Cab. & El. 283; *Dewar v. Mintoft*, [1912] 2 K. B. 373.

(*m*) As to brokers in particular, see pp. 138 *et seq.*, *post*; and as to auctioneers and their clerks, see title AUCTION AND AUCTIONEERS, Vol. I., p. 504.

(*n*) *Maclean v. Dunn* (1828), 4 Bing. 722; *Soames v. Spencer* (1822), 1 Dow. & Ry. (K. B.) 32; *Brooks v. Billingham* (1912), 56 Sol. Jo. 503 (defendant's dictation of memorandum); see, generally, titles AGENCY, Vol. I., pp. 156, 157; CONTRACT, Vol. VII., pp. 377—379; as to appointment of agents generally, see title AGENCY, Vol. I., pp. 153 *et seq.* The authority cannot be delegated (*Henderson v. Barnewall* (1827), 1 Y. & J. 387; *Bell v. Balls*, [1897] 1 Ch. 663); see title CONTRACT, Vol. VII., p. 379. But a special authority may be conferred by the person employing the agent on the agent's agent (*Bird v. Boulter* (1833), 4 B. & Ad. 443; *Sims v. Landray*, [1894] 2 Ch. 318 (auctioneer's clerk); *Godwin v. Francis* (1870), L. R. 5 C. P. 295 (telegraph company's clerk)). Whether the authority of an agent is revocable after the contract, up to the time when the memorandum is made, seems to be doubtful; see in the affirmative, *Farmer v. Robinson* (1805), 2 Camp. 339, n.; *Warwick v. Slade* (1811), 3 Camp. 127 (broker); but compare *Bell v. Balls, supra, per* STIRLING, J.; *Van Praagh v. Eberidge*, [1902] 2 Ch. 266 (auctioneers); and title AGENCY, Vol. I., pp. 230 *et seq.*

(*o*) *Rosenbaum v. Belson*, [1900] 2 Ch. 267; see title CONTRACT, Vol. VII., p. 378. A signature by an agent purporting to be made by him as a witness is valid, if the signature be intended to authenticate the document, and not merely to attest another signature (*Wallace v. Roe*, [1903] 1 I. R. 32); see also *Gosbell v. Archer* (1835), 2 Ad. & El. 500; title CONTRACT, Vol. VII., p. 379.

SMOT. 3.
Contracts
for £10 or
Upwards.

Agency of
 other party's
 agent.

Authority to
 record the
 contract
 unnecessary.

252. One party to the contract cannot be the agent of the other to make and sign a memorandum on his behalf (*p*). But one party may confer authority on the agent of the other party to do so (*q*). But no such authority will be inferred where the acts done by the other party's agent are not inconsistent with agency merely for his own principal (*r*).

253. It is not necessary that the agent should be authorised to sign a record of the contract as such. An authority to sign a document which in fact constitutes, or incorporates, a note or memorandum of the terms of the contract is sufficient (*s*).

(ii.) *Brokers.*

Definition.

254. A broker for sale is a person making it a trade to find buyers for those who wish to sell, and sellers for those who wish to buy, and to negotiate and superintend the making of the bargain between them (*t*). His duty is to establish privity of contract between the seller and the buyer (*a*).

Seller's
 objection
 to buyer by
 usage.

255. A usage of trade that, on a sale on credit through a broker to a buyer whose name has not previously been communicated to the seller, the seller may, within a reasonable time after the receipt of the sold note, object to the sufficiency of the buyer, and repudiate the contract, is reasonable and valid (*b*).

(*p*) *Sharman v. Brandt* (1871), L. R. 6 Q. B. 720, Ex. Ch.; *Wright v. Dannah* (1809), 2 Camp. 203; *Farebrother v. Simmons* (1822), 5 R. & Ald. 333; and see title AGENCY, Vol. I., p. 152.

(*q*) *Durrell v. Evans* (1862), 1 H. & C. 174, Ex. Ch. (agency shown); compare *Graham v. Musson* (1839), 5 Bing. (N. C.) 603; *Graham v. Fretwell* (1841), 3 Man. & G. 368; *Murphy v. Boese* (1875), L. R. 10 Exch. 126; and see title AGENCY, Vol. I., p. 152.

(*r*) *Murphy v. Boese*, *supra*, per PIGOTT, B., at p. 130.

(*s*) *Griffiths (John) Cycle Corporation, Ltd. v. Humber & Co., Ltd.*, [1899] 2 Q. B. 414, C. A.; reversed on another point, *sub nom. Humber & Co. v. Griffiths (John) Cycle Co.* (1901), 85 L. T. 141, H. L., approving *Jones v. Victoria Graving Dock Co.* (1877), 2 Q. B. D. 314, C. A., and, *semble*, overruling on this point *Eley v. Positive Assurance Co.* (1875), 1 Ex. D. 20; *Re Hoyle, Hoyle v. Hoyle*, [1893] 1 Ch. 84, C. A. But the signature of an agent merely to approve the form of a document, such as a solicitor who approves a draft, is insufficient (*Bowen v. Duc d'Orléans* (1900), 16 T. L. R. 226, C. A.).

(*t*) *Mollett v. Robinson* (1872), L. R. 7 C. P. 84, Ex. Ch., per HANNEN, J., at p. 97, quoting Blackburn, *Contract of Sale*, 1st ed., p. 81; 2nd ed., p. 78. A broker is a special agent, and must duly act within the limits of his authority (*Pitts v. Beckett* (1845), 13 M. & W. 743, per PARKE, B., at p. 747). When he has executed his authority it is exhausted; he cannot make the contract and make another (*White v. Benekendorff* (1873), 29 L. T. 475, per BRETT, J., at p. 477). As to stockbrokers, see title STOCK EXCHANGE.

(*a*) *Mollett v. Robinson*, *supra*, reversed *sub nom. Robinson v. Mollett* (1875), L. R. 7 H. L. 802. He is thus distinguished from a commission agent for a foreign principal, who is not authorised or allowed, in the absence of express authority, to establish privity of contract between the ultimate seller and buyer (per WILLES and KEATING, JJ., in *S. C.* (1870), L. R. 5 C. P. 646; per BLACKBURN, J., in *S. C.* (1875), L. R. 7 H. L. 802, at p. 810); *Bostock v. Jardine* (1865), 1 H. & C. 700; see the position of a broker with regard to the contract and the property in the goods explained by BRETT, J., in *Fowler v. Hollins* (1872), L. R. 7 Q. B. 616, Ex. Ch., at p. 623. As to the different classes of agents, see title AGENCY, Vol. I., pp. 152, 153.

(*b*) *Hodgson v. Davies* (1810), 2 Camp. 530. As to the admissibility of

256. A broker employed by a principal to buy or sell is the agent of that principal to make and sign on his behalf a memorandum of the contract (c); by dealing with the broker as a broker (d) the other party to the contract is deemed, on the conclusion of the bargain, to authorise him to make a memorandum on that other party's behalf (e).

SECT. 3.
Contracts
for £10 or
Upwards.

Broker's
agency for
either party.

Written
contracts.

257. A written contract made by a broker is the primary evidence of the contract, to the exclusion of any notes which may afterwards be delivered to the parties (f); but the acceptance of the notes by the parties may be relevant to show a new contract in the terms of the notes (g).

258. A written contract may be constituted by one of two notes delivered to the parties if it be assented to by both as containing the terms of the contract (h). In such a case a variance in the other note is immaterial (i).

Contract by
one note.

evidence of usage to annex terms to the contract, see also and compare the cases cited in title CUSTOM AND USAGES, Vol. X., pp. 262, note (p), 263, note (g), and see *ibid.*, pp. 260 *et seq.*; as to the proof of usage, and the usages recognised in particular trades, see *ibid.*, pp. 270 *et seq.*, 274 *et seq.*

(c) *Rosenbaum v. Belson*, [1900] 2 Ch. 267 (real estate), and see the cases in note (e), *infra*.

(d) It is otherwise where the other party deals with the broker, believing him to be principal (*McCaul v. Strauss & Co.* (1883), Cab. & El. 106).

(e) *Rucker v. Cammeyer* (1794), 1 Esp. 105, following *Simon v. Motivos* (1766), 3 Burr. 1921; *Chapman v. Partridge* (1805), 5 Esp. 256 (buyer's express authority); *Hicks v. Hankin* (1802), 4 Esp. 114; *Buchmaster v. Harrop* (1807), 13 Ves. 456, *per* Lord ERSKINE, L.C., at p. 473; *Henderson v. Barnecall* (1827), 1 Y. & J. 387, *per* ALEXANDER, C.B., and GARROW, B.; Blackburn, *Contract of Sale*, 1st ed., p. 83; 2nd ed., p. 79. The position of the party bargaining with the broker is in fact similar to that of a buyer at an auction with respect to the auctioneer after the fall of the hammer (*Rucker v. Cammeyer*, *supra*). The dealing gives the authority. See the law well stated by BIGELOW, C.J., in *Coddington v. Goddard* (1860), 82 Massachusetts Reports, 436, at p. 445, and by the Court in *Remick v. Sandford* (1875), 118 Massachusetts Reports, 102. The broker being a special agent must of course enter the actual contract made, not one in different terms (*Pitts v. Beckett* (1845), 13 M. & W. 743; *Remick v. Sandford*, *supra*); as to the distinction between general and special agents, see title AGENCY, Vol. I., p. 152.

(f) *Heyworth v. Knight* (1864), 17 C. B. (N. S.) 298 (contract by correspondence); *Stevewright v. Archibald* (1851), 17 Q. B. 103, *per* PATTESON, J.; *McCaul v. Strauss & Co.*, *supra*; see title CONTRACT, Vol. VII., p. 351.

(g) *Hawes v. Forster* (1834), 1 Mood. & R. 368, as explained by PARKE, B., in *Thornton v. Charles* (1842), 9 M. & W. 802.

(h) *Rowe v. Osborne* (1815), 1 Stark. 140 (note signed by defendant and sent to plaintiff varying from note sent to defendant by broker), as explained in *Cowie v. Remfry* (1846), 5 Moo. P. C. C. 232; *Higgins v. Senior* (1841), 8 M. & W. 834 (notes exchanged by agents: one intended to be the contract); *Moore v. Campbell* (1854), 10 Exch. 323 (plaintiff's broker sends note to defendant, who sends substituted note), where it was a question of fact whether the defendant intended that one note should constitute the contract; *Cowie v. Remfry*, *supra* (custom to contract by two notes), criticised by WILLES, J., in *Heyworth v. Knight*, *supra*; *Re Thorp, Ex parte Thomas* (1865), 11 L. T. 586 (bought note only delivered but acted on: no note to seller); *Re Williams Brothers and Agius (E. T.), Ltd.* (1913), 135 L. T. Jo. 34, C. A. (broker's note: also defendant's note signed by plaintiff). See, further, title CONTRACT, Vol. VII., p. 351.

(i) *Heyworth v. Knight*, *supra*, *per* WILLES, J., criticising *Cowie v. Remfry*, *supra*. As to usage, see note (b), p. 138, *ante*.

SECT. 3.
Contracts
for £10 or
Upwards.

Rules as to
brokers' books
and notes.

A usage of trade or course of dealing to contract by two notes is relevant, but not conclusive, to disprove a common intention to contract by one note (*k*).

259. With respect to brokers' books and bought and sold notes the following rules apply:—

(1) Where the broker enters the terms of the contract in a broker's book, and signs the entry, and also delivers to the parties bought and sold notes, the entry in the book perhaps constitutes a contract in writing to the exclusion of the notes (*l*);

(2) The acceptance by the parties of bought and sold notes is relevant to show a new contract in the terms of the notes (*m*);

(3) A signed and sufficient entry in a broker's book of the terms of a verbal contract is a good memorandum thereof (*n*);

(4) Where there is no entry of the terms of the contract in a broker's book, or it is unsigned, or insufficient, the bought and sold notes, if they correspond with one another (*o*), and are sufficient, constitute a contract in writing, or are a good memorandum of a

(*k*) See note (*b*), p. 138, *ante*; note (*i*), p. 139, *ante*.

(*l*) Such was the opinion of three judges in *Sievwright v. Archibald* (1851), 17 Q. B. 103; of PARKE, B., in *Thornton v. Charles* (1842), 9 M. & W. 802, and *Pitts v. Beckett* (1845), 13 M. & W. 743, 746; and of Lord ELLENBOROUGH, C.J., in *Heyman v. Neale* (1807), 2 Camp. 337, and *Dickenson v. Lilwal* (1815), 1 Stark. 128. That the contract was contained in the notes was the opinion of GIBBS, C.J., in *Cumming v. Roebuck* (1816), Holt (N. P.), 172; of ABBOTT, C.J., in *Thornton v. Meux* (1827), Mood. & M. 43 (revoking his contrary opinion in *Grant v. Fletcher* (1826), 5 B. & C. 436, and *Goom v. Aflalo* (1826), 6 B. & C. 117); of Lord DENMAN, C.J., in *Hawes v. Forster* (1834), 1 Mood. & R. 368, and *Townend v. Drakeford* (1843), 1 Car. & Kir. 20; of Lord ABINGER, C.B., in *Thornton v. Charles*, *supra*; and of the court in *Richey v. Garvey* (1847), 10 L. L. R. 544. Moreover the report of *Hawes v. Forster*, *supra*, seems to show that the jury found that by usage the notes were considered as the contract; but this case has been otherwise explained; see *per* PARKE, B., in *Thornton v. Charles*, *supra*. It must be remembered that, up to the date of *Sievwright v. Archibald*, *supra*, and to the year 1884, it was the duty of a broker in the city of London to enter the terms of the contract in his book (a duty which no longer exists), and stress was laid upon this fact in many of the cases. The custom of making an entry has become largely obsolete. At the present day it may perhaps be a question of fact in each case whether the entry or the notes be intended by the parties as the contract, so as to be conclusive between them. It seems to be difficult to attribute the effect of a written contract to a private act of the broker, and one, moreover, not made under any legal obligation. Thirty-five years after *Sievwright v. Archibald*, *supra*, no special efficacy was attributed to the entry in the book; see *Thompson v. Gardiner* (1876), 1 C. P. D. 777; see also title CONTRACT, Vol. VII., p. 351.

(*m*) *Hawes v. Forster* (1834), 1 Mood. & R. 368; see p. 139, *ante*.

(*n*) *Thompson v. Gardiner*, *supra*; *Thornton v. Charles*, *supra*, *per* PARKE, B.; *Richey v. Garvey*, *supra*; see title CONTRACT, Vol. VII., p. 351.

(*o*) It is not a variance because one of the parties is named in one note and only described in the other (*Cropper v. Cook* (1868), L. R. 3 C. P. 194; *Trueman v. Loder* (1840), 11 Ad. & El. 589). Parol evidence may be given to explain any apparent discrepancy, so as to show that it is not material (*Bold v. Rayner* (1836), 1 M. & W. 343), *e.g.*, to show that the discrepancy is a mere memorandum of the broker, and not a term of the contract (*Kempson v. Boyle* (1865), 3 H. & C. 763); see also *Maclean v. Dunn* (1828).

verbal contract (*p*). If they do not correspond, or are insufficient, and no other written evidence of the contract is shown, no written contract or memorandum is proved (*q*);

SECT. 3.
Contracts
for £10 or
Upwards.

(5) Where bought and sold notes are delivered by a broker, being agent of both parties, either note, being sufficient, is by itself proof of a contract in writing, or is a good memorandum of a verbal contract, in the absence of proof by the party to be charged that the other note differs (*r*).

260. A material alteration in a broker's note, made by or at the instance of either party without the consent of the other, vitiates the note as a written contract, or memorandum of a verbal contract, as against the other party (*s*).

Material
alteration
of note.

SUB-SECT. 7.—*Effect of Statutory Provisions.*

261. On the fulfilment of any of the statutory conditions, the contract becomes enforceable by action (*t*); but the conditions must be fulfilled before action is brought (*a*).

Contract
becomes
enforceable.

The effect of acceptance and actual receipt, as also of earnest and part payment, is merely to establish the existence of an enforceable contract of sale between the parties (*b*): and the actual terms of the

Effect of
statutory
conditions
respectively.

4 Bing. 722 (bought and sold notes on one sheet of paper: one explaining the other).

(*p*) *Goom v. Aflalo* (1826), 6 B. & C. 117 (unsigned entry: signed and consistent notes); *Sievwright v. Archibald* (1851), 17 Q. B. 103, *per curiam*; *Trueman v. Loder* (1840), 11 Ad. & El. 589; *Gale v. Wells* (1824), 1 C. & P. 388 (two bought notes delivered); see title CONTRACT, Vol. VII., p. 351.

(*q*) *Thornton v. Kempster* (1814), 5 Taunt. 786 (differing subject-matters); *Grant v. Fletcher* (1826), 5 B. & C. 436; *Townend v. Drakeford* (1843), 1 Car. & Kir. 20 (unsigned entry: insufficient notes); *Gregson v. Ruck* (1843), 4 Q. B. 737 (differing terms of payment); *Sievwright v. Archibald*, *supra* (no entry: varying subject-matters); *Fisenden v. Levy* (1863), 11 W. R. 259 (two sellers, one buyer: two sold notes, one bought); see title CONTRACT, Vol. VII., p. 351.

(*r*) *Hawes v. Forster* (1834), 1 Mood. & R. 368 (note delivered to plaintiff); *Parlon v. Crofts* (1864), 16 C. B. (N. S.) 11 (note sent to party to be charged); *Thompson v. Gardiner* (1876), 1 C. P. D. 777 (note sent to plaintiff).

(*s*) *Powell v. Divett* (1812), 15 East, 29 (action by seller on sale note altered by him); *Mollett v. Wackerbarth* (1847), 5 C. B. 181 (alteration by buyer plaintiff in bought note). In this case the buyer declared on the note in its original form. An alteration by one party may be material although it does not alter the duty to be performed by the other party (*ibid.*). If the broker, at the instance of the seller, materially alters the sold note, he cannot recover from the buyer, as money paid, the price paid by him to the seller (*White v. Benekendorff* (1873), 29 L. T. 475 (alteration of time of delivery)); see the whole subject considered in the notes to *Master v. Miller* (1793), 1 Smith, L. C., 11th ed., p. 767; 4 Term Rep. 320; 2 Hy. Bl. 140, Ex. Ch.; and in *Suffell v. Bank of England* (1882), 9 Q. B. D. 555, C. A.; and see title CONTRACT, Vol. VII., pp. 424 *et seq.*

(*t*) *Bailey v. Sweeting* (1861), 9 C. B. (N. S.) 843, *per WILLIAMS, J.*; *Brittain v. Rossiter* (1879), 11 Q. B. D. 123, C. A., *per BRETT and THESIGER, L.JJ.* (cases decided under the Statute of Frauds (29 Car. 2, c. 3)).

(*a*) *Bill v. Bament* (1841), 9 M. & W. 36; *Lucas v. Dixon* (1889), 22 Q. B. D. 357, C. A. This rule is an exception to the general principle that the Statute of Frauds (29 Car. 2, c. 3), s. 4 (which would also be the case with the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4), is a rule of procedure (*Lucas v. Dixon*, *supra*, *per FRY, L.J.*).

(*b*) *Tomkinson v. Staight* (1856), 17 C. B. 697; *Morton v. Tibbitt*

SECT. 3.
Contracts
for £10 or
Upwards.

contract must, as in all cases, be proved by evidence, oral or written (c).

The effect of a note or memorandum is to make enforceable the contract set up by the party relying upon the memorandum, by showing the parties to, and the substantial terms of, the contract (d). Accordingly, the party seeking to charge the other cannot supplement the memorandum by oral evidence of terms not contained therein (e); but it is competent to the party sought to be charged to invalidate it by giving oral evidence to show that it is not a memorandum of any completed contract at all (f), or does not contain all the substantial terms (g), or not the real terms (h), of the contract entered into.

Right of
action only
excluded.

262. The fact that a contract of sale is not enforceable by action (i)

(1850), 15 Q. B. 428, *per* Lord CAMPBELL, C.J.; "The object of the statute is that, where there was no contract in writing, there must be some overt act to render the bargain binding" (*Kibble v. Gough* (1878), 38 L. T. 204, C. A., *per* COTTON, L.J., at p. 206).

(c) *Tomkinson v. Staight* (1856), 17 C. B. 697; *Lockett v. Nicklin* (1848), 2 Exch. 93, *per* PARKE, B.; *Jeffcott v. North British Oil Co.* (1873), 8 I. R. C. L. 17 (price provable by parol).

(d) Of course, if the writing is intended to be the contract itself, as distinguished from a memorandum of a verbal contract, it must be proved, whether the case is within the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4, or not, or whether or not that provision has been satisfied by an acceptance etc.

(e) *Boydell v. Drummond* (1809), 11 East, 142; *Fitzmaurice v. Bayley* (1860), 9 H. L. Cas. 78.

(f) *Pym v. Campbell* (1856), 6 E. & B. 370; followed in *Pattle v. Hornibrook*, [1897] 1 Ch. 25; *Hussey v. Horne-Payne* (1879), 4 App. Cas. 311, *per* Lord CAIRNS, L.C., at p. 320.

(g) *Goodman v. Griffiths* (1857), 1 H. & N. 574 (price omitted); *Pitts v. Beckett* (1845), 13 M. & W. 743 (quality omitted); *Lockett v. Nicklin*, *supra* (credit omitted); *M'Mullen v. Helberg* (1879), 6 L. R. Ir. 463, C. A. (sample omitted).

(h) *Rogers v. Hadley* (1863), 2 H. & C. 227. As to the admissibility generally of verbal evidence in relation to written documents, see title CONTRACT, Vol. VII., pp. 373, 523 *et seq.*

(i) For the definition of action, see p. 118, *ante*. As to account stated, see title CONTRACT, Vol. VII., pp. 489—493. It was decided before the Act that, on a verbal contract for the sale of an interest in land, such as growing timber, the price might be recovered by the seller on an account stated after the contract is executed by the delivery of the timber or other interest (*Knowles v. Michel* (1811), 13 East, 249; *Seago v. Deane* (1828), 4 Bing. 459 (price of repairs done by incoming tenant); *Cocking v. Ward* (1845), 1 C. B. 858 (money payable for surrender of lease); *secus*, if the account was stated before delivery (*Falmouth (Earl) v. Thomas* (1832), 1 Cr. & M. 89 (growing crops)). As timber etc. to be severed now generally falls under the definition of "goods" (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1); p. 112, *ante*), a resort to an account stated will no longer be necessary, as the delivery would satisfy *ibid.*, s. 4. But the principle of the authorities cited would probably apply where the subject-matter of the sale, though ultimately to become a chattel, is not at the time of the contract "goods" within the definition, as in *Morgan v. Russell & Sons*, [1909] 1 K. B. 357 (slag and cinders to be removed from land by buyer an interest in land). As to interests in land generally, see titles EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 237; LANDLORD AND TENANT, Vol. XVIII., p. 338, note (c), 372, note (d); MINES, MINERALS, AND QUARRIES, Vol. XX., p. 647; MORTGAGE, Vol. XXI., p. 74; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 157, note (r).

does not displace (*k*) any remedy other than by action (*l*), nor the proof of the contract for any collateral purpose (*m*).

263. Whether a contract of sale, not enforceable by action, is nevertheless effectual to pass the property in the goods to the buyer is doubtful (*n*). If the property does not pass by the contract, the buyer cannot, by satisfying the statutory provisions, vest in himself retrospectively a right of action dependent on the right of property (*o*).

SECT. 3.
Contracts
for £10 or
Upwards.

Effect on
property of
unenforce-
able
contract.

(*k*) As to the effect and scope of the provisions of the Statute of Frauds (29 Car. 2, c. 3), s. 4, see, generally, title CONTRACT, Vol. VII., pp. 361—383; and see note (*i*), p. 142, *ante*. Where the facts admit, the decisions under the Statute of Frauds (29 Car. 2, c. 3), s. 4, are applicable under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4.

(*l*) *Philpott v. Jones* (1834), 2 Ad. & El. 41 (appropriation by creditor of payment to an unenforceable debt). A seller, who is the buyer's executor, cannot, however, retain an unenforceable debt for goods sold (*Re Rowson, Field v. White* (1885), 29 Ch. D. 358, C. A.). Nor can the buyer's executor pay the seller the price under an unenforceable contract (*ibid.*). Such payments are devastavit. The case of the retainer of a debt barred by the Statute of Limitations is not analogous (*ibid.*).

(*m*) *Pullbrook v. Lawes* (1876), 1 Q. B. D. 284, *per* BLACKBURN, J., at p. 289; see also the language of Lord SELBORNE, L.C., with regard to the Statute of Frauds (29 Car. 2, c. 3), s. 4, in *Maddison v. Alderson* (1883), 8 App. Cas. 467, at p. 476. Thus, the contract may be looked at to show that acts done by the buyer were done by the seller's licence, so as to excuse a trespass (*Carrington v. Roots* (1837), 2 M. & W. 248), or that the buyer has "agreed to buy" under the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 9 (*Hugill v. Masker* (1889), 22 Q. B. D. 364, C. A.), or to negative the implication of any other contract (*Britain v. Rossiter* (1879), 11 Q. B. D. 123, C. A.), or to show that its performance was an accord and satisfaction of a liability under another contract (*Lavery v. Turley* (1860), 6 H. & N. 239). If the goods are to be paid for by moneys to be received from a third person, and the buyer receives such moneys, it is conceived that the contract may be looked at to show that the buyer receives the money to the use of the seller, according to the principle of *Griffith v. Young* (1810), 12 East, 513.

(*n*) Decisions in the negative under the Statute of Frauds (29 Car. 2, c. 3), s. 17, are: *Alexander v. Comber* (1788), 1 Hy. Bl. 20 (trover against seller); *Stockdale v. Dunlop* (1840), 6 M. & W. 224 (insurable interest); *Coats v. Chaplin* (1842), 3 Q. B. 483; *Wait v. Baker* (1848), 2 Exch. 1, *per curiam*; *Coombs v. Bristol and Exeter Rail. Co.* (1858), 3 H. & N. 510 (actions against carriers); *Nicholson v. Bower* (1858), 1 E. & E. 172 (feigned issue to determine property); *Felthouse v. Bindley* (1862), 11 C. B. (N. S.) 869 (trover against auctioneer); *Smith v. Hudson* (1865), 6 B. & S. 431 (trover against seller); *Re Roberts, Evans v. Roberts* (1887), 36 Ch. D. 196 (memorandum is an "assurance of personal chattels"). In the affirmative is the changed wording of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), which substitutes "not enforceable by action" for "not allowed to be good" in the Statute of Frauds (29 Car. 2, c. 3), s. 17; and the dictum of BIGHAM, J., in *Taylor v. Great Eastern Railway*, [1901] 1 K. B. 774, at p. 779, where the learned judge says that the verbal contract is good for all purposes, including the passing of the property. It is, however, conceived that difficulties would arise in this view in the case of actions against third persons. Would the buyer, for instance, be able to recover for the loss of the goods under an insurance, although he was not liable to be sued for the price of the goods?

(*o*) *Morgan v. Sykes* (undated), *per* Lord ABINGER, C.B., affirmed by the Court of Exchequer, cited in *Coats v. Chaplin*, *supra*, at p. 486; *Coombs v. Bristol and Exeter Rail. Co.*, *supra*, *per* POLLOCK, C.B.; *Daves v. Peck* (1799), 8 Term Rep. 330, *per* Lord KENYON, C.J.; *Stockdale v. Dunlop* (1840), 6 M. & W. 224, 233; *Smith v. Hudson*, *supra*.

SECT. 4.

Subject-matter of the Contract.

Goods, existing or future.

SECT. 4.—*Subject-matter of the Contract.*

264. The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, hereinafter called "future goods" (p).

There may be a contract for the sale of goods the acquisition of which by the seller depends on a contingency which may or may not happen (q).

(p) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 5 (1); see *ibid.*, s. 62 (1); p. 120, *ante*; *Garbutt v. Watson* (1822), 5 B. & Ald. 613 (flour to be ground from wheat); *Watts v. Friend* (1830), 10 B. & C. 446 (crop not yet sown); *Wilks v. Atkinson* (1815), 6 Taunt. 11; *Langton v. Higgins* (1859), 4 H. & N. 402 (oil to be made from seed); *Pinner v. Arnold* (1835), 2 Cr. M. & R. 613 (machine to be made); *Hibblewhite v. M'Morine* (1839), 5 M. & W. 462 (shares to be acquired by purchase by seller); followed in *Mortimer v. M'Callan* (1840), 6 M. & W. 58; 7 M. & W. 20 (stock to be purchased); *Gurr v. Scudds* (1855), 11 Exch. 190 (manure to be produced by horses); *Ajello v. Worsley*, [1898] 1 Ch. 274 (piano to be purchased of a rival maker). Although there may be a contract of sale of future goods, it is of course necessary that a sale should be intended, and not a wager, as, e.g., on differences of price at a future date, with no intention that the goods shall be delivered (*Grizewood v. Blane* (1851), 11 C. B. 526; *Thacker v. Hardy* (1878), 4 Q. B. D. 685, C. A.).

(q) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 5 (2); *Howell v. Coupland* (1876), 1 Q. B. D. 258, C. A. (potatoes to be grown: failure of crop); *Watts v. Friend*, *supra* (turnip seed to be grown: crop produced). As a contract of sale may be absolute or conditional (see p. 113, *ante*), the result is that, if the contingent event does not happen, the terms of the particular contract determine the effect on the liabilities of the parties. They may expressly or by implication stipulate (1) that the contract shall be conditional on the part of the seller only, the price being payable in any event (*Covas v. Bingham* (1853), 2 E. & B. 836), or (2) that the contract shall be absolute on the part of the seller, who shall be liable in damages if the buyer does not get the goods (*Splidt v. Heath* (1809), 2 Camp. 57, n.; *Simond v. Braddon* (1857), 2 C. B. (N. S.) 324; *Hale v. Rawson* (1858), 4 C. B. (N. S.) 85), or (3) that the contract shall be conditional on both sides, and, if the event does not happen, both parties shall be freed from their obligations (*Hayward v. Scougall* (1809), 2 Camp. 56 ("hemp that may be loaded")). The parties may make what bargain they please (*Calcutta and Burmah Steam Navigation Co. v. De Mattos* (1863), 32 L. J. (Q. B.) 322, *per* BLACKBURN, J., at p. 328; *Hale v. Rawson*, *supra*, *per* WILLIAMS, J., at p. 95). Where the fulfilment of the contingency on which the seller's acquisition of the goods depends is within the control of the seller, it is a question of construction whether an obligation on his part will be implied not, at any rate wilfully, to prevent its fulfilment, or whether his contract is not contingent at all (*Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q. B. 488, C. A. (contract for grains to be made by seller as a brewer: contract conditional)). Where there is a contract for the sale of goods to arrive, or "on arrival," in the absence of terms creating such a warranty, the seller does not warrant the arrival of the goods, but the contract is on both sides contingent on their arrival, and when a particular ship is named, contingent both on the arrival of the ship in the ordinary course, and within the time stated, if any, and on the goods being on board; where there is a warranty that the goods are in a particular ship, the contract is subject to the single contingency of the arrival of the ship; see *Boyd v. Siffkin* (1809), 2 Camp. 326 (on arrival *per F.*); *Hawes v. Humble* (1809), 2 Camp. 327, n. (same); *Idle v. Thornton* (1812), 3 Camp. 274 (on arrival by particular ship and date); *Thornton v. Simpson* (1816), 6 Taunt. 556 (short arrival); *Alwyn v. Pryor* (1826), Ry. & M. 406 (late arrival); *Lovatt v. Hamilton*

265. Where the parties clearly intend it, there may be an *emptio spei*, that is to say, the sale and purchase of the chance of obtaining goods, rather than of the goods themselves (*r*). Such a contract is contingent on the part of the seller, but absolute on the part of the buyer (*s*).

SECT. 4.
Subject-matter
of the
Contract.

266. Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods (*t*).

Sale of a
chance.
Present sale
of future
goods.

SECT. 5.—Perishing of Specific Goods.

SUB-SECT. 1.—Before the Contract.

267. Where there is a contract for the sale (*u*) of specific (*a*) goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void (*b*).

Before the
contract.

(1839), 5 M. & W. 639; *Johnson v. Macdonald* (1842), 9 M. & W. 600 (goods to arrive by the ship *M.*, arrive in the *W.*); *Fischel v. Scott* (1854), 15 C. B. 69 (goods expected to arrive by the *R.* arrive consigned to others); *Vernede v. Weber* (1856), 1 H. & N. 311 (cargo of special rice per *M.*, provided it was shipped on seller's account); *Simond v. Braddon* (1857), 2 C. B. (N. S.) 324 ("rice per *S.* now on her way": warranty by seller); *Gorriessen v. Perrin* (1857), 2 C. B. (N. S.) 681 (gambier "now on passage from *S.* and expected to arrive per *R.*": warranty by seller); *Hale v. Rawson* (1858), 4 C. B. (N. S.) 85 (tallow to be delivered on safe arrival of ship *E.* then on passage: warranty by seller); *Neill v. Whitworth* (1866), L. R. 1 C. P. 684, Ex. Ch. (goods to arrive and to be taken from the quay); *Smith v. Myers* (1871), L. R. 7 Q. B. 139, Ex. Ch. (specific goods expected to arrive by ship *P.*: similar goods arrive); *Wyllie v. Povah* (1907), 12 Com. Cas. 317 ("expected to arrive per sailer from *F.*": contract mutually abandoned). The contingency of the arrival of the goods will not be fulfilled by the arrival of similar goods consigned to third persons, with which the contract did not purport to deal (*Gorriessen v. Perrin*, *supra*; *Thornton v. Simpson* (1816), 6 Taunt. 556; and compare *Fischel v. Scott*, *supra*).

(*r*) *Hitchcock v. Giddings* (1817), 4 Price, 135; *Hanks v. Palling* (1856), 6 E. & B. 659; *Buddle v. Green* (1857), 27 L. J. (EX.) 33; and see *Bagueley v. Hawley* (1867), L. R. 2 C. P. 625 (purchase of another man's bargain at auction); *Covas v. Bingham* (1853), 2 E. & B. 836 (chance of quantity).

(*s*) I.e., the seller must deliver the goods only if he gets them, but the buyer must pay the price in any event.

(*t*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 5 (3); *Lunn v. Thornton* (1845), 1 C. B. 379; compare *Heselline v. Siggers* (1848), 1 Exch. 856 ("bought and sold": agreed to be bought and sold); *Vickers v. Hertz* (1871), 9 Macpherson (House of Lords), 65, *per* Lord WESTBURY, at pp. 71, 72; see "sale" and "agreement to sell" defined p. 117, *ante*. A man cannot sell what he has not got, but he can agree to sell property which he expects to acquire, and then, when the property is acquired, the agreement to sell attaches; as to the passing of the property in the goods, and the buyer's equitable interest therein, see p. 170, *post*.

(*u*) As by its definition "contract of sale" includes both a sale and an agreement to sell (see p. 117, *ante*), the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 6, applies whether the contract purports to be the one or the other. On the other hand, *ibid.*, s. 7, applies only to agreements to sell.

(*a*) Defined in *ibid.*, s. 62 (1); see p. 121, *ante*.

(*b*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 6; *Couturier v. Hastie* (1856), 5 H. L. Cas. 673 (cargo of corn sold while at sea); *Smith v. Myers* (1872), L. R. 7 Q. B. 139, Ex. Ch. (cargo expected to arrive by particular ship); *Scott v. Coulson*, [1903] 2 Ch. 249, C. A. (sale of life policy after death of assured). The provision only applies to specific goods. Generic goods come within the rule *genus nunquam perit*. As to the case where an unascertained portion of a specific bulk is sold, and the whole bulk

SECT. 5.

Perishing
of Specific
Goods.After the
contract.SUB-SECT. 2.—*After the Contract.*

268. Where there is an agreement to sell (c) specific goods (c), and subsequently the goods, without any fault (c) on the part of the seller or buyer, perish (d) before the risk (e) passes to the buyer, the agreement is thereby avoided (f).

has perished, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 7; note (f), *infra*. Probably goods may be held to have "perished" when they are so damaged as no longer to answer to the description under which they have been sold; see *Barr v. Gibson* (1838), 3 M. & W. 390 (stranded ship); *Asfar & Co. v. Blundell*, [1896] 1 Q. B. 123, C. A. (dates contaminated with sewage); *Montreal Light, Heat, and Power Co. v. Sedgwick*, [1910] A. C. 598, P. C. (cement turned by water into stone); *Palace Shipping Co. v. Spillers* (1908), *Times*, 18th May (wheat submerged, but good as cattle food); see also *Dakin v. Orley* (1864), 15 C. B. (N. S.) 646, *per curiam*, and cases as to total loss cited in title INSURANCE, Vol. XVII., pp. 474, 475. If the seller knows that the goods have perished, then, by implication from the terms of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 6, and according to general principles (see *Smith v. Hughes* (1871), L. R. 6 Q. B. 597), the seller, but not the buyer, will be estopped from asserting that no contract exists. Conversely, if the buyer only knows of the loss of the goods, he, but not the seller, will be estopped from setting up a contract (*ibid.*; and see, generally, the Civil law (Dig. 18, 1, 57)). As the contract is void *ab initio*, the price, if paid, can be recovered back. It is money paid under a mistake of fact, for the contract is founded on mutual mistake (*Strickland v. Turner* (1852), 7 Exch. 208 (sale of annuity)); see, generally, title MISTAKE, Vol. XXI., pp. 29 *et seq.*

(c) For definition of "sale" and "specific goods," see pp. 117, 121, *ante*; and for definition of "fault," see p. 120, *ante*.

(d) For the meaning of "perish," see note (b), p. 145, *ante*.

(e) As to the passing of the risk, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 20; p. 188, *post*. If the contract were a sale, the risk *ab initio* would *primâ facie* attach to the buyer. Some complicated questions may arise under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 7, and *ibid.*, s. 20, where either party by his fault delays delivery. As to the case where the buyer is liable, and the goods perish before the price is fixed, see pp. 147, 235, *post*.

(f) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 7. This provision is an application of the general rule as to impossibility of performance, and deals with cases where the contract is not void *ab initio*, as under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 6, but where performance is on either side excused as from the time of the perishing of the goods. As to impossibility of performance generally, see title CONTRACT, Vol. VII., pp. 426 *et seq.*; and see *ibid.*, p. 430, and the cases cited in *ibid.*, note (j); compare *Hayward Brothers, Ltd. v. Daniel (James) & Son* (1904), 91 L. T. 319 (crops not identified as the produce of particular land); see, further, *Rugg v. Minett* (1809), 11 East, 210 (goods consumed by fire before property passed), as explained by *Taylor v. Caldwell* (1863), 3 B. & S. 826; *Elphick v. Barnes* (1880), 5 C. P. D. 321 (death of horse delivered within time limited for sale or return); see also *Stubbs v. Holywell Rail. Co.* (1867), L. R. 2 Exch. 311; title CONTRACT, Vol. VII., p. 431, note (n)).

Where either party is in fault, he is liable, if the seller, for non-delivery, according to the ordinary rules governing impossibility in fact; and, if the buyer, he must pay for the goods, although they are not delivered. *Howell v. Coupland* (1874), L. R. 9 Q. B. 462; affirmed (1876), 1 Q. B. D. 258, C. A., shows that the rule in *Taylor v. Caldwell*, *supra*, is not confined to sales of specific things, but is extended to sales of unascertained portions of a specific thing, where the whole bulk perishes, as, e.g., a sale of 100 tons out of a specific cargo (*Howell v. Coupland*, *supra*, *per* BLACKBURN, J., at pp. 465, 466); or the sale of a portion of a specific bin of wine). *Quare* whether, if a portion of the specific bulk remains undestroyed, the seller is wholly discharged or must deliver as much as he can. It is submitted that, the contract being *primâ facie* an

SECT. 6.—*The Price.*

SECT. 6.

SUB-SECT. 1.—*In General.*The Price.

269. The price (*g*) in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties (*h*). Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case (*i*). How fixed.

270. Where the ascertainment of the price depends upon the goods being weighed, measured, tested, or counted, or upon some other act or thing being done to or in relation to them, and such act has become impossible by the perishing of the goods, the buyer, if liable to pay the price, must pay a sum reasonably estimated (*k*). Price dependent on weighing etc.

271. If the ascertainment of the price involves a wager, as, for example, where there is an alternative price in the nature of a bet, the contract is void as being a gaming contract (*l*). Ascertainment of price involving a wager.

entire one for the whole quantity of the goods, the seller is probably discharged; see a somewhat similar case of *Lovatt v. Hamilton* (1839), 5 M. & W. 639 (goods to arrive). So again, if two specific articles are agreed to be sold under an entire contract, and one subsequently perishes, the seller is probably discharged from delivering the other; it was so, at any rate, in the Civil law (Dig. 18, 1, 44).

(*g*) The price is an essential element of a contract of sale; see p. 113, *ante*.

(*h*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 8 (1); *Valpy v. Gibson* (1847), 4 C. B. 837, 864; *Joyce v. Swan* (1864), 17 C. B. (N. S.) 84, 93; *Churchill v. Wilkins* (1786), 1 Term Rep. 447 (so much a stone, and as much more as buyer gave to others); *Smith v. Blandy* (1825), Ry. & M. 257, 260 (buyer to pay customs duty: discount deductible only on net price); *Cannan v. Fowler* (1853), 14 C. B. 181 (interpretation of "fair value" by previous valuation); *Orchard v. Simpson* (1857), 2 C. B. (N. S.) 299 ("market value," not cost to seller); *Shaw's Llow Iron Co. v. Birchgrove Steel Co.* (1891), 7 T. L. R. 246, 11 L. L. (average of weekly official prices); *Biddell Brothers v. E. Clemens Horst Co.*, [1911] 1 K. B. 934, C. A., *per* FARWELL and KENNEDY, L.J.J. ("net cash": no deduction by rebate or otherwise and no credit); *Charrington & Co. v. Woolder* (1912), 29 T. L. R. 145, C. A. ("fair market price": tied house). As to course of dealing, see *Re Anglessey (Marquis)*, *Willmot v. Gardner*, [1901] 2 Ch. 548, C. A. (agreement to pay interest implied from course of dealing); *Browne v. Byrne* (1854), 3 E. & B. 703 (freight subject by usage to discount).

(*i*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 8 (2); *Acebal v. Levy* (1834), 10 Bing. 376 (executed contract); *Hoadly v. M'Laine* (1834), 10 Bing. 482 (executory contract); *Valpy v. Gibson* (1847), 4 C. B. 837, 864; *Laing v. Fidgeon* (1815), 6 Taunt. 108 (order for goods at "2s. to 26s.": reasonable price about those figures); *Olunnes v. Pezzey* (1807), 1 Camp. 8 (lowest value of goods, when presumed). The current or market price is not necessarily the measure of reasonable price (*Acebal v. Levy*, *supra*, *per* TINDAL, C.J., at p. 383).

(*k*) *Martinsau v. Kitching* (1872), L. R. 7 Q. B., *per* BLACKBURN, J., 436, at p. 456 (weighing on delivery); *Castle v. Playford* (1872), L. R. 7 Exch. 98, Ex. Ch. (weighing on arrival). This may perhaps be regarded as an extension of the doctrine of reasonable price. As to other cases of the goods perishing, see pp. 145, 146, *ante*.

(*l*) *Brogden v. Marriott* (1836), 3 Bing. (N. C.) 88; *Rourke v. Short* (1856), 5 E. & B. 904. An alternative price does not, of course, necessarily involve a bet; see *Cave v. Coleman* (1828), 3 Man. & Ry. (K. B.) 2. As to gaming contracts generally, see title GAMING AND WAGERING, Vol. XV., pp. 266 *et seq.*

SECT. 6.

The Price.

Change of
customs or
excise duty.

272. Unless otherwise agreed, where a new or increased customs or excise duty is imposed after the making of the contract, but before delivery of the goods, the amount of the duty may be added to the price, and, conversely, where a duty is repealed or reduced, the amount may be deducted from the price; and, in case the amount is not agreed between the parties it may be settled by the Revenue authorities (*m*).

SUB-SECT. 2.—Valuation by Third Party.

Valuation by
agreement.

273. The price may be left to be fixed by the valuation of a third party (*n*).

Valuer's
failure to
act.

274. Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided (*o*); provided that, if the goods or any part thereof have been delivered to and appropriated by the buyer, he must pay a reasonable price for the same (*p*).

Valuation
prevented
by party.

275. Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault (*q*).

(*m*) Finance Act, 1901 (1 Edw. 7, c. 7), s. 10, amended by the Finance Act, 1902 (2 Edw. 7, c. 7), s. 7; see *Conway Brothers and Savage v. Mulhern & Co.* (1901), 17 T. L. R. 730; *Newbridge Rhondda Brewery Co. v. Evans* (1902), 86 L. T. 453; title REVENUE, Vol. XXIV., p. 591, note (*c*).

(*n*) See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 8 (1); p. 147, *ante*; *Smith v. Peters* (1875), L. R. 20 Eq. 511; *Cannan v. Fowler* (1853), 14 C. B. 181 (fair value, to be fixed by arbitration if necessary). As to what amounts to a valuation, see *Gordon v. Whitehouse* (1856), 18 C. B. 747 (figures merely not added up).

(*o*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 9 (1); *Thurnell v. Balbirnie* (1837), 2 M. & W. 786 (action for non-acceptance); *Vickers v. Vickers* (1867), L. R. 4 Eq. 529 (action for specific performance); and compare title SPECIFIC PERFORMANCE. The valuation cannot be delegated (*Ess v. Truscott* (1837), 2 M. & W. 385). Valuation is distinguished from arbitration, which is in the nature of a judicial proceeding to decide an existing dispute (*Bos v. Helsham* (1866), L. R. 2 Exch. 72; *Re Carus-Wilson and Greene* (1886), 18 Q. B. D. 7, C. A.); compare title ARBITRATION, Vol. I., pp. 440, 441. Even where a question of fixing of price is involved, there may be an arbitration, as distinguished from a mere valuation, as where different prices are offered by two parties, and a third person is to decide (*Thomson v. Anderson* (1870), L. R. 9 Eq. 523). A valuation may be included in the term "arbitration" as used in a particular statute (*Stewart v. Williamson*, [1910] A. C. 455); see, further, title ARBITRATION, Vol. I., p. 440. It is conceived that the agreement is avoided, not from the time of the failure of the valuation, but *ab initio*, so that the buyer, if not in fault, could recover any sum paid as a deposit.

(*p*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 9 (1); *Clarke v. Westrope* (1856), 18 C. B. 765; and see title VALUERS AND APPRAISERS.

(*q*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 9 (2); *Thomas v. Fredricks* (1847), 10 Q. B. 775. So, too, the party in fault may be restrained by injunction from preventing the valuer from acting (*Smith v. Peters* (1875), L. R. 20 Eq. 511). For definition of "fault," see p. 120, *ante*. The "action for damages" seems to mean an action for preventing the valuation. Where a valuer is appointed there is no promise implied on the part of the person appointing that the valuer shall act (*Cooper v. Shuttleworth* (1856), 25 L. J. (ex.) 114). As to a contract that, on either

SECT. 7.—Conditions and Warranties.

SUB-SECT. 1.—Construction and Effect of Conditions and Warranties.

276. It depends upon the construction of the contract whether any statement made with reference to the goods is a stipulation in the contract, being a condition, or a warranty only, or whether it is an expression of opinion, or other mere representation, not forming part of the contract(r).

SECT. 7.
Conditions
and War-
ranties.

Statements
may be mere
representa-
tions or
stipulations.

party's default, the other party's valuer should value alone, see *Tew v. Harris* (1847), 11 Q. B. 7.

(r) *Behn v. Burness* (1863), 3 B. & S. 751, Ex. Ch.; *Bentzen v. Taylor, Sons & Co.* (2), [1893] 2 Q. B. 274, C. A.; see title CONTRACT, Vol. VII., p. 521. For the distinction between guarantee and warranty, compare title GUARANTEE, Vol. XV., p. 440, note (g). This is a question for the jury or, if the contract be in writing, for the court; *Behn v. Burness, supra*; *Bentzen v. Taylor, Sons & Co.* (2), *supra*. To form part of the contract the statement need not be made simultaneously with the conclusion of the bargain; it is sufficient that it should be "given during the course of the dealing which leads to the bargain, and should then enter into the bargain as part of it" (*De Lassalle v. Guildford*, [1901] 2 K. B. 215, 221, C. A.; *Cowdy v. Thomas* (1877), 36 L. T. 22; *Mew v. Russell* (1883), 2 Show. 284; *Lysney v. Selby* (1705), 2 Ld. Raym. 1118). It follows that representations made after the conclusion of the bargain are no part of it and require new consideration (*Roscorla v. Thomas* (1842), 3 Q. B. 234). Similarly, a representation made before the bargain is, except as the basis of an action of deceit (*Wright v. Crookes* (1840), 1 Scott (N. R.), 685), ineffectual, unless it be shown that the bargain was grounded on it (*Hopkins v. Tanqueray* (1854), 15 C. B. 130; *Malcolm v. Cross* (1898), 35 Sc. L. R. 794; compare *Percival v. Oldacre* (1865), 18 C. B. (N. S.) 398; *Schawel v. Reade* (1912), 46 L. T. 281, H. L.; *Heilbut, Symons & Co. v. Buckleton*, [1913] A. C. 30), or, if the bargain be committed to writing, the representation be either incorporated therein, or is shown to be part of the contract, collateral to the written terms (*Lloyd (Edward), Ltd. v. Sturgeon Falls Pulp Co., Ltd.* (1901), 85 L. T. 162; see title CONTRACT, Vol. VII., p. 528. In determining whether a representation be a promise, whether warranty or condition, it may be relevant to consider whether the seller asserts a fact of which the buyer is ignorant, or merely states his own opinion without special knowledge (*Heilbut, Symons & Co. v. Buckleton, supra*, per Lord Moulton, explaining *De Lassalle v. Guildford, supra*; and the dictum in *Cave v. Coleman* (1828), 3 Man. & Ry. (K. B.) 2; *Gee v. Lucas* (1867), 16 L. T. 357 (sale catalogue describes mare as "in foal to W.")). Statements in writing, alleged to be promises, may, by the terms of the writing, be shown not to be such (*Taylor v. Bullen* (1850), 5 Exch. 779 (clause against "error" excluding warranty)); and see the cases on horses, *infra*. See also the following cases:—as to genuineness of pictures: *Jendwine v. Slade* (1797), 2 Esp. 572 (old painter: opinion), explained in *Power v. Barham* (1836), 4 Ad. & El. 473, and *Gee v. Lucas, supra*; *Lomi v. Tucker* (1829), 4 C. & P. 15 ("a couple of Poussins": condition of genuineness); *De Sewhanberg v. Buchanan* (1832), 5 C. & P. 343 (question of warranty for jury); *Power v. Barham, supra* ("four pictures, Canaletto": question for jury); *Hyslop v. Skirlaw* (1905), 7 F. (Ct. of Sess.) 875 ("received for two pictures by P. and G.": facts show representation only); as to horses: *Geddes v. Pennington* (1817), 5 Dow, 159, H. L. (written warranty of soundness: verbal representation of place of origin of horse); *Richardson v. Brown* (1823), 1 Bing. 344 ("gelding driven in plough—warranted": soundness only warranted); *Hort v. Newry (Lord)* (1823), 1 L. J. (O. S.) (K. B.) 237 (description of horse intended to be reported to buyer); *Budd v. Fairmaner* (1831), 8 Bing. 48 ("grey four year colt, warranted sound": no warranty of age); *Anthony v. Halstead* (1877), 37 L. T. 433 ("horse rising five years, quiet, and warranted sound"); *Schawel v. Reade, supra* ("the horse is perfectly sound"); as to other goods: *Button v. Corder* (1817), 1 Moore (C. P.), 109

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ranties.

Stipulation
may be of
condition
or warranty.

Buyer's
voluntary
election as
regards con-
ditions.

277. Whether a stipulation (*s*) in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty (*t*), the breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract (*u*). A stipulation may be a condition though called a warranty in the contract (*a*).

278. Where a contract of sale is subject to any condition to be fulfilled by the seller the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated (*b*).

(turnip seed : statement that seller "could" warrant); *Camac v. Warriner* (1845), 1 C. B. 356 (materials described as "roofing or flooring" ten months after sold as "materials": no warranty); *Stucley v. Baily* (1862), 1 H. & C. 405 (condition of yacht: seller's opinion only); *Hopkins v. Hitchcock* (1863), 14 C. B. (N. S.) 65 (iron "S. and H. (crown) bars": brand referring to quality, not manufacture); *Walker v. Milner* (1866), 4 F. & F. 745 (safe: only a representation of future soundness); *Chalmers v. Harding* (1868), 17 L. T. 571 ("Wood's patent reaper will work efficiently": puff only of patent generally); *Osborn v. Hart* (1871), 23 L. T. 851 ("superior old port": warranty, not puff); *Cowdy v. Thomas* (1876), 36 L. T. 22 ("tubes of engine are copper": warranty).

(*s*) The reference to damages shows that "stipulation" includes only promises, and does not include collateral contingencies beyond the control of either party, as, e.g., in sales of goods "to arrive." Such cases are governed by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 1 (2) (see note (*q*), p. 115, *ante*), and the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 61 (2), saving the common law (see p. 281, *post*).

(*t*) See "warranty" explained, p. 122, *ante*.

(*u*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11 (1) (b); it is clear from the language of the clause that it is intended to apply only to stipulations performable by the seller; and see *Graves v. Legg* (1854), 9 Exch. 709; *Behn v. Burness* (1863), 3 B. & S. 751, Ex. Ch.; *Oppenheim v. Fraser* (1876), 34 L. T. 524 (sale of cargo: "ship now at Rangoon"); compare *Woolfe v. Horne* (1877), 2 Q. B. D. 355, 360, 361; and see title CONTRACT, Vol. VII., pp. 520 *et seq.* The question is whether performance of the condition "goes to" the whole consideration for the promise of the other party; see *Bentzen v. Taylor, Sons & Co.* (2), [1893] 2 Q. B. 274, C. A., *per* BOWEN, L.J., at p. 281; *Wallis, Son and Wells v. Pratt and Haynes*, [1910] 2 K. B. 1003, C. A.; reversed, [1911] A. C. 394; S. C. *per* FLETCHER MOULTON, L.J., at [1910] 2 K. B. 1012, C. A.; see, generally, as to the principles governing dependent or independent agreements, title CONTRACT, Vol. VII., pp. 435, 436, 520 *et seq.* As to Scotland, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11 (2); as to construction of contracts generally with reference to this subject, see title CONTRACT, Vol. VII., pp. 432 *et seq.*, 520 *et seq.*; DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 433 *et seq.*, 489 *et seq.*

(*a*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11 (1) (b). Before the Act terms relating to the quality of the goods were, in spite of judicial protests, continually referred to as warranties though they were given effect to as conditions; see, e.g., *Chanter v. Hopkins* (1838), 4 M. & W. 399, 404; *Bannerman v. White* (1861), 10 C. B. (N. S.) 844. The Act now discriminates and provides that, though the parties may use the old language, if a term be really a condition it is to be given effect to as such (*Wallis, Son and Wells v. Pratt and Haynes*, [1911] A. C. 394, 397).

(*b*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11 (1) (a); *Ellen v. Topp* (1851), 6 Exch. 424, 431; *Behn v. Burness*, *supra*. The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11, deals only with conditions to be fulfilled by the seller, but by virtue of the saving of

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ranties.

Buyer's
compulsory
election.

279. Where a contract of sale is not severable (c), and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated (d), unless there be a term of the contract, express or implied, to that effect (e).

280. Nothing in the above statutory provisions affects the case of any condition or warranty (f) fulfilment of which is excused by law by reason of impossibility or otherwise (g).

Impossibility
etc. as an
excuse.

the common law in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 61 (2) (see p. 281, *post*), similar considerations apply to conditions to be fulfilled by the buyer. The principle that a party may voluntarily waive a stipulation which is for his own benefit is a general rule of contract law; and it is to such a voluntary waiver that the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11 (1) (a), seems to apply, whereas *ibid.*, s. 11 (1) (c), refers to two specific cases of waiver compulsorily presumed by law (*Wallis, Son and Wells v. Pratt and Haynes*, [1910] 2 K. B. 1003, C. A.; reversed, [1911] A. C. 394; S. C. *per* FLETCHER MOULTON, L. J. at [1910] 2 K. B. 1013, C. A.) and the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11 (3), to other cases of compulsory waiver.

(c) *Ibid.*, s. 11 (1) (c). The reference to part acceptance shows that these words are not confined to cases where the subject-matter of the contract is physically one, but that they include contracts intended to be treated as unseverable. An illustration of a severable contract is one for delivery of the goods by instalments where the price of the instalments is separately payable; as to such see *ibid.*, s. 31: p. 215, *post*; *Simpson v. Crippin* (1872), L. R. 8 Q. B. 14; *Brandt v. Lawrence* (1876), 1 Q. B. D. 344, C. A.; *Jackson v. Rotax Motor and Cycle Co.*, [1910] 2 K. B. 937, C. A., approving *Tarling v. O'Riordan* (1878), 2 L. R. Ir. 82, C. A.; and see also as to divisible and entire contracts, title CONTRACT, Vol. VII., p. 522.

(d) As to acceptance, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 35; p. 228, *post*; as to passing of property in specific goods, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 17, 18; pp. 174, 175, *post*; and, in illustration of the clause in the text, see *Graves v. Legg* (1854), 9 Exch. 709, 717; *Champion v. Short* (1807), 1 Camp. 53; *Harnor v. Groves* (1855), 15 C. B. 667 (entire contract); *Gompertz v. Denton* (1832), 1 Cr. & M. 207; *Street v. Blay* (1831), 2 B. & Ad. 456 (specific goods); *Wallis, Son and Wells v. Pratt and Haynes*, [1911] A. C. 304. The words "treated as a breach of warranty" do not mean "become a warranty *ex post facto*," but that the remedy of the buyer after an acceptance of the goods, whether voluntary or compulsory, is an action of damages as if the condition were a warranty; see *Wallis, Son and Wells v. Pratt and Haynes*, *supra*, *per* FLETCHER MOULTON, L. J., at [1910] 2 K. B. 1015, C. A.: "The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11 (1), does not state that a condition becomes a warranty if the goods are accepted, but only that the legal remedies for the breach of a condition become . . . limited to the single remedy which exists in the case of a warranty, namely, suing for damages. Whether an obligation is a condition or a warranty is decided . . . by the contract itself, and not by matters subsequent to the contract"; approved, S. C., [1911] A. C. 394.

(e) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11 (1) (c). As to the last clause, see *Bannerman v. White* (1861), 10 C. B. (N. S.) 844; *Head v. Tattersall* (1871), L. R. 7 Exch. 7.

(f) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11.

(g) *Ibid.*, s. 11 (3). As to impossibility, see *ibid.*, ss. 6, 7; pp. 145, 146, *ante*; *Chapman v. Withers* (1888), 20 Q. B. D. 824 (perishing of goods); and, generally, title CONTRACT, Vol. VII., pp. 426—432, 436. The word "impossibility" covers impossibility in fact and by law. As to legal impossibility as an excuse by the terms of the contract, see *United States*

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ranties.When
conditions.SUB-SECT. 2.—*Stipulations as to Time.*

281. Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale (*h*). Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract (*i*).

of *America v. Pelly* (1899), 15 T. L. R. 166 (delivery excused by state of war). The words "or otherwise" would seem to cover other cases than those mentioned in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11 (1) (c), in which a waiver of a condition is compulsorily presumed by law, as where the other party has prevented its performance (*Hotham v. East India Co.* (1787), 1 Term Rep. 638, 645, *per* ASHHURST, J.; *Mackay v. Dick* (1881), 6 App. Cas. 251), or has rendered himself unable to perform his own part (*Planché v. Colburn* (1831), 8 Bing. 14), or has absolutely refused to perform it (*Cort v. Ambergate, Nottingham and Boston and Eastern Junction Rail. Co.* (1851), 17 Q. B. 127; *Braithwaite v. Foreign Hardwood Co.*, [1905] 2 K. B. 543, C. A. (tender excused); and see title CONTRACT, Vol. VII., pp. 432 *et seq.* The conditions alluded to in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11 (3), are the conditions performable by the seller referred to in *ibid.*, s. 11 (1). As to conditions performable by the buyer, the common law is saved by *ibid.*, s. 61 (2).

(*h*) *Ibid.*, s. 10 (1); *Martindale v. Smith* (1841), 1 Q. B. 389; *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; compare the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (7). The reason is that failure in punctual payment does not go to the whole consideration for the sale. But the terms of the contract may make the time of payment an essential condition (*Bishop v. Shillito* (1819), 2 B. & Ald. 329, n. (passing of property); *Ebbw Vale Steel, Iron and Coal Co. v. Blaina Iron and Tinplate Co.* (1901), 6 Com. Cas. 33, C. A.; *Ryan v. Ridley & Co.* (1902), 8 Com. Cas. 105 (payment for each instalment); and see title CONTRACT, Vol. VII., pp. 413, 522.

(*i*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 10 (1); compare the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (3), as to contracts generally. But in mercantile contracts time is usually of the essence of the contract (*Reuter v. Sala* (1879), 4 C. P. D. 239, 246, 249, C. A.; *Alewyn v. Pryor* (1826), Ry. & M. 406 (arrival of goods on ship); *Tew v. Harris* (1847), 11 Q. B. 7 (time of appointment of valuer of goods); *Wimshurst v. Dealey* (1845), 2 C. B. 253 (engines for ship)); compare *Woolfe v. Horne* (1877), 2 Q. B. D. 355 (clearance of goods sold at auction); *Paton & Sons v. Payne & Co.* (1897), 35 Sc. L. R. 112, H. L. (delivery of printing machine: time not essential); *Sanders v. Maclean* (1883), 11 Q. B. D. 327, 336, C. A. (punctual delivery of bill of lading not ordinarily a condition). The reason for the general rule is obvious. A mercantile contract is not always an isolated transaction, but a link in a chain of transactions, and if A. does not keep his contract with B., then B. may not be able to keep his contract with C., so that punctual performance may go to the whole consideration for the sale. In many cases the time of shipment or delivery of the goods is treated as part of the essential description of the goods themselves (*Bowes v. Shand* (1877), 2 App. Cas. 455 (see title CONTRACT, Vol. VII., p. 413, note (c)); *Re General Trading Co. and Van Stolk's Commissiehandel* (1911), 16 Com. Cas. 95 ("shipment to be made and bill of lading dated during December or January")); compare *Gattorno v. Adams* (1862), 12 C. B. (N. S.) 560; see, too, *Graves v. Legg* (1854), 9 Exch. 709; *Busk v. Spence* (1815), 4 Camp. 329 (names of vessels to be declared as soon as goods are shipped); *Gattorno v. Adams, supra* (specific cargo shipped as per bill of lading dated September or October); *Alexander v. Vandersee* (1872), L. R. 7 C. P. 530, Ex. Ch. (for shipment in June and July); *Brandt v. Lawrence* (1876), 1 Q. B. D. 344, C. A. (shipment by steamer or steamers during February); *Reuter v. Sala, supra* (name of vessel or vessels, marks and

In a contract of sale "month" *prima facie* means calendar month (j).

SUB-SECT. 3.—*Implied Undertakings as to Title.*

282. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

(1) an implied condition on the part of the seller that, in the case of a sale, he has a right to sell (k) the goods, and that, in the case of an agreement to sell (l), he will have a right to sell the goods at the time when the property is to pass (m);

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Title, quiet
possession,
and freedom
from charges.

other particulars to be declared within sixty days of date of bill of lading); *Ashmore & Son v. Cox (C. S.) & Co.*, [1899] 1 Q. B. 436 (to be shipped by sailer or sailers from the Philippines between 1st May and 31st July); *Thalmann Frères & Co. v. Texas Flour Mills* (1900), 5 Com. Cas. 321, C. A. (clearance not later than 31st May); *Nickoll and Knight v. Ashton, Edridge & Co.*, [1901] 2 K. B. 126, C. A. (to be shipped from Egypt during February per ship O.); compare *Kidston & Co. v. Monceau Ironworks Co.* (1902), 7 Com. Cas. 82 (delivery of specification at particular time not a condition). Like other conditions, conditions as to time may be waived (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11 (1) (a); see p. 150, *ante*; *Alexander v. Gardner* (1835), 1 Bing. (N. C.) 671); see, generally, title CONTRACT, Vol. VII., p. 413.

(j) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 10 (2). This is the rule in mercantile contracts generally (*Webb v. Fairmaner* (1838), 3 M. & W. 473). But by usage "month" may have a special trade meaning in a particular trade (*Bissell v. Beard* (1873), 28 L. T. 740); see title CUSTOM AND USAGES, Vol. X., p. 265; and see, generally, title TIME.

(k) All that "right to sell" means is that the seller can pass the property, and that nobody has a title superior to that of the seller so as to interfere with the use (*Monforts v. Marsden* (1895), 12 R. P. C. 266, 269).

(l) As to the distinction between "sale" and "agreement to sell," see p. 117, *ante*.

(m) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 12 (1); *Allen v. Hopkins* (1844), 13 M. & W. 94, 102; *Eichholz v. Bunnister* (1864), 17 C. B. (N. S.) 708 (job lot of goods sold in a shop); *Raphael v. Burt* (1884), Cab. & El. 325; *Edwards v. Pearson* (1890), 6 T. L. R. 220, C. A. In cases of covenants of title to land the breach takes place when the property was intended to pass without the buyer being evicted (*Kingdon v. Nottle* (1815), 4 M. & S. 53; *Turner v. Moon*, [1901] 2 Ch. 825; *Baynes & Co. v. Lloyd & Sons*, [1895] 1 Q. B. 820, 824). The old common law rule was that on the sale of a specific chattel there was no implied undertaking as to title (Noy's Maxims, ch. 42; *Paget v. Wilkinson* (1696), cited in note to *Williamson v. Allison* (1802), 2 East, 446, 448; *Ormrod v. Huth* (1845), 14 M. & W. 651, 664, Ex. Ch.); but, as Lord CAMPBELL, C.J., said in 1851, "the exceptions have well nigh eaten up the rule" (*Sims v. Marryat* (1851), 17 Q. B. 281, at p. 291); and now the Act lays down a clear *prima facie* rule. In the following cases before the Act (some of which may still be of authority, as showing "a different intention") there was held to be no implied warranty of title:—*Peto v. Blades* (1814), 5 Taunt. 657 (qualified warranty by sheriff); *Morley v. Attonborough* (1849), 3 Exch. 500 (sale of unredeemed pledges); *Chapman v. Speller* (1850), 14 Q. B. 621 (purchase of another man's bargain at sale by sheriff); *Smith v. Neale* (1857), 2 C. B. (N. S.) 67 (assignment of patent: no warranty that invention new); *Bagueley v. Hawley* (1867), L. R. 2 C. P. 625 (purchase of bargain at auction for second-hand boiler); *Re Rogers, Ex parte Villars* (1874), 9 Ch. App. 432, 437 (no implied warranty of title by sheriff); *Dorab Ally Khan v. Abdool Azees* (1878), L. R. 5 Ind. App. 116 (qualified warranty by sheriff); see also, since the Act, *Payne v. Elsdon* (1900), 17 T. L. R. 161 (sale by auctioneer of goods under invalid distress). As to the master of a ship, see the *dictum* in *Page v. Cowasjee Eduljee* (1866), L. R. 1 P. C. 127, 144 (sale of ship by master as such implies no warranty).

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ranties.

(2) an implied warranty that the buyer shall have and enjoy quiet possession of the goods (*n*);

(3) an implied warranty that the goods shall be free from any charge or incumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made (*o*).

SUB-SECT. 4.—Sales by Description.

Conformity
with descrip-
tion a con-
dition.

283. Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description (*p*); and if the sale be by sample as well as by

(*n*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 12 (2); and see "warranty," defined, p. 122, *ante*. The distinction between the condition as to title and the warranty of quiet possession is similar to that between a covenant for title and one for quiet enjoyment. The former is an assurance by the grantor that he has the very estate in quantity and quality which he purports to convey; the latter is an assurance to the grantee against the consequences of a defective title and of any disturbance thereupon (*Howell v. Richards* (1809), 11 East, 633, *per* Lord ELLENBOROUGH, C.J., at p. 642). Thus, if the title is defective, the buyer may, under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 12 (1), reject the goods, but if he has accepted them and is afterwards disturbed he has, under *ibid.*, s. 12 (2), his remedy by action for breach of the warranty of quiet possession, the right of action arising on disturbance. Following the analogy of realty, the words "have and enjoy" would seem to cover the obtaining of possession (*Ludwell v. Newman* (1795), 6 Term Rep. 458; see also *Hawkes v. Orton* (1836), 5 Ad. & El. 367). But in this sense the clause is unnecessary, having regard to the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 27, 28; see pp. 204, 205, *post*. The implied warranty will probably be construed similarly to express contracts of indemnity or for quiet enjoyment, that is to say, as applicable to all acts of the seller, but only to lawful acts of third persons; see *Foster and Wilson v. Mapes* (1591), Cro. Eliz. 212; *Chanilflower v. Priestly* (1603), Cro. Eliz. 914 (quiet possession of goods); 2 Wms. Saund., ed. 1871, p. 526; *Nash v. Palmer* (1816), 5 M. & S. 374. The effect of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 12 (2), has been stated to this effect in *Monforts v. Marsden* (1895), 12 R. P. C. 266.

(*o*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 12 (3). That an express stipulation to the same effect would not be a condition a common law is shown by the reasoning of BRETT, M.R., in *Sanders v. Maclean* (1883), 11 Q. B. D. 327, C. A., at p. 337.

(*p*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 13. The general principle is clear; *Si aes pro auro veneat, non valet* (*Kennedy v. Panama etc. Mail Co.* (1867), L. R. 2 Q. B. 580, 588; *Wieler v. Schilizzi* (1856), 17 C. B. 619, *per* WILLES, J. ("Calcutta linseed")). "If you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it" (*Bowes v. Shand* (1877), 2 App. Cas. 455, *per* Lord BLACKBURN, at p. 480). The expression "description" usually means a particular class or kind of goods; but it also includes any statement which may be essential to the identity of the goods as contracted for, as, *e.g.*, as to their quality or fitness, place of origin or of shipment, time of despatch or delivery, mode of packing etc. The question is whether the untruth of the statement makes the goods delivered or tendered different things from what were contracted for (*Gompertz v. Bartlett* (1853), 2 E. & B. 849 (inland bill sold as foreign); *Jones v. Clarke* (1858), 2 H. & N. 725 (pitch pine to arrive from Savannah); *Bowes v. Shand*, *supra* (shipment in particular month); *Makin v. London Rice Mill Co.* (1869), 20 L. T. 705 (rice "in double bags")). It depends upon the construction of the

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contract whether any statement is a description, or a collateral warranty only, or a mere representation (*Allan v. Lake* (1852), 18 Q. B. 560, *per* ERLE, J., at p. 566). See, generally, on the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 13, the following cases :—as to pictures: *Lomi v. Tucker* (1829), 4 C. & P. 15 (name of painter), and the cases cited, note (7), p. 149, *ante*; as to ships: *Shepherd v. Kain* (1822), 5 B. & Ald. 240 (“copper fastened, with all faults”); *Barr v. Gibson* (1838), 3 M. & W. 390 (wrecked ship may be a “ship”); *Taylor v. Bullen* (1850), 5 Exch. 779 (“barque, teak built, A1; without allowance for error”: only description “barque”); as to seeds: *Poullon v. Lattimore* (1839), 9 B. & C. 259 (“good growing cinq foin”); *Allan v. Lake* (1852), 18 Q. B. 560 (“Skirving’s swedes turnip seed”); *Wieler v. Schilizzi* (1856), 17 C. B. 619 (“Calcutta linseed”); *Lovegrove v. Fisher* (1860), 2 F. & F. 128 (rape seed by sample: delivery of turnip seed); *Randall v. Raper* (1858), E. B. & E. 84 (Chevalier seed barley); *Carter v. Crick* (1859), 4 H. & N. 412 (seed professedly unknown, called “seed barley”); *Pinder v. Button* (1862), 11 W. R. 25 (mangold wurzell seed “of good growing stock”); *Wagstaff v. Shorthorn Dairy Co.* (1884), Cab. & El. 324 (“early rose regents potatoes”); *Howcroft v. Laycock* (1898), 14 T. L. R. 460 (cabbage seed: tree cabbage seed delivered: clause excluding warranty); *Howcroft and Watkins v. Perkins* (1900), 16 T. L. R. 217 (“Clayworth prize” celery seed: clause excluding liability for misdescription); *Re Walkers, Winsor and Hamm and Shaw, Son & Co.*, [1904] 2 K. B. 152 (St. Malo barley “about as per sample”); *Wallis, Son and Wells v. Pratt and Haynes*, [1911] A. C. 394 (common English sainfoin; attempted exclusion of seller’s liability for misdescription); as to provisions: *Yates v. Pym* (1816), 6 Taunt. 446 (“P.’s prime singed bacon”: inconsistent usage); *Powell v. Horton* (1836), 2 Bing. (N. C.) 668 (“mess pork of Scott & Co.”: trade meaning); *Smith v. Jeffryes* (1846), 15 M. & W. 561 (“ware potatoes”: written contract conclusive as to kind); *Harnor v. Groves* (1855), 15 C. B. 667 (same: flour “whites XS”); *Vernede v. Weber* (1856), 1 H. & N. 311 (Aracan Necrensis rice: some latitude by agreement allowed); *Simond v. Braddon* (1857), 2 C. B. (N. S.) 324 (“fair average Nieranzi rice”); *Osborn v. Hart* (1871), 23 L. T. 851 (“superior old port”); *Bowes v. Shand* (1877), 2 App. Cas. 455 (rice to be shipped in specified months); *Wren v. Holt*, [1903] 1 K. B. 610, C. A. (beer sold over counter); and as to other goods: *Tye v. Fynmore* (1813), 3 Camp. 462 (“sassafras wood”); *Bridge v. Wain* (1816), 1 Stark. 504 (“scarlet cuttings” of cloth); *Pettitt v. Mitchell* (1842), 4 Man. & G. 819 (woollen goods sold in specific lots by the yard “with all faults and errors of description”: subsequent adjustment of price); *Jones v. Clarke* (1858), 2 H. & N. 725 (“pitch pine timber of fair average quality from Savannah”: place of origin part of description); *Lucas v. Bristow* (1858), E. B. & E. 907 (“best oil: wet and inferior, if any, at fair allowance”) *Taylor v. Dalton* (1862), 3 F. & F. 263 (“Haswell Wallsend coals”); *Kirkpatrick v. Gowan* (1875), 9 I. R. C. L. 521 (“Cumberland and Welsh coal mixed”: admixture of other coal, when fatal); *Josling v. Kingsford* (1863), 13 C. B. (N. S.) 447 (oxalic acid); *Frith v. Mitchell* (1865), 4 F. & F. 464 (wool: special trade meaning of description); *Azémar v. Casella* (1867), L. R. 2 C. P. 677, Ex. Ch. (long-staple Salem cotton by sample); *Easterbrook v. Gibb & Co.* (1887), 3 T. L. R. 401, C. A. (gas-pipe vices, partly defective, but answering description as a whole lot); *Peters & Co. v. Planner* (1895), 11 T. L. R. 169 (“Galician eggs with all faults”); *Varley v. Whipp*, [1900] 1 Q. B. 513 (second-hand reaper); *Vigers Brothers v. Sanderson Brothers*, [1901] 1 K. B. 608 (laths “of about the specification” as to length); *Bostock & Co., Ltd. v. Nicholson & Sons, Ltd.*, [1904] 1 K. B. 725 (“sulphuric acid commercially free from arsenic”); *Re North Western Rubber Co., Ltd., and Huttenbach & Co.*, [1908] 2 K. B. 907, C. A. (“fair usual quality Banjermassin Jelutong rubber”: inconsistent usage); *Dominion Coal Co., Ltd. v. Dominion Iron and Steel Co., Ltd., and National Trust Co., Ltd.*, [1909] A. C. 293, P. C. (coal “reasonably free from stone and shale”); see also the cases cited as to the meaning of trade descriptions in title CUSTOM AND USAGES, Vol. X., pp. 265, 266, 279, 280, 281. The course of dealing between the parties may show the meaning of the terms used, and so establish a sale by description (*Bostock & Co., Ltd. v.*

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description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description (q).

Goods are sold by description where the buyer enters into the contract of sale in reliance on the description of the goods given by or on behalf of the seller (r). There may be a sale by description although the goods are specific (s).

Nicholson & Sons, Ltd., [1904] 1 K. B. 725 ("B.O.V."). And a particular description may attach to the goods by estoppel. Thus, on a sale of "oats," the seller may be aware that the buyer thinks he is being promised old oats (*Smith v. Hughes* (1871), L. R. 6 Q. B. 597). Examination of bulk or sample does not necessarily negative a sale by description (*Josling v. Kingsford* (1863), 13 C. B. (N. S.) 447 (latent defect); *Tye v. Fynmore* (1813), 3 Camp. 462). But an examination, where, at least, the nature of the goods is discoverable, may show that the buyer bought on his own judgment, and not by description (*Prosser v. Hooper* (1817), 1 Moore (C. R.), 106 (article called saffron bought at damage price, and examined by buyer); *Parsons v. Sexton* (1847), 4 C. B. 899; *Attwater v. Kinnes* (1906), in House of Lords, unreported (Arctic mica)). Nor is a sale by description negated by a clause excluding the liability of the seller, or the buyer's right of rejection, or providing for arbitration (*Azémar v. Casella* (1867), L. R. 2 C. P. 677, Ex. Ch.; *Gorton v. Macintosh Co.*, [1883] W. N. 103, C. A.; *Vigers Brothers v. Sanderson Brothers*, [1901] 1 K. B. 608; *Wallis, Son and Wells v. Pratt and Haynes*, [1911] A. C. 394). But, where several statements are made about the goods, a clause excluding liability for errors of description may turn one or more of such statements into mere representations (*Taylor v. Bullen* (1850), 5 Exch. 779 (barque described as "teak built, A1, and fitted for passenger ship"); *Reynolds v. Wrench* (1888), 23 L. J. N. C. 27 (seed sold as "Yellow Tankard turnip"); *Howcroft and Watkins v. Perlins* (1900), 16 T. L. R. 217 (celery seed also described as "Clayworth prize"). It is submitted that these cases are not inconsistent with *Wallis, Son and Wells v. Pratt and Haynes*, *supra*. Parol evidence may be given of the trade meaning of the description contained in the contract (*Powell v. Horton* (1836), 2 Bing. (N. C.) 668 ("mess pork of Scott & Co."); *Woodhouse v. Swift* (1836), 7 C. & P. 310 ("sound timber"); *Ryder v. Woodley* (1862), 10 W. R. 294 ("St. Gilles Marais wheat": mixture of barley); *Lucas v. Bristol* (1858), E. B. & E. 907 ("best oil"); see title CUSTOM AND USAGES, Vol. X., pp. 264 *et seq.* But, on ordinary principles, parol evidence is not admissible to vary or to negative the description contained in the written contract (*Smith v. Jeffries* (1846), 15 M. & W. 561; *Harnor v. Groves* (1855), 15 C. B. 667; *Schweir v. Thoras* (1862), 3 F. & F. 243; *Gardiner v. Gray* (1815), 4 Camp. 144); and see title EVIDENCE, Vol. XIII., pp. 427, 566.

(q) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 13; *Nichol v. Godts* (1854), 10 Exch. 191; *Azémar v. Casella*, *supra*; *Lovegrove v. Fisher* (1860), 2 F. & F. 128 (turnip seed delivered for rape seed); *Wallis, Son and Wells v. Pratt and Haynes*, *supra* (giant sainfoin seed delivered as common English); see also *Towerson v. Aspatria Agricultural Co-operative Society* (1877), 27 L. T. 276, Ex. Ch. (guaranteed analysis of bulk to accompany sample). The case contemplated is a sale by sample as well as by description. Sometimes, however, the sample is the only description, as where the subject-matter of the sale is a thing of which the character is unknown; here accordance of the bulk with the sample satisfies the contract (*Mody v. Gregson* (1868), L. R. 4 Exch. 49, 53 Ex. Ch.; *Carter v. Crick* (1859), 4 H. & N. 412 (seed)).

(r) *Varley v. Whipp*, [1900] 1 Q. B. 513. Unascertained or future goods can only be identified by what is said with regard to them. The buyer, therefore, necessarily relies upon what is said. But he may rely upon the physical identity of specific goods; so that what is said about them may be therefore only an immaterial representation, or at most a collateral warranty.

(s) *Varley v. Whipp*, *supra*; *Kirkpatrick v. Gowan* (1875), 9 L. R. C. L. 521 (stack of coal described as "of C. and W. coal mixed").

SUB-SECT. 5.—*Implied Terms as to Quality or Fitness.*SECT. 7.
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General rule.

(i.) *Caveat Emptor.*

284. Subject to the provisions of the Sale of Goods Act, 1893 (*t*), and any other statutory provisions, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as hereinafter stated (*a*).

(ii.) *Fitness for Particular Purpose.*

285. Where the buyer, expressly or by implication (*b*), makes known to the seller the particular (*c*) purpose for which the goods are required, so as to show (*d*) that the buyer relies on the seller's

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goods, when
a condition.

(*t*) 56 & 57 Vict. c. 71. The general exceptions to the rule are contained in *ibid.*, ss. 14, 15; see note (*a*), *infra*; p. 160, *post*. These general exceptions are supplemented by certain statutory provisions as to particular classes of goods; see, *e.g.*, Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 17; see, further, p. 282, *post*. As to usages to the same effect, see the cases cited in title CUSTOM AND USAGES, Vol. X., pp. 265, 266; and compare titles FOOD AND DRUGS, Vol. XV., pp. 5 *et seq.*, 45 *et seq.*; MEDICINE AND PHARMACY, Vol. XX., pp. 377 *et seq.*, 381 *et seq.*

(*a*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14. "Contract of sale" includes both an agreement to sell and a sale (*ibid.*, s. 62 (1)); and "quality of goods" includes their state or condition (*ibid.*). The general rule as to quality or fitness is *caveat emptor*, but it has become in reality largely the exception. The same rule applies to goods given in exchange (*La Neuville v. Nourse* (1813), 3 Camp. 351). Illustrations of sales are *Chundelov v. Lopus* (1603), Cro. Jac. 4; 2 Smith, L. C., 11th ed., pp. 54, 62, Ex. Ch.; *Barr v. Gibson* (1838), 3 M. & W. 390, 399 (ship sold at sea); *Chanter v. Hopkins* (1838), 4 M. & W. 399 (smoke-consuming furnace); *Burnby v. Bollett* (1847), 16 M. & W. 644 (carcase of meat: seller not dealer); *Emmerton v. Mathews* (1862), 7 H. & N. 586 (carcase of meat: seller a dealer); *Hall v. Conder* (1857), 2 C. B. (N. S.) 22, 40 (patent); *Horsfall v. Thomas* (1862), 1 H. & C. 90 (defective gun); *Kennedy v. Panama etc. Mail Co.* (1867), L. R. 2 Q. B. 580, 587 (horse (cited as an example only)); *Jones v. Just* (1868), L. R. 3 Q. B. 197, 202 (rule stated). In *Wallis v. Russell*, [1902] 2 I. R. 585, at p. 615, C. A. (unwholesome crab), FIRZGIBBON, L.J. says: "*Caveat emptor* does not mean in law or Latin that the buyer must take chance, it means that he must take care. It applies to the purchase of specific things, *e.g.*, to a horse or a picture upon which the buyer can and usually does exercise his own judgment. It applies also whenever the buyer voluntarily chooses what he buys. It applies also whenever by usage or otherwise it is a term of the contract express or implied that the buyer shall not rely on the skill or judgment of the seller."

(*b*) Knowledge may be imparted by matters *ab extra* the contract itself, even when it is in writing, or by the very description of the goods themselves (*Gillespie Brothers & Co. v. Cheney, Eggar & Co.*, [1896] 2 Q. B. 59, 63; *Jacobs v. Scott & Co.* (1899), 2 Fraser, 70 House of Lords; *Preist v. Last*, [1903] 2 K. B. 148, C. A.).

(*c*) "Particular purpose" means purpose known or communicated, not special, as distinguished from general purpose (*Preist v. Last*, *supra*; *Wallis v. Russell*, *supra*).

(*d*) These words mean "in circumstances showing." Not only must the buyer's purpose be communicated, but he must rely upon the seller's skill or judgment. Thus, if, *e.g.*, the goods are to be manufactured according to the buyer's plan, the buyer relies upon his own judgment (*Hall v. Burke* (1886), 3 T. L. R. 165, C. A., *per* Lord ESHER, M.R.). And generally no condition or warranty of fitness is implied where the buyer, although he may state his purpose, selects the goods he requires (*Wilson v. Dunville* (1879), 4 L. R. 1r. 249; see also *Turner v. Mucklow* (1862),

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skill or judgment (e), and the goods are of a description which it is in the course of the seller's business to supply (f), whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose (g).

8 Jur. (N. S.) 870; *Fitzgerald v. Iveson* (1858), 1 F. & F. 410; *Robertson v. Amazon Tug and Lighterage Co.* (1881), 7 Q. B. D. 598, C. A.).

(e) The fact that no ordinary skill or judgment could detect a defect does not negative the implied condition if the seller's skill etc. is in fact relied upon (*Frost v. Aylesbury Dairy Co.*, [1905] 1 K. B. 608, 613, C. A.).

(f) The seller must therefore be a dealer (*Wilson v. Dunville* (1879), 4 L. R. Ir. 249; *Turner v. Mucklow* (1862), 3 Jur. (N. S.) 870).

(g) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14 (1). As to the distinction between condition and warranty, see *ibid.*, s. 11 (1) (b); p. 150, ante. The burden of proof of fitness is *prima facie* on the seller (*Hayden v. Hayward* (1808), 1 Camp. 180). Illustrations of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14 (1), are *Holcombe v. Hewson* (1810), 2 Camp. 391; *Stanchiffe v. Clarke* (1852), 7 Exch. 439 (beer supplied by brewer to publican); *Brown v. Edgington* (1841), 2 Man. & G. 279 (rope for hoisting casks); *Cumac v. Warriner* (1845), 1 C. B. 356 (alternative use of material: no particular use mentioned); *Bluck v. Elliot* (1859), 1 F. & F. 595 (sheep wash); *Jackson v. Harrison* (1862), 2 F. & F. 782 (refuse product of seed crushing bought as cattle food: no purpose mentioned); *Turner v. Mucklow* (1862), 8 Jur. (N. S.) 870 (refuse product of calico printing bought as dye: seller not dealer); *Bigge v. Parkinson* (1862), 7 H. & N. 955, Ex. Ch. (troop stores for ship); *Mallan v. Radloff* (1864), 17 C. B. (N. S.) 588 (specific soap frames: express warranty); *Macfarlane v. Taylor* (1868), L. R. 1 Sc. & Div. 245 (whisky to be coloured like rum for African trade); *Osborn v. Hart* (1871), 23 L. T. 851 (port fit for laying down); *Beer v. Walker* (1877), 46 L. J. (Q. B.) 677 (rabbits); *Randall v. Newson* (1877), 2 Q. B. D. 102, C. A. (latent defect, *semble* overruling *Bhuett v. Osborne* (1816), 1 Stark. 384 (defective bowsprit); *Hall v. Burke* (1886), 3 T. L. R. 165, C. A. (machinery for sawing marble); *Drummond v. Van Ingen* (1887), 12 App. Cas. 284 (worsted coatings); *Burrows v. Smith* (1894), 10 T. L. R. 246 (partridges); *Gillespie Brothers & Co. v. Cheney, Eggar & Co.*, [1896] 2 Q. B. 59 (coal for bunkering); *Jacobs v. Scott & Co.* (1899), 2 Fraser, 70 House of Lords (hay for tram company); *Williamson v. Rover Cycle Co.*, [1901] 2 I. R. 615, C. A. (limited warranty: express exclusion of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14); *Wallis v. Russell*, [1902] 2 I. R. 585, C. A. (crab for supper); *Preist v. Last*, [1903] 2 K. B. 148, C. A. (hot-water bottle); see *Clarke v. Army and Navy Co-operative Society*, [1903] 1 K. B. 155, C. A. (tin of disinfecting powder dangerous to open: tort); *Strongitharm v. North Lonsdale Iron and Steel Co.* (1905), 21 T. L. R. 357, C. A. (limestone for smelting from second-grade quarry); *Frost v. Aylesbury Dairy Co.*, [1905] 1 K. B. 608, C. A. (contaminated milk: latent defect); *Chaproniere v. Mason* (1905), 21 T. L. R. 633, C. A. (Bath bun with stone in it: negligence); *Crichton and Stevenson v. Love*, [1908] S. C. 818 (bunkering coal); *Jackson v. Watson & Sons*, [1909] 2 K. B. 193, C. A. (tinned salmon); *Dominion Coal Co., Ltd. v. Dominion Iron and Steel Co., Ltd.*, and *National Trust Co., Ltd.*, [1909] A. C. 293, P. C. (coal for steel manufacture); *Bristol Tramways etc. Carriage Co., Ltd. v. Fiat Motors, Ltd.*, [1910] 2 K. B. 831, C. A. (motor omnibus etc.). The parties may agree that a fixed period of trial, without the discovery of any unfitness of the goods, shall be conclusive (*Sharp v. Great Western Rail. Co.* (1841), 9 M. & W. 7). The provisions of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14 (1), and of *ibid.*, s. 14 (2) (see p. 159, post), are not mutually exclusive. Thus, the fact that the latter clause is satisfied does not show that the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14 (1), is (*Bristol Tramways etc. Carriage Co., Ltd. v. Fiat Motors, Ltd.*, [1910] 2 K. B. 831, C. A., per KENNEDY, L.J., at p. 843). An implied condition of fitness covers latent defects (*Randall v. Newson*, *supra*; *Frost v. Aylesbury Dairy Co.*, *supra*); and the fact that the buyer has an opportunity of examining, or actually

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But in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose^(h). It must, however, be a merchantable article, and of the description contracted for⁽ⁱ⁾.

(iii.) *Merchantable Quality.*

286. Where goods are bought by description^(j) from a seller who deals in goods of that description, whether he be the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality^(k); provided that if the buyer

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quality, when
a condition.

examines, the goods is immaterial if the other's judgment is relied on, which is a question of fact (*Wallis v. Russell*, [1902] 2 I. R. 585, C. A., *per* FALLES, C.B., and the Court of Appeal). Where, however, the defect in the goods is one known to the buyer, or, where he has seen the goods, is obvious to the senses, it is conceived that the presumption will be that the buyer bought on his own judgment, so far as the particular defect is concerned, according to the analogy of the rule applicable to express warranties; see p. 164, *post*; but see the *dictum* of the Court of Appeal in *Randall v. Newson* (1877), 2 Q. B. D. 102, C. A. It was formerly thought that there is necessarily an implied condition that provisions sold are fit for food (3 Bl. Com. 165; but see to the contrary, *Burnby v. Bollett* (1847), 16 M. & W. 644, where the law is considered; *Emmerton v. Mathews* (1862), 7 H. & N. 586; *Smith v. Baker, Son, and Death* (1878), 40 L. T. 261; and, since the Act, *Newbury v. Perowne* (1908), referred to in 72 J. P. (Journal) 302). The Act draws no distinction between provisions and other goods (*Wallis v. Russell*, *supra*, at p. 611; *Wren v. Holt*, [1903] 1 K. B. 610, C. A.; *Frost v. Aylesbury Dairy Co.*, [1905] 1 K. B. 608, C. A.; *Chuproniere v. Mason* (1905), 21 T. L. R. 633, C. A.; *Jackson v. Watson & Sons*, [1909] 2 K. B. 193, C. A.), provided the seller be a dealer; see *Burnby v. Bollett*, *supra* (seller not dealer).

(h) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14 (1) (proviso). In such a case the buyer is deemed to buy on his own judgment, even although the goods are not specific (*Chanter v. Hopkins* (1838), 4 M. & W. 399 (patent smoke-consuming furnace); *Prideaux v. Bunnett* (1857), 1 C. B. (N. S.) 613; *Prideaux v. M'Murray* (1860) 2 F. & F. 225 (smoke-consuming valve); *Ollivant v. Bayley* (1843), 5 Q. B. 288 (patent printing machine); *Chalmers v. Harding* (1868), 17 L. T. 571 (corn reaper); *Paul & Co. v. Glasgow Corporation* (1900), 3 F. (Ct. of Sess.) 119 (patent smoke-consuming apparatus)); compare title FOOD AND DRUGS, Vol. XV., p. 22. As to what constitutes a "patent or other trade name" for this purpose, see *Gillespie Brothers & Co. v. Cheney, Eggar & Co.*, [1896] 2 Q. B. 59, 64; *Bristol Tramways etc. Carriage Co., Ltd. v. Fiat Motors, Ltd.*, [1910] 2 K. B. 831, 839, 842, C. A. The proviso is a branch of the larger rule that a buyer buys on his own judgment where he defines the thing he requires for his stated purpose. It also assumes that the seller has not expressly undertaken that the goods shall be fit for the buyer's purpose, in which case the buyer would of course not be bound to take the goods (*Chanter v. Hopkins*, *supra*, *per* Lord ABINGER, C.B., at p. 405; *Hydraulic Engineering Co. v. Spencer & Sons* (1886), 2 T. L. R. 554, C. A.; *Bristol Tramways etc. Carriage Co., Ltd. v. Fiat Motors, Ltd.*, *supra*).

(i) Under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 13, 14 (2); *Bristol Tramways etc. Carriage Co., Ltd. v. Fiat Motors, Ltd.*, *supra*; *Williamson v. Rover Cycle Co.*, [1901] 2 I. R. 615, C. A., *per* FITZGIBBON, L.J.

(j) For the meaning of these words, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 13; p. 156, *ante*. The description may be implied (*Wren v. Holt*, *supra*).

(k) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14 (2). "Quality" includes "state or condition" (*ibid.*, s. 62 (1)). As illustrations of *ibid.*,

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has examined the goods there is no implied condition as regards defects which such examination ought to have revealed (*l*).

Goods are of merchantable quality where they are of such quality and in such condition that a reasonable man, acting reasonably, would, after a full examination, accept the goods in the circumstances of the case in performance of his offer to buy them, whether he buys for his own use or to sell again (*m*).

SUB-SECT. 6.—Sale by Sample.

A question of
intention.

287. A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect (*n*).

s. 14 (2), see *Gardiner v. Gray* (1815), 4 Camp. 144 (waste silk); *Laing v. Fidgeon* (1815), 6 Taunt. 108 (saddles); *Jones v. Bright* (1829), 5 Bing. 533 (copper sheathing); *Mody v. Gregson* (1868), L. R. 4 Exch. 49, Ex. Ch. (shirting); *Jones v. Just* (1868), L. R. 3 Q. B. 197 (Manilla hemp), reviewing the previous cases; *Beer v. Walker* (1877), 46 L. J. (Q. B.) 677 (rabbits); *McClelland v. Stewart* (1883), 12 L. R. Ir. 125 (goods "as classified": exclusion of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14 (2)); *Drummond v. Van Ingen* (1887), 12 App. Cas. 284, 290; *Jones v. Padgett* (1890), 24 Q. B. D. 650 (cloth); *Wren v. Holt*, [1903] 1 K. B. 610, C. A. (beer contaminated with arsenic); *Bristol Tramways etc. Carriage Co., Ltd. v. Fiat Motors, Ltd.*, [1910] 2 K. B. 831, C. A. (motor omnibuses); *Jackson v. Rotax Motor and Cycle Co.*, [1910] 2 K. B. 937, C. A. (motor horns). The condition does not apply to the receptacle of the goods where it is a mere adjunct to, or incident of, the goods themselves, as, e.g., the casks containing oil sold, but the state of the receptacle may affect the quality of the goods themselves (*Gower v. Von Dedalzen* (1837), 3 Bing. (N. C.) 717; *Makin v. London Rice Mill Co.* (1869), 20 L. T. 705). As under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14 (1), it is necessary under *ibid.*, s. 14 (2), that the seller should be a dealer in the class of goods sold; otherwise there is no condition (*Ipswich Gaslight Co. v. King & Co.* (1886), 3 T. L. R. 100, C. A. (surplus tar: seller not a dealer)). The rule applies to specific as well as to unascertained goods (*Shepherd v. Pybus* (1842), 3 Man. & G. 868; *Bristol Tramways etc. Carriage Co., Ltd. v. Fiat Motors, Ltd.*, *supra*, at p. 838). As to deterioration of the goods in transit to the buyer, see p. 223, *post*; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 33.

(*l*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14 (2); compare, as to sale by sample, *ibid.*, s. 15 (2) (c); see p. 162, *post*; *Drummond v. Van Ingen* (1887), 12 App. Cas. 284, 290; *Wallis v. Russell*, [1902] 2 I. R. 585, 596, C. A. The rule previously to the Act was that a warranty of merchantable quality was implied where goods of a specified description, i.e., kind, inaccessible to the buyer's examination, were contracted for. In such a case the presumption was that the buyer relied upon the judgment, knowledge, and information of the seller, and the maxim *caveat emptor* accordingly did not apply (*Jones v. Just* (1868), L. R. 3 Q. B. 197). Under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), the condition is not excluded except where the buyer has actually examined the goods, and then only as regards discoverable defects. The Act has thus adapted to implied conditions the principle of the rule at common law that an express general warranty does not cover patent defects; see p. 164, *post*.

(*m*) *Bristol Tramways etc. Carriage Co., Ltd. v. Fiat Motors, Ltd.*, *supra*, per FARWELL, L.J., at p. 841; see also *Jones v. Bright* (1829), 5 Bing. 533, per BEST, C.J., at p. 544; *Shepherd v. Pybus*, *supra* (barge unfit for ordinary use as such); and, if the buyer carries on two businesses, of which the seller knows one only, the question is whether the goods are merchantable as supplied to a buyer carrying on the business known to the seller (*Jones v. Padgett* (1890), 24 Q. B. D. 650).

(*n*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 15 (1). As to annexing such a term by usage to a written contract, see *Syers v. Jones* (1848),

The mere exhibition of a sample during the negotiation of the contract does not constitute the contract one for sale by sample (o).

SECT. 7.
Conditions
and War-
ranties.

288. In the case of a contract for sale by sample the following conditions are implied:—

Conditions
implied.

- (1) that the bulk shall correspond with the sample in quality (p);
- (2) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample (q);

2 Exch. 111. As to express sales by sample, see, *e.g.*, *Russell v. Nicolopulo* (1860), 8 C. B. (N. S.) 362 (bulk to be equal to agent's report and to samples); *Towerson v. Aspatia Agricultural Co-operative Society* (1872), 27 L. T. 276, Ex. Ch.; *Clark v. Schwartz* (1853), 2 W. R. 16 (bulk to be equal to sample and analysis); *Heyworth v. Hutchinson* (1867), L. R. 2 Q. B. 447 ("wool guaranteed about similar to samples"); *Azémar v. Casella* (1867), L. R. 2 C. P. 677, Ex. Ch. ("cotton guaranteed equal to sample": otherwise an allowance); *Re Walkers, Winsor and Hamm and Shaw, Son & Co.*, [1904] 2 K. B. 152 ("about as per sample"). The office of a sample, like inspection of bulk, is to present to the eye the intention of the parties, which it may be difficult or impossible to express in words. But a sample cannot be treated as conveying any greater information than would be given by express words (*Drummond v. Van Ingen* (1887), 12 App. Cas. 284, 297 (latent defect in goods and sample). *Parkinson v. Lee* (1802), 2 East, 314, to the contrary, is no longer law (*Randall v. Newson* (1877), 2 Q. B. D. 102, C. A.).

(o) *Tye v. Fynmore* (1813), 3 Camp. 462; *Gardiner v. Gray* (1815), 4 Camp. 144; *Meyer v. Everth* (1814), 4 Camp. 22; *Ginner v. King* (1890), 7 T. L. R. 140, C. A. (all cases of written contracts).

(p) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 15 (2) (a). "Quality" includes state or condition; see p. 121, *ante*. Where the goods do not answer to their description, *ibid.*, s. 13, also applies; see p. 154, *ante*. See, on this enactment, *Hibbert v. Shee* (1807), 1 Camp. 113 (usage inconsistent with written contract); *Parker v. Palmer* (1821), 4 B. & Ald. 387, 391 (Indian rice); *Wells v. Hopkins* (1839), 5 M. & W. 7 (failure of consideration for bill given for hops); *Cooke v. Riddell* (1844), 1 Car. & Kir. 561 (usage to make rebate on price); *Carter v. Crick* (1859), 4 H. & N. 412 (unknown seed called seed barley); *Lucy v. Mouslet* (1860), 5 H. & N. 229 (cider); *Borrowman v. Rossel* (1864), 16 C. B. (N. S.) 58 (refined petroleum: sold note omitting provision as to sample: buyer's equitable plea); *Heilbutt v. Hickson* (1872), L. R. 7 C. P. 438 (boots); *Smith v. Hughes* (1871), L. R. 6 Q. B. 597 (oats sold simply as oats, and not as old oats); *Mellor v. Japing* (1889), 5 T. L. R. 574 (cloth not according to sample in colour); *Johnson v. Gaskain* (1891), 8 T. L. R. 70 (hops falsely packed contrary to statute); *Re Walkers, Winsor and Hamm and Shaw, Son & Co.*, *supra* ("about as per sample": usage qualifying implied condition). As to "average sample," see *Leonard v. Fowler* (1871), 44 New York Reports, 289. As to mistake in exhibiting the wrong sample, and the effect, see *Scott v. Littledale* (1858), 8 E. & B. 815; *Megaw v. Molloy* (1878), 2 L. R. Ir. 530, C. A. As to part of bulk being inferior to sample, see *Aitken, Campbell & Co., Ltd. v. Bollen and Gutenby*, [1908] S. C. 490. The implied condition applies to specific goods; accordingly *Heyworth v. Hutchinson* (1867), L. R. 2 Q. B. 447, is open to reconsideration.

(q) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 15 (2) (b); *Lorymer v. Smith* (1822), 1 B. & C. 1; *Heilbutt v. Hickson* (1872), L. R. 7 C. P. 438). The condition is excluded under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 55, where there is a stipulation for payment of the price on arrival of the goods, and before actual delivery to the buyer (*Polenghi Brothers v. Dried Milk Co., Ltd.* (1904), 10 Com. Cas. 42 (cash on arrival against shipping documents)). But the buyer retains the right, after payment, to examine the goods on delivery or tender by the seller, as a condition precedent to acceptance (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 34); see p. 228, *post*.

SECT. 7.
Conditions
and War-
ranties.

(3) that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample (r).

SUB-SECT. 7.—Other Common Law or Statutory Conditions and Warranties.

By trade
usage.

289. An implied condition as to quality or fitness for a particular purpose may be annexed by the usage of trade (s).

Sale by
manufacturer
as such.

290. Where there is a contract of sale by a manufacturer, as such, and not as a dealer, there is perhaps, in the absence of trade usage, an implied condition that the goods are of the seller's own manufacture (t).

Statutory
warranties.

291. Statutory warranties are annexed to the sale of certain articles. For example, on the sale of an anchor or chain cable, there is an implied warranty that it has been proved and tested before sale (a); on the sale of hops in any bag or pocket marked with any description etc. indicating the name of the grower, or the place or year of growth, the seller is deemed to contract for the genuineness of the description etc. (b); and on the sale of an article with a trade mark, there is an implied warranty that the mark is genuine and has been properly applied (c).

(r) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 15 (2) (c); *Macfarlane v. Taylor* (1868), L. R. 1 Sc. & Div. 245; *Heilbutt v. Dickinson* (1872), L. R. 7 C. P. 438; *Mody v. Gregson* (1868), L. R. 4 Exch. 49, Ex. Ch.; *Drummond v. Van Ingen* (1887), 12 App. Cas. 284; *Haines, Butcher & Co. v. Firminger* (1885), 2 T. L. R. 107. For the meaning of "merchantable," see p. 160, *ante*. The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 15 (2) (c), presupposes that both the sample and the bulk contain a latent defect. If the latent defect is in the sample only there is no breach of the provision, and the question would seem to be whether, under *ibid.*, s. 15 (2) (a), the bulk corresponds with the apparent quality of the sample. If the defect in the sample is patent, the seller fulfils his contract by delivering the bulk in accordance with the defective sample, for any implied intention that the bulk shall be of higher quality is negatived (*Mody v. Gregson, supra*).

(s) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14 (3); *Jones v. Bowden* (1813), 4 Taunt. 847; *Weall v. King* (1810), 12 East, 452, cited by HEATH, J., in *Jones v. Bowden, supra* (sale of sheep as "stock"); compare *Syers v. Jonas* (1848), 2 Exch. 111 (sale by sample implied). Conversely, an implied condition or warranty may be negatived by the usage of a particular trade (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 55). As to trade usage generally, see title CUSTOM AND USAGES, Vol. X., pp. 249 *et seq.*

(t) *Johnson v. Raylton* (1881), 7 Q. B. D. 438, C. A., BRAMWELL, L.J., dissenting; *contra* in Scotland (*West Stockton Iron Co. v. Neilson and Maxwell* (1880), 7 R. (Ct. of Sess.) 1055; *Johnson and Reay v. Nicholl & Son* (1881), 8 R. (Ct. of Sess.) 437). If this implied condition can be considered as coming within the expression "quality of goods," it is negatived by the exclusive terms of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14, but if it does not fall within that term, *Johnson v. Raylton, supra*, is still law in England. *Quære*, however, whether manufacture by the seller himself may not in some circumstances be considered an implied description of the goods under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 13.

(a) Anchors and Chain Cables Act, 1899 (62 & 63 Vict. c. 23), s. 2: *Hall v. Billingham & Sons* (1885), 54 L. T. 387; see titles SHIPPING AND NAVIGATION; TRADE AND TRADE UNIONS.

(b) Hops (Prevention of Frauds) Act, 1866 (29 & 30 Vict. c. 37), s. 18. As to the sale of hops, see titles AGRICULTURE, Vol. I., pp. 291, 292; FOOD AND DRUGS, Vol. XV., p. 69.

(c) Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 17; see, also,

292. Apart from any condition or warranty, the seller of dangerous goods is liable in damages if he sells them without fair warning and injury results to the buyer (*d*).

SECT. 7.
**Conditions
and War-
ranties.**

SUB-SECT. 8.—*Exclusion or Variation of Implied Conditions and Warranties.*

Sale of
dangerous
goods.
Express
agreement etc.

293. An implied condition or warranty in a contract of sale may be negatived or varied by express agreement, or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract (*e*). But an express warranty or condition does not negative a warranty or condition implied by the Act unless inconsistent therewith (*f*).

the Flax and Hemp Seed (Ireland) Act, 1810 (50 Geo. 3, c. 82). As to fertilisers and feeding stuffs, see title AGRICULTURE, Vol. I., p. 285, and, generally, titles TRADE AND TRADE UNIONS; TRADE MARKS, TRADE NAMES, AND DESIGNS; compare titles FOOD AND DRUGS, Vol. XV., pp. 5 *et seq.*, 45 *et seq.*; MEDICINE AND PHARMACY, Vol. XX., pp. 377 *et seq.*, 381 *et seq.*

(*d*) *Clarke v. Army and Navy Co-operative Society*, [1903] 1 K. B. 155, C. A.; *Blacker v. Luke and Elliot* (1912), 106 J. T. 533, where the cases are considered; see also title NEGLIGENCE, Vol. XXI., pp. 370, 408, 409, 480. The principle is not confined to sellers; it applies equally to anyone who bails dangerous goods to another without warning (*Bamfield v. Goole and Sheffield Transport Co., Ltd.*, [1910] 2 K. B. 94, C. A.).

(*e*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 55, which applies generally to any "right, duty, or liability" implied by law in a contract of sale; see *Prosser v. Hooper* (1817), 1 Moore (C. P.), 106 (safron expressly bought as being inferior); *Pinder v. Button* (1862), 11 W. R. 25 (seed "of good growing stock": warranty of productiveness excluded); *Dickson v. Zizinia* (1851), 10 C. B. 602 (express warranty of quality on shipment only); *Covas v. Bingham* (1853), 2 E. & B. 836 (cargo "as it stands"); *Josling v. Kingsford* (1863), 13 C. B. (N. S.) 447 (sale of oxalic acid, "quality approved"); *Ward v. Hobbs* (1878), 4 App. Cas. 13 (pigs sold "with all faults"); *McClelland v. Stewart* (1883), 12 L. R. Ir. 125 (goods "as classified"); *Hydraulic Engineering Co. v. Spencer & Sons* (1886), 2 T. L. R. 554, C. A. (goods to be made sound according to buyer's plan); *De Witt v. Berry* (1890), 134 United States Reports, 306 (express standard of quality); *Polenghi Brothers v. Dried Milk Co., Ltd.* (1904), 10 Com. Cas. 42 (payment on arrival against documents: Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 15 (2) (b) excluded); see *Wallis, Son and Wells v. Pratt and Haynes*, [1911] A. C. 394, where an unsuccessful attempt was made to negative the implied condition of description. As to usage, see *Johnson v. Raylton* (1881), 7 Q. B. D. 438, C. A. (usage to supply goods of other manufacturers); *Re Walkers, Winsor and Hamm and Shaw, Son & Co.*, [1904] 2 K. B. 152, 158 (usage to turn condition into warranty); *Yates v. Pym* (1816), 6 Taunt. 446 (failure of description: usage to exclude buyer's right of rejection invalid). And see, generally, titles CUSTOM AND USAGES, Vol. X., pp. 249 *et seq.*; EVIDENCE, Vol. XIII., pp. 444, 445. The general proposition in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 55, must of course be read subject to the general rules of evidence with regard to contracts reduced to writing; see on this, titles CONTRACT, Vol. VII., pp. 509 *et seq.*, 523 *et seq.*; DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 444 *et seq.*

(*f*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14 (4); *Bigge v. Parkinson* (1862), 7 H. & N. 955, Ex. Ch. (provisions); *Johnson v. Raylton, supra* (ship-plates to pass Lloyd's survey); *Mody v. Gregson* (1868), L. R. 4 Exch. 49, Ex. Ch.; *Drummond v. Van Ingen* (1887), 12 App. Cas. 284 (express sale by sample: warranty of merchantable quality, not excluded *quâ* latent defects); compare *McClelland v. Stewart, supra*; *Dickson v. Zizinia, supra* (inconsistent express warranty).

SECT. 7.

Conditions
and War-
ranties.Warranty
limited in
time.

SUB-SECT. 9.—Construction of Certain Express Warranties or Conditions.

294. A limitation of time added to an express stipulation as to the quality, fitness, or other incident of the goods *prima facie* means that the goods shall conform to the warranty or condition during the whole of the time (*g*); but it may, by the construction of the contract, the nature of the goods sold, or usage of trade, be intended to mean that the seller shall be liable for such breach only of the warranty or condition as shall be enforced by action, or notified (*h*) to the seller, within the time (*i*).

Goods war-
ranted also to
be approved
by third
person.

295. Where goods are to be supplied to the buyer to the satisfaction of a third person (*k*), and the goods are also subject to an express warranty or condition, the approval of the third person is not, unless it is otherwise agreed, deemed to show conclusively that the warranty or condition has been duly performed (*l*). Conversely, the fact that the goods conform to the warranty or condition does not show that they are supplied to the satisfaction of the third person (*m*).

General
warranty
and patent
defects.

296. An express (*n*) warranty of goods, although in general terms, is not, unless it be otherwise agreed (*o*), deemed to protect the buyer against defects in the goods of which he was, at the time of the contract, aware, or which, the buyer having at that time seen the goods, were apparent without the exercise of skill or knowledge (*p*).

(*g*) *Chapman v. Gwyther* (1866), L. R. 1 Q. B. 463. Such would be the case of a warranty of watches, pianos, or provisions. See, as to the latter, *Johnston (J. Barre) & Co. v. Oldham* (1895), 11 T. L. R. 401, P. C.

(*h*) A notification is, however, not ordinarily a condition precedent to a right of action; see p. 276, *post*.

(*i*) *Chapman v. Gwyther*, *supra*. In *Bywater v. Richardson* (1834), 1 Ad. & El. 508, and *Smart v. Hyde* (1841), 8 M. & W. 723, the seller's responsibility was in terms limited to a certain time; see also *Speak v. Taylor* (1894), 10 T. L. R. 224 (damages held to cover past and future defects).

(*k*) As to contracts subject to approval of the buyer or a third person, see, generally, titles BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS. Vol. III. pp. 206—8; CONTRACT, Vol. VII., p. 433; and note (*g*), p. 115, *ante*; and see also *Shipway v. Broadwood*, [1899] 1 Q. B. 369, C. A. (seller's collusion with third person); *Butterbury v. Vyse* (1863), 2 H. & C. 42 (buyer's collusion with third person).

(*l*) *Bird v. Smith* (1848), 12 Q. B. 786; *Ripley v. Lordan* (1860), 2 L. T. 154; *Bombay Burmah Trading Corporation, Ltd. v. Aga Mahomet Khaleel Shirazee* (1911), L. R. 38 Ind. App. 169 (goods sold to be "passed" by seller's agent).

(*m*) *Grafton v. Eastern Counties Rail. Co.* (1853), 8 Exch. 699.

(*n*) *COCKBURN, C.J.*, in *Burges v. Wickham* (1863), 3 B. & S. 609, 684, considered that the principle *a fortiori* applied to warranties or conditions implied by law; and it has been expressly adopted by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14 (2); see p. 159, *ante*. It is also impliedly enacted in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 13, 14 (1), 15.

(*o*) The seller may, for example, warrant the future soundness of goods having a patent defect (*Liddard v. Kain* (1824), 2 Bing. 183).

(*p*) "If one sell me a horse apparent blind, and warrant him sound of all his members, and I see him, I shall have no deceit, for that I might see it. Otherwise it is of a disease within his body; there upon the warrant I shall have deceit. But if one sell a blind horse, and warrant him to one that does not see him, deceit lyes" (*Kitchin on Courts*, 1675 ed., p. 347); *Baily v. Merrell* (1615), 3 Bulst. 94 (horse with one eye); *Butterfield v. Burroughs*

But the buyer is entitled to rely upon such a warranty, and is not bound to examine the goods (*q*).

SECT. 7.
Conditions
and War-
ranties.

Where the seller, in order to prevent, or render ineffectual, an examination of the goods by the buyer, gives an express warranty, or uses some other artifice, an express general warranty is deemed to cover defects which would otherwise have been apparent (*r*).

SECT. 8.—*Stamps*.

297. As a general rule, contracts of sale reduced into writing do not require any stamp, for any agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise is exempt from duty by statute (*s*).

(1706), 1 Salk. 211 (same: defect not obvious); *Liddard v. Kain* (1824), 2 Bing. 183; *Margetson v. Wright* (1831), 7 Bing. 603; (1832) 8 Bing. 454; *Holliday v. Morgan* (1858), 1 E. & F. 1; *Smith v. O'Bryan* (1864), 13 W. R. 79 (defect not patent); *Cowdy v. Thomas* (1876), 36 L. T. 22 (inspection for collateral purpose of buyer's agent). The rule is as old as the Civil law (Dig. 18, 1, 43, 1), and is also the same in equity (*Dyer v. Hargrave*, *Hargrave v. Dyer* (1805), 10 Ves. 505; *Jennings v. Broughton* (1854), 5 De G. M. & G. 126, 131, C. A.), and illustrates the wider principle that a thing may be sold subject to defects (*Ducondu v. Dupuy* (1883), 9 App. Cas. 150, P. C. (title)). In written contracts oral evidence is not admissible to show that a defect was pointed out by the seller (*Smith v. O'Bryan*, *supra*, per BRAMWELL, B.); *contra* in America (*Schuyler v. Russ* (1804), 2 Caines, 202). See also, generally, title ANIMALS, Vol. I., p. 389. For forms of warranty as to condition on sale of horses, see *Encyclopædia of Forms and Precedents*, Vol. XI., pp. 578, 579. As to misrepresentation and fraud generally, see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 653 *et seq*.

(*q*) *Tye v. Fynmore* (1813), 3 Camp. 462 (latent defect in samples); *Mowbray v. Merryweather*, [1895] 2 Q. B. 640, C. A.; *Scott v. Foley*, *Aikman & Co.* (1899), 16 T. L. R. 55 (ship under charterparty). The buyer cannot, however, wilfully blind his eyes (*Vandewalker v. Osmer* (1873), 65 Barbour (New York), 556).

(*r*) *Dorrington v. Edwards* (1620), 2 Roll. Rep. 188; *Kenner v. Harding* (1877), 28 American Reports, 615. The law is well stated in *Chadsey v. Greene* (1856), 24 Connecticut Reports, 562.

(*s*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 22, Sched. I., title "Agreement"; see *Skrine v. Elmore* (1809), 2 Camp. 407 (warranty in receipt for price); *Meering v. Duke* (1828), 2 Man. & Ry. (K. B.) 121 (sale of ship); *Chanter v. Dickinson* (1843), 6 Scott (N. R.), 182 (affixing chattel and sale of patent rights); *Mayfield v. Robinson* (1845), 7 Q. B. 486 (memorandum of sale with subsidiary stipulations); *Sadler v. Johnson* (1847), 16 M. & W. 775 (agreement to guarantee payment for goods by consignor); and other cases in title GUARANTEE, Vol. XV., p. 473; *Topping v. Bull* (1861), 2 F. & F. 408 (agreement to employ auctioneer); and other cases in title CONTRACT, Vol. VII., pp. 538 *et seq*. The general principle is that an agreement, of which the primary object is a sale, is exempt, other stipulations being merely subsidiary (*Rein v. Lane* (1867), L. R. 2 Q. B. 144, per BLACKBURN, J.). As to contracts now falling under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4 (2) (see p. 128, *ante*), no memorandum or other writing made necessary by the Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), is deemed to be an agreement within the meaning of any statute relating to the duties of stamps (*ibid.*, s. 8); see *Jones v. Ryder* (1838), 4 M. & W. 32. An agreement for the sale of any interest in goods, wares, or merchandise, or any ship or vessel, is expressly exempted from the conveyances duty imposed upon certain contracts or agreements for sale (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 59 (1); Revenue Act, 1909 (9 Edw. 7, c. 43), s. 7); see also title CONTRACT, Vol. VII., pp. 538 *et seq*. As to exemptions from stamp duties generally, see title REVENUE, Vol. XXIV., pp. 721 *et seq*.

SECT. 8.
Stamps.

If, however, a contract of sale be under seal (*t*), or is in such a form as to come specifically under some other heading charged with duty, it must be stamped accordingly (*u*), and every instrument whereby any property, upon the sale thereof, is transferred to, or vested in, a purchaser, or any other person on his behalf, or by his direction, is subject to the stamp applicable to a conveyance on sale (*x*). Moreover, certain mercantile documents used in connection with contracts of sale are subject to specific rates of duty (*y*).

Part III.—Effects of the Contract.

SECT. 1.—Transfer of the Property from Seller to Buyer.

SUB-SECT. 1.—In General.

Intention
governed.

298. The intention of the parties, as shown by the terms of the contract and the circumstances of the case, determines the time

(*t*) *Clayton v. Burtenshaw* (1826), 5 B. & C. 41.

(*u*) *County of Durham Electrical Power Distribution Co. v. Inland Revenue Commissioners*, [1909] 1 K. B. 737; affirmed [1909] 2 K. B. 604, C. A.; see title ELECTRIC LIGHTING AND POWER, Vol. XII., p. 616; *Corder v. Drakeford* (1811), 3 Taunt. 382 (lease containing contract of sale); and see, generally, title REVENUE, Vol. XXIV., pp. 708 *et seq.* By the Finance Act, 1907 (7 Edw. 7, c. 13), s. 7, hire-purchase agreements are made subject to an agreement, or to a deed, stamp, as the case may be; as to hire-purchase agreements generally, see titles BAILMENT, Vol. I., pp. 554 *et seq.*; BILLS OF SALE, Vol. III., pp. 12, 13.

(*x*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 54. Thus, absolute bills of sale are subject to *ad valorem* duty as conveyances; see the scale in title BILLS OF SALE, Vol. III., p. 76, note (*k*). These duties are, by the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 73, doubled, except in cases where the consideration does not exceed £500, and the instrument contains a statement that the sale does not form part of a larger transaction, or series of transactions, the consideration for which exceeds £500. A bill of sale cannot be registered unless the original be duly stamped (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 41; see title BILLS OF SALE, Vol. III., p. 76); but, if the deed has actually been registered, the omission of the stamp does not render the deed void (*Bellamy v. Saull* (1863), 4 B. & S. 265). As to the words "transferred to or vested in," see *Phillips v. Morrison* (1844), 12 M. & W. 740 (coal to be severed by buyer). By the Finance Act, 1895 (58 & 59 Vict. c. 16), s. 12, the *ad valorem* duty on a conveyance on sale is payable on property, including goods and chattels, purchased by a person "authorised to purchase property" under any Act (*Eastbourne Corporation v. A.-G.*, [1904] A. C. 155).

(*y*) A "warrant for goods," as defined in that Act, must be stamped with a 3*d*. stamp, which may be adhesive (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 111, Sched. I.). Receipts by inland carriers, and weight notes issued with stamped warrants, are exempt (*ibid.*). Delivery orders are exempt from stamp duty (Finance Act, 1905 (5 Edw. 7, c. 4), s. 5 (2)). A promissory note or bill of exchange given or accepted for the price must be stamped as such; but an instrument relating to the sale of goods is not a promissory note merely because it contains an express promise to pay the price (*Ellis v. Ellis* (1820), Gow, 216); see the general principle stated in *Mortgage Insurance Corporation v. Inland Revenue Commissioners* (1888), 21 Q. B. D. 352, C. A., and in title CONTRACT, Vol. VII., p. 537; and see title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 573, 574. As to a bill of lading, see title SHIPPING AND NAVIGATION; and as to stamp duties generally, see title REVENUE, Vol. XXIV., pp. 700 *et seq.*

when, and the conditions subject to which, the property in the goods is to be transferred (*z*).

A contract of sale must, like all contracts, be construed as a whole. Accordingly, the property in the goods passes where the terms of the contract show a clear intention that it shall pass (*a*), notwithstanding that there may be an express provision in the contract to the contrary (*b*).

SECT. 1.
Transfer
of the
Property
from Seller
to Buyer.

SUB-SECT. 2.—*Unascertained Goods.*

299. Where there is a contract for the sale of unascertained goods, no property (*c*) in the goods is transferred to the buyer unless and until the goods are ascertained (*d*).

Ascertain-
ment of goods
necessary.

In particular, where the individuality of the goods depends upon their being separated, weighed, measured, tested, or counted, or upon some other act or thing being done in relation thereto for their ascertainment, the goods are not ascertained until such act or thing be done (*e*).

Goods are unascertained, notwithstanding that they are to be taken from a specific larger bulk, if the identity of the portion so to be taken is unascertained (*f*).

The ascertainment of the goods does not of itself necessarily pass the property. It is necessary that the parties should agree that the property in the goods, when ascertained, should pass (*g*).

300. The property in unascertained goods passes—

(1) on the happening of a specified event which identifies (*h*) the

When pro-
perty passes.

(*z*) So enacted in express terms with regard to specific goods by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 17, and with regard to both specific and unascertained goods by the covering words, *ibid.*, s. 18; see pp. 168, 170, 171, 175 *et seq.*, *post*. See also Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 61 (2); p. 281. *post* (saving the common law).

(*a*) *Shaw v. Jeffery* (1860), 13 Moo. P. C. C. 432 (several documents); *McEntire v. Crossley Brothers*, [1895] A. C. 457, 463, 468—470.

(*b*) *McEntire v. Crossley Brothers*, *supra*.

(*c*) *I.e.*, the general property, not merely a special property (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1)); see p. 120, *ante*.

(*d*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 16; *Austen v. Craven* (1812), 4 Taunt. 644 (hogsheads of sugar out of bulk); *Heilbutt v. Hickson* (1872), L. R. 7 C. P. 438, *per* BOVILL, C.J., and BYLES, J., at p. 449.

(*e*) *Gillett v. Hill* (1834), 2 Cr. & M. 530, *per* BAYLEY, B., at p. 535 (10 out of 18 tons of oil); *Swanwick v. Sothorn* (1839), 9 Ad. & El. 895, 900 (weighing); *R. v. Tideswell*, [1905] 2 K. B. 273, C. C. R. (same); *Sharp v. Christmas* (1892), 8 T. L. R. 687, C. A. (separation by sieve); *Wallace v. Breeds* (1811), 13 East, 522 (casks of oil to be searched and filled); *White v. Wilks* (1813), 5 Taunt. 176 (drawing off of oil); *Shepley v. Davis* (1814), 5 Taunt. 617 (weighing of 10 tons of a specific bulk of 30); *Boswell v. Kilborn* (1862), 15 Moo. P. C. C. 309 (weighing); *Jenkyns v. Usborne* (1844), 7 Mar. & G. 678 (ascertainment by separation of residue).

(*f*) Blackburn, *Contract of Sale*, 1st ed., p. 123; *Rohde v. Thwaites* (1827), 6 B. & C. 388 (20 hogsheads out of bulk); *Shepley v. Davis*, *supra*; *Busk v. Davis* (1814), 2 M. & S. 397 (10 tons of flax out of 18 marked P.D.R.); *Snell v. Heighton* (1883), Cab. & El. 95 (stack of bricks); *Pletts v. Campbell*, [1895] 2 Q. B. 229 (one jar of beer in a cart with others).

(*g*) *Wait v. Baker* (1848), 2 Exch. 1, 9; *Campbell v. Mersey Docks and Harbour Board* (1863), 14 C. B. (N. S.) 412, *per* ERLE, C.J., at p. 415.

(*h*) *Secus*, if the event does not identify (*Gaba von v. Kreeft, Kreeft v. Thompson* (1875), L. R. 10 Exch. 274).

SECT. 1.
Transfer
of the
Property
from Seller
to Buyer.
—
Subsequent
appropriation.

goods, and on the happening whereof it is agreed that the property shall pass (i);

(2) by the unconditional appropriation, subsequently to the contract, as the subject-matter thereof, of the goods with the assent of both parties (j).

301. Unless a different intention appears (k), where there is a contract for the sale of unascertained or future goods (l) by description (m), and goods of that description (n) and in a deliverable state (o) are unconditionally (p) appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property (q) in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made (r). But

(i) *Reeves v. Barlow* (1884), 12 Q. B. D. 436, C. A. (materials brought on premises); *Banbury and Cheltenham Direct Rail. Co. v. Daniel* (1884), 54 L. J. (CH.) 265 (materials brought on land and certified). So it may be agreed, e.g., that all fruit that falls from a particular tree should thereupon become the property of the buyer.

(j) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 5 (1); *Rohde v. Thwaites* (1827), 6 B. & C. 388, per HOLROYD, J., at p. 393. PARKE, B., in *Wait v. Baker* (1848), 2 Exch. 1, at p. 8, points out that the word "appropriation" is used in the cases in two senses. It may mean a selection with common consent of the goods as the goods to be delivered, no property nevertheless passing, thus constituting an *obligatio certi corporis*; or a final appropriation of the goods to the contract, so as to pass the property therein to the buyer. In the text, *supra*, and in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 73), s. 18, r. 5, and *ibid.*, s. 19, the term is used in the second sense.

(k) *Ibid.*, s. 18 (covering words).

(l) See the definition in *ibid.*, s. 62 (1); p. 120, *ante*.

(m) Which implies a condition that the goods shall conform to the description (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 13); see p. 154, *ante*.

(n) *Vigers Brothers v. Sanderson Brothers*, [1901] 1 K. B. 608; *Bowes v. Shand* (1877), 2 App. Cas. 455 (shipment in certain months). The property does not pass, if the goods do not conform to their description, even although there is an express agreement that the property shall pass on shipment (*Vigers Brothers v. Sanderson Brothers*, *supra*).

(o) I.e., "such a state that the buyer would under the contract be bound to take delivery" (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (4)).

(p) For the seller may reserve the right of disposal under *ibid.*, s. 19 (see p. 181, *post*); or there may be other conditions precedent to the passing of the property. There seems to be no reason to confine the word "unconditionally" to the absence of express conditions; e.g., suppose the goods, after being identified, have to be weighed to ascertain the price. Here, it is conceived, the analogy of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 3, would apply; see p. 177, *post*.

(q) I.e., the general property (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1)).

(r) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 5 (1); *White v. Wilks* (1813), 5 Taunt. 176 (unascertained goods remaining at a rent); *Bishop v. Crawshaw* (1824), 3 B. & C. 415 (general payment no assent to appropriation); *Rohde v. Thwaites* (1827), 6 B. & C. 388 (filling up casks afterwards assented to); *Atkinson v. Bell* (1828), 8 B. & C. 277 (notice that machine complete: no assent by buyer); *Elliott v. Pybus* (1834), 10 Bing. 512 (same: buyer's grumbling assent); *Alexander v. Gardner* (1835), 1 Bing. (N. C.) 671 (buyer's assent to shipment); *Sparkes v. Marshall* (1836), 2 Bing. (N. C.) 761 (notice of shipment, then insurance by buyer); *Wilkins v. Bromhead* (1844), 6 Man. & G. 963 (request for payment, and

when the appropriation made by one party is not made by the previous authority of the other, a subsequent assent thereto by the latter party is necessary (s).

An appropriation takes place where the goods are situate at the time of the appropriation, not where the contract of sale is made, or where one party assents to an appropriation by the other (t).

302. An authority given by one party to the other to appropriate the goods is an implied assent by the party giving the authority to a subsequent appropriation by the other (a), provided the appropriation be made in accordance with the contract (b). Such an authority confers an election on the party authorised (c).

An authority to appropriate is presumed where, by the terms of the contract, one party is to do with reference to the goods some act or thing which cannot be done until the goods are appropriated. When the party authorised has determined his election by doing such act or thing, the appropriation is finally made (d). Until that time any act or thing done with reference to the goods towards appropriation by the party authorised is revocable (e), unless it

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**Transfer
of the
Property
from Seller
to Buyer.**

Place of
appropriation.
Authority to
appropriate.

payment); *Godts v. Rose* (1855), 17 C. B. 229 (conditional appropriation): buyer does not assent to conditions); *Boswell v. Kilborn* (1862) 15 Moo. P. C. C. 309 (no separation and appropriation); *Jenner v. Smith* (1869), L. R. 4 C. P. 270 (setting aside goods: no subsequent assent by buyer); *Gabaron v. Kreeft*, *Kreeft v. Thompson* (1875), L. R. 10 Exch. 274 (complete payment: no appropriation); *Ridgway v. Ward* (1884), 14 Q. B. D. 110; *Noblett v. Hopkinson*, [1905] 2 K. B. 214 (setting aside: no assent); compare *Daniel v. Whitfield* (1885), 15 Q. B. D. 408 (mutual appropriation of goods at shop); *Pletts v. Beattie*, [1896] 1 Q. B. 519 (setting aside goods with buyer's express previous assent); *Ginner v. King* (1890), 7 T. L. R. 140, C. A. (seller's authority to appropriate revoked); *Hayman & Son v. M'Lintock*, [1907] S. C. 936 (attornment by warehouseman to buyer: no appropriation). For the effect of the giving of earnest, see *Hinde v. Whitehouse* (1806), 7 East, 558; *Bach v. Owen* (1793), 5 Term Rep. 409; *Langfort v. Tyler's Administratrix* (1704), 1 Salk. 113; as to the meaning of "earnest," see p. 133, *ante*.

(s) *Jenner v. Smith*, *supra*.

(t) *Badische Anilin und Soda Fabrik v. Hickson*, [1906] A. C. 419, per Lord LOREBURN, L.C., at p. 421. Consequently, an appropriation of goods abroad is no infringement of an English patent (*ibid.*).

(a) *Aldridge v. Johnson* (1857), 7 E. & B. 885, per ERLE, J.; *Jenner v. Smith*, *supra*, per curiam.

(b) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 5 (1); *Borrowman v. Free* (1878), 4 Q. B. D. 500, C. A., per BRETT and COTTON, L.JJ., at pp. 504, 505.

(c) Blackburn, *Contract of Sale*, 1st ed., p. 128; 3rd ed., p. 138, citing *Ileyward's (Sir Rowland) Case* (1595), 2 Co. Rep. 35 a, 37 a; approved by ERLE, J., in *Aldridge v. Johnson*, *supra*. "An election once determined is determined for ever, and such a determination is made by any act which shows it to be made" (*Rankin v. Potter* (1873), L. R. 6 H. L. 83, per BLACKBURN, J., at p. 119); see, further, on election, *Scarfe v. Jardine* (1882), 7 App. Cas. 345; and see, generally, title EQUITY, Vol. XIII., pp. 116 *et seq.*

(d) Blackburn, *Contract of Sale*, 1st ed., p. 128; 3rd ed., p. 138; *Fragano v. Long* (1825), 4 B. & C. 219 (dispatch of goods by buyer's authority); *Aldridge v. Johnson*, *supra* (filling buyer's sacks by his authority); *Langton v. Higgins* (1859), 4 H. & N. 402 (filling buyer's bottles); *Pletts v. Beattie*, *supra*.

(e) *Anderson v. Morice* (1876), 1 App. Cas. 713 (delivery to seller's own servant or agent); *Borrowman v. Free*, *supra*.

SECT. 1.
Transfer
of the
Property
from Seller
to Buyer.

Delivery to
buyer or
carrier.

Present sale
of future
goods;
goods in
potential
existence.

has, previous to its revocation, been assented to by the other party (*f*).

The question whether any act or thing done with reference to the goods is a final determination of an election to appropriate, or merely indicates a revocable intention to appropriate, is one of law (*g*).

303. Unless a different intention appears (*h*), where, in pursuance of the contract (*i*), the seller delivers the goods (*k*) to the buyer (*l*), or to a carrier (*m*) or other bailee, whether named by the buyer or not (*n*), for the purpose of transmission to the buyer, and does not reserve the right of disposal (*o*), he is deemed to have unconditionally appropriated the goods to the contract (*p*).

304. Where there is a contract purporting to be a present sale of future goods (*q*), and, when the goods come into existence or are acquired, the seller delivers them to the buyer (*r*), or otherwise

(*f*) This point was not decided in *Borrowman v. Free* (1878), 4 Q. B. D. 500, C. A., but is in accordance with principle, an irregular appropriation being an offer of a new contract (*Cunliffe v. Harrison* (1851) 6 Exch. 903, *per* PARKE, B., at p. 906).

(*g*) Blackburn, *Contract of Sale*, 1st ed., p. 128; 3rd ed., p. 138.

(*h*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18 (covering words).

(*i*) *I.e.*, for unascertained or future goods (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 5 (2), being a branch of the general proposition in *ibid.*, s. 18, r. 5 (1)).

(*k*) Being goods of the description contracted for, and in a deliverable state (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 5 (1); see p. 168, *ante*), and the delivery being otherwise good (*Hoare v. Great Western Rail. Co.* (1877), 37 L. T. 186 (consignment by seller to wrong consignee)).

(*l*) *Ogle v. Atkinson* (1814), 5 Taunt. 759 (buyer's ship); *Greaves v. Hepke* (1818), 2 B. & Ald. 131 (buyer obtains delivery order on warehouseman); *Studdy v. Sanders* (1826), 5 B. & C. 628 (delivery of cider juice to buyer's agent); *Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.* (1886), 12 App. Cas. 128, P. C. (delivery on buyer's chartered ship).

(*m*) *Vale v. Bayle* (1775), 1 Cowp. 294 (carrier indicated); *Dutton v. Solomonson* (1803), 3 Bos. & P. 582 (delivery to carrier's waggon); *Fragano v. Long* (1825), 4 B. & C. 219; *Bryans v. Nix* (1839), 4 M. & W. 775 (canal boat); *Evans v. Nichol* (1841), 3 Man. & G. 614 (shipment: mate's receipt sent by consignor to consignee); *Tregelles v. Sewell* (1862), 7 H. & N. 574, Ex. Ch. (shipment and payment against shipping documents); *Badische Anilin und Soda Fabrik v. Basle Chemical Works, Bindschedler*, [1898] A. C. 200 (foreign parcel-post office). The carrier is *prima facie* the buyer's agent. If the terms of the contract or appropriation show that the carrier is the seller's agent, the appropriation is revocable, and the property does not pass until delivery (*Badische Anilin und Soda Fabrik v. Basle Chemical Works, Bindschedler, supra*).

(*n*) These words should be read subject to the preceding words, "in pursuance of the contract." Thus, if the buyer names the carrier, the seller does not duly pursue his authority to appropriate if he deliver to another carrier (*Ullock, Lancaster & Co. v. Reddelein* (1828), Dan. & Ll. 6).

(*o*) Which he may do under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19 (1); see p. 181, *post*. The effect of the reservation is to suspend the passing of the property.

(*p*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 5 (2).

(*q*) *I.e.*, an agreement to sell; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 5 (3); p. 145, *ante*.

(*r*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 5 (2); see note (*i*), *supra*.

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Transfer
of the
Property
from Seller
to Buyer.

appropriates them to him (s), or the buyer takes possession of them by the authority, given by the terms of the contract or subsequently thereto, of the seller, the property in the goods is thereupon transferred to the buyer (t).

Where, however, the future goods are such as have, at the date of the contract, a potential existence, the property in them is *primâ facie* transferred to the buyer when they come into existence, so as to be capable of identification, without any further act of appropriation (a).

Goods are in potential existence when they are the natural product, or expected increase, of something owned or possessed by the seller at the time of the contract, such as the hay or wheat to be grown in his field, the wool to be clipped from his existing sheep,

(s) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 5 (1); see p. 168, *ante*.

(t) The authorities are:—Bacon, *Maxims of the Law*, Regula 14; *Basset v. Maynard* (1601), Cro. Eliz. 819, *sub nom. Palmer's (Sir Thomas) Case* (1601), 5 Co. Rep. 24 b; *Lunn v. Thornton* (1845), 1 C. B. 379 (no new act of appropriation by grantor); *Congreve v. Evells* (1854), 10 Exch. 298; *Hope v. Hayley* (1856), 5 B. & B. 830 (possession taken by grantee); *Carr v. Acraman* (1856), 11 Exch. 566 (assignor's intervening act of bankruptcy); *Carr v. Allatt*, *Allatt v. Tweedale* (1858), 27 L. J. (ex.), 385; *Childell v. Galsworthy* (1859), 6 C. B. (N. S.) 471 (possession taken by grantee); *Holroyd v. Marshall* (1862), 10 H. L. Cas. 191, 216; *Reeve v. Whitmore*, *Martin v. Whitmore* (1863), 4 De G. J. & Sm. 1 (no agreement to give present interest); compare *Joseph v. Lyons* (1884), 15 Q. B. D. 280, C. A.; *Hallas v. Robinson* (1885), 15 Q. B. D. 288, C. A. (no seizure). The interest of the buyer under the contract previous to seizure is assignable (*Basset v. Maynard*, *supra*; *Muskett v. Hill* (1839), 5 Bing. (N. C.) 694). As between the seller and the buyer, an equitable interest passes to the buyer by virtue of the contract as soon as the goods come into existence, or are acquired, and can be identified (*Holroyd v. Marshall*, *supra*; *Collyer v. Isaacs* (1881), 19 Ch. D. 342, 354, C. A.; *Clements v. Matthews* (1883), 11 Q. B. D. 808, C. A.; *Tailby v. Official Receiver* (1888), 13 App. Cas. 523). As to the assignment of future acquired property, see, further, title PERSONAL PROPERTY, Vol. XXII., pp. 409, 410.

(a) *Grantham v. Hawley* (1615), Hob. 132; followed in *Petch v. Tutin* (1846), 15 M. & W. 110 (crops); Y. B. 21 Hen. 6, p. 43 (future tithable grain); *Wood and Foster's Case* (1586), 1 Leon. 42 (unascertained cattle deliverable *in futuro* not potential); *Robinson v. Macdonnell* (1816), 5 M. & S. 228 (future whale oil not potential); *Lunn v. Thornton* (1845), 1 C. B. 379 (future furniture not potential); see also the American case, *Low v. Pew* (1871), 108 Massachusetts Reports, 347 (halibut to be caught not potential). If the existence of the future thing is possible only, it has no potential existence (*Robinson v. Macdonnell*, *supra*, per Lord ELLENBOROUGH, C.J.). The property passes when the goods are "extant" (*Grantham v. Hawley*, *supra*). The rule has been recognised in America in recent times (*Briggs v. United States* (1891), 143 United States Reports, 346, 354; *Butt v. Elliott* (1873), 19 Wallace [86 United States Reports], 544; *Rochester Distilling Co. v. Rasey* (1894), 142 New York Reports, 570), and has been held to include such future goods as unborn animals, hay, manure of sheep, cotton etc. The court in *Rochester Distilling Co. v. Rasey*, *supra*, held that the rule did not apply to annual products, such as potatoes. It would seem that the seller must have a present interest in a thing, out of which the future product would, in the ordinary course of events, be expected naturally to spring, as under the *emptio rei speratae* of the civil law, which is probably the origin of the doctrine. The rule is perfectly logical, because *ex hypothesi* the goods contracted for are not generic, but as specific from the first as the future crop of potatoes in *Howell v. Coupland*

SECT. 1.
Transfer
of the
Property
from Seller
to Buyer.

Goods to be
 manufac-
 tured.

Completion,
 when not
 necessary.

the milk to be given by his existing cows, the young to be produced by his existing animals, and similar products (b).

Where, however, the subject-matter of the contract is a product to be made or manufactured out of potentially existing future goods, a subsequent act of appropriation when the goods come into actual existence is *primâ facie* necessary (c).

305. Under a contract for the manufacture and sale of goods, the property in the goods and the materials (d) thereof does not, unless it be otherwise agreed (e), pass to the buyer until the goods have been finished and appropriated to the contract with the assent of both parties (f). Whether the goods have been finished depends upon the construction of the contract and the surrounding circumstances (f).

306. An intention that the property in an article to be manufactured and sold shall pass to the buyer at any stage before the completion of the manufacture may be gathered from the terms of the contract (g). Subject thereto, such an intention may be presumed where the price is made payable by instalments regulated according to particular stages of the work, and from the due payment of such price, and from the fact that the work during its progress has been inspected by or on behalf of the buyer (h).

(1876), 1 Q. B. D. 258, C. A., and their existence absolutely identifies them; see *Reeves v. Burlow* (1884), 12 Q. B. D. 436, C. A., *per* BOWEN, L.J., at p. 442.

(b) See cases in note (a), p. 171, *ante*, and Benjamin, *Sale of Personal Property*, 2nd ed., p. 63; 5th ed., p. 130.

(c) *Langton v. Higgins* (1859), 4 H. & N. 402; *Anon.* (1583), Moore (K. B.), 174 (butter produced from cows). There is, however, authority in America that the manufactured products of potentially existing goods form no exception (*Conderman v. Smith* (1863), 41 Barbour (New York), 404 (butter and cheese); *Van Hoozer v. Cory* (1860), 34 Barbour (New York), 9 (cheese)).

(d) *Atkinson v. Bell* (1828), 8 B. & C. 277, *per* BAYLEY, J. As there is no contract of sale of the materials, apart from the goods themselves, the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 5 (1), cannot be called in aid (*Reid v. Macbeth and Gray*, [1904] A. C. 223). For forms of contract for the supply and manufacture of goods, see *Encyclopædia of Forms and Precedents*, Vol. XI., pp. 591, 595.

(e) Under the covering words of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18 ("unless a different intention appears"); see the text, *infra*.

(f) Such cases fall under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 5 (1), the goods being future. See, for examples, *Mucklow v. Mangles* (1808), 1 Taunt. 318 (barge); *Bishop v. Crawshay* (1824), 3 B. & C. 415 (no assent by buyer); *Atkinson v. Bell* (1828), 8 B. & C. 277 (machine); *Carruthers v. Payne* (1828), 5 Bing. 270 (carriage treated by parties as complete); *Werner v. Humphreys* (1841), 2 Man. & G. 853 (unfinished coat); *Wilkins v. Bromhead* (1844), 6 Man. & G. 963 (greenhouse); *Armistage v. Haigh (John) & Sons, Ltd.* (1893), 9 T. L. R. 287, C. A. (machine to be "set up": working order); *Laing (Sir James) & Sons, Ltd. v. Barclay, Curle & Co., Ltd.*, [1908] A. C. 35 (ship); see also *Oldfield v. Lowe* (1829), 9 B. & C. 73 (chattel started by A. and finished by B.).

(g) *Seath v. Moore* (1886), 11 App. Cas. 350, *per* Lord BLACKBURN, at p. 370; *Wood v. Bell* (1856), 5 E. & B. 772; 6 E. & B. 355, Ex. Ch. The question at what stage the property is to pass is one depending on the construction of the contract; whether that stage has been reached is a question of fact (*Seath v. Moore*, *supra*, *per* Lord BLACKBURN, at p. 370.).

(h) *Seath v. Moore*, *supra*, *per* Lord WATSON, at pp. 380, 381. But these facts are not conclusive (*Laing (Sir James) & Sons, Ltd. v. Barclay*,

307. When an article in an incomplete state of manufacture has become the property of the buyer, materials subsequently added thereto become by accession the property of the buyer when, but not before, they have been affixed to, or become in a reasonable way part of, the article (*i*).

SECT. 1.
Transfer
of the
Property
from Seller
to Buyer.

308. Under a contract for the sale of a quantity of goods the question whether the property passes in any part of the goods before the full quantity is made up depends upon whether successive appropriations of separate portions of the goods were contemplated, or whether the goods were contracted for only as an indivisible whole, to be appropriated as such (*k*). In particular, a contract for the sale of a cargo or boatload is *prima facie* (*l*) a contract for the entire and indivisible loading as such of the vessel or boat on the particular voyage (*m*).

Materials
subsequently
added.

Contract for
a quantity
of goods.

Curle & Co., Ltd., [1908] A. C. 35, *per* Lord LOREBURN, L.C., at p. 43). See *Woods v. Russell* (1822), 5 B. & Ald. 942 (signing by builder of ship of certificate of registry in favour of buyer); *Clark v. Spence* (1836), 4 Ad. & El. 448 (payment by instalments at particular stages and supervision by buyer); *Laidler v. Burlinson* (1837), 2 M. & W. 602 (instalments not appropriated to particular stages); *Reid v. Fairbanks* (1853), 13 C. B. 692 (bill of sale of ship: intention to give security); *Wood v. Bell* (1856), 5 E. & B. 772; 6 E. & B. 355, Ex. Ch. (punching buyer's name on ship, and builder's admission of buyer's ownership); *Laing (Sir James) & Sons, Ltd. v. Barclay, Curle & Co., Ltd.*, [1908] A. C. 35 (delivery not to be complete until trial of ship when finished).

(*i*) *Seath v. Moore* (1886), 11 App. Cas. 350, *per* Lord WATSON, at p. 381; *Reid v. Macbeth and Gray*, [1904] A. C. 223; *Wood v. Bell*, *supra*; *Baker v. Gray* (1856), 17 C. B. 462 (property to pass on "user" by buyer). *Woods v. Russell*, *supra* (rudder and cordage of ship); and *Goss v. Quinton* (1842), 3 Man. & G. 825 (rudder), were on this point overruled by *Wood v. Bell*, *supra*. It is not sufficient that the materials have been finished, or marked, or numbered by the seller with reference to their future position as part of the article, or have been intended by him to form part thereof (*Reid v. Macbeth and Gray*, *supra*).

(*k*) *Anderson v. Morice* (1876), 1 App. Cas. 713 (cargo an indivisible whole); *Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.* (1886), 12 App. Cas. 128, P. C. (cargo a divisible quantity); *Aldridge v. Johnson* (1857), 7 E. & B. 885 (sackloads); *Langton v. Higgins* (1859), 4 H. & N. 402 (bottles). A quantity of goods contracted for as an indivisible whole is like a chattel to be manufactured; see *Anderson v. Morice*, *supra*, *per* Lord HATHERLEY, at p. 733. Where the goods are so contracted for as an indivisible whole, the instalments are not "the goods" appropriated under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 5 (1), for there is no contract for the sale of them as separate entities; nor are they "the goods" delivered to a carrier under *ibid.*, s. 18, r. 2 (*Reid v. Macbeth and Gray*, *supra*, *per* Lord DAVEY, at p. 232). *Bryans v. Nix* (1839), 4 M. & W. 775, is probably another illustration, in spite of the dictum of PARKE, B., *ibid.*, at p. 793 ("or less"). If A. agrees to sell to B. an unascertained set of Meeson and Welsby's Reports, and hands B. the books, volume by volume, it seems to be evident that no property would pass in any volume until delivery of all.

(*l*) But the facts may show that "cargo" means merely a quantity, to be separately appropriated, equal to the capacity of the vessel (*Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.*, *supra*).

(*m*) *Borrowman v. Drayton* (1876), 2 Ex. D. 15, C. A.; *Levi and Browne Island Guano Co. v. Berk & Co.* (1886), 2 T. L. R. 898, C. A. ("cargo" governing an estimated quantity); *Bryans v. Nix*, *supra* (bargeload); compare *Bourne v. Seymour* (1855), 16 C. B. 337 (estimated quantity governing "cargo"). An American judge calls a cargo or boatload as entire a thing as an animal of a certain weight, strength, or speed (*Flanagan*

SECT. 1.

Transfer of the Property from Seller to Buyer.

Goods deliverable

(i.) as a whole;
(ii.) successive instalments.

Goods to be delivered at particular place.

The fact that the goods are deliverable as a whole by the transfer to the buyer of a bill of lading, or other document representing the whole quantity, is relevant to show that the goods were contracted for as an indivisible whole (*n*).

The fact that successive instalments of goods are deliverable to the buyer during a period of time, especially when the earlier instalments would be consumed or otherwise dealt with before the completion of the full quantity, is relevant to show that the instalments were intended to be separately appropriated (*o*).

309. Where, by the terms of the contract for unascertained goods, the seller agrees to deliver the goods at a particular place, and no intention appears in the contract that the property shall pass previously to such delivery, the property does not pass unless and until delivery is made accordingly (*p*).

SUB-SECT. 3.—*Specific Goods.*(i.) *In General.*

A question of intention.

310. Where there is a contract for the sale of specific (*q*) or ascertained (*r*) goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred (*s*).

For the purpose of ascertaining the intention of the parties regard

v. Demarest (1865), 26 New York Superior Court, 173, *per* ROBERTSON, C.J., at p. 188; see also *Hays v. Pittsburgh, G & B. Packet Co.* (1888), 33 Federal Reporter, 552; and *Rochester and Oleopolis Oil Co. v. Hughes* (1867), 56 Pennsylvania State Reports, 322 (both cases of bargeloads).

(*n*) See *Anderson v. Morice* (1875), L. R. 10 C. P. 609, Ex. Ch., *per* BLACKBURN and LUSH, JJ., at pp. 617, 619.

(*o*) *Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.* (1886), 12 App. Cas. 128, P. C.

(*p*) *Calcutta and Burmah Steam Navigation Co. v. De Mallos* (1863), 32 L. J. (Q. B.) 322, *per* COCKBURN, C.J., and BLACKBURN, J., at pp. 335, 328; *Wheeler v. Pearson* (1857), 5 W. R. 227; *Dunlop v. Lambert* (1839), 6 Cl. & Fin. 600, H. L., *per* Lord COTTENHAM, L.C., at pp. 621, 622; *Badische Anilin und Soda Fabrik v. Basile Chemical Works, Bindschedler*, [1898] A. C. 200, *per* Lord HERSCHELL, at p. 207; *Henckell Du Buisson & Co. v. Swan & Co.* (1839), 17 R. (Ct. of Sess.) 252 (ship deliverable abroad after completion). Familiar instances are: where a tradesman agrees to deliver goods at the customer's house (*Ridgway v. Ward* (1884), 14 Q. B. D. 110, *per* HAWKINS, J., at p. 119 (bread); compare *Daniel v. Whitfield* (1885), 15 Q. B. D. 408 (where the property passed before delivery); or to the customer over the counter (*Addy v. Blake* (1887), 19 Q. B. D. 478 (liquor)). The reason for the rule is that until delivery the appropriation is not complete, as till then the seller may change his mind.

(*q*) I.e., "goods identified and agreed upon at the time a contract of sale is made" (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1)).

(*r*) The term "ascertained goods," as contrasted with specific goods, may be intended to cover the case of goods which have become ascertained subsequently to the formation of the contract. To make them synonymous with "specific" is unnecessary, as "specific goods" are defined. The same collocation of words is found in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 52; see p. 272, *post*.

(*s*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 17 (1). Illustrations are to be found in the following pages of the text, where various rules of presumption enacted by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, are dealt with.

is to be had to the terms of the contract, the conduct of the parties, and the circumstances of the case (*t*).

(ii.) *Specific Goods in a Deliverable State.*

311. Unless a different intention appears (*a*), where there is an unconditional (*b*) contract for the sale of specific goods (*c*) in a deliverable state (*d*), the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed (*e*).

312. A non-severable contract for the sale of specific goods and of an interest in land is, with regard to the goods, *primâ facie* an agreement to sell only; and the transfer of the property in the goods is *primâ facie* conditional on the conveyance of the interest in land (*f*), even although separate prices may have been fixed for the goods and for the interest in land (*g*).

(iii.) *Specific Goods to be put in a Deliverable State.*

313. Unless a different intention appears (*h*), where there is a contract for the sale of specific goods, and the seller is bound (*i*) to do

(*t*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 17 (2).

(*a*) *Ibid.*, s. 18 (covering words); see *Langton v. Waring* (1865), 18 C. B. (N. S.) 315 (advance of price against goods as security).

(*b*) This word is unnecessary, having regard to the covering words of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18.

(*c*) For the definition, see p. 121, *ante*.

(*d*) For the definition, see p. 119, *ante*.

(*e*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 1. This is the first presumptive rule to ascertain the intention of the parties under *ibid.*, s. 17; see p. 174, *ante*. The French Civil Code, art. 1583, contains a similar provision. See *Phillimore v. Barry* (1808), 1 Camp. 513 (storage free for thirty days); *Tarling v. Barter* (1827), 6 B. & C. 360; *Gurr v. Cuthbert* (1843), 12 L. J. (EX.) 309 (rick of hay not to be cut till paid for); *Sweeting v. Turner* (1872), L. R. 7 Q. B. 310 (sale at auction). In cases under this rule the appropriation by the parties is a purely mental one (*Badische Anilin und Soda Fabrik v. Hickson*, [1906] A. C. 419, *per* Lord ATKINSON, at p. 424; *Dixon v. Yates* (1833), 5 B. & Ad. 313, *per* PARKE, B., at p. 340).

(*f*) *Lanyon v. Toogood* (1844), 13 M. & W. 27 (house and furniture); *Sleddon v. Cruikshank* (1846), 16 M. & W. 71 (assignment of lease and sale of greenhouse); see also *Corder v. Drakeford* (1811), 3 Taunt. 382 (document creating lease and sale of goods: stamp); *Vaughan v. Hancock* (1846), 3 C. B. 766 (lease of house and sale of furniture and fixtures). The buyer must, however, pay for the goods if, without a conveyance of the interest in land, he has appropriated them (*Sleddon v. Cruikshank, supra*).

(*g*) *Neal v. Viney* (1808), 1 Camp. 471 (purchase of lease and crops); *Salmon v. Watson* (1819), 4 Moore (C. P.), 43 (account stated). It is of importance to notice that all the cases are concerned with entire agreements for an interest in land together with chattels in some way connected therewith.

(*h*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, by the covering words.

(*i*) *Secus*, where no such act is required or obligatory on the seller, as where it is merely for the satisfaction of the buyer (*Swanwick v. Sothorn* (1839), 9 Ad. & El. 895 (weighing specific goods in a deliverable state), or where the buyer is to do the act (*Rugg v. Minett* (1809), 11 East, 210 (gauging casks); *Turley v. Bates* (1863), 2 H. & C. 200 (weighing clay by buyer after delivery)). But, if the seller is bound to do the act, it cannot be done by the buyer without the seller's consent (*Acraman v. Morrice* (1849), 8 C. B. 449).

SECT. 1.
Transfer
of the
Property
from Seller
to Buyer.

Property
primâ facie
passes
immediately.

Contract for
specific goods
and interest
in land.

When
transfer of
property
suspended.

SECT. 1.
Transfer
of the
Property
from Seller
to Buyer.

something (*k*) to the goods for the purpose (*l*) of putting them into a deliverable state (*m*), the property does not pass until such thing be done and the buyer have notice (*n*) thereof (*o*).

The principle of this rule applies also where a specific chattel which is partially manufactured at the time of the contract is by the contract to be completed by the seller (*p*); and also where, subsequently to a contract for the manufacture and sale of a chattel, the parties agree that the specific partially manufactured chattel, and no other, shall be the subject-matter of the contract (*q*).

(iv.) *Measuring or Testing to Ascertain Price.*

When
transfer of
property
suspended.

314. Unless a different intention appears (*r*), where there is a contract for the sale of specific goods in a deliverable state (*s*), but the seller is bound (*a*) to weigh, measure, test, or do some other act or thing (*b*) with reference to (*c*) the goods for the purpose of

(*k*) This word would seem to contemplate some act done directly to the goods, and not merely an act done "with reference to them," as under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 3; see note (*e*), p. 177, *post*. In *Anderson v. Morice* (1875), L. R. 10 C. P. 609, Ex. Ch., BLACKBURN and LUSH, JJ., were of opinion that, in a contract for the sale of a cargo, the completing of the loading was an act to put the goods in a deliverable state; but see S. C. (1876), 1 App. Cas. 713, *per* Lord SELBORNE, at p. 749.

(*l*) Thus, the fact that the seller is to pay warehouse or wharfage rent for the goods does not suspend the passing of the property (*Hammond v. Anderson* (1803), 1 Bos. & P. (N. R.) 69; *Greaves v. Hepke* (1818), 2 B. & Ald. 131), nor the fact that he is to pay custom duties (*Hinde v. Whitehouse* (1806), 7 East, 558), or retains the warrants for that purpose (*North British and Mercantile Insurance Co. v. Moffatt* (1871), L. R. 7 C. P. 25).

(*m*) For the definition, see p. 119, *ante*.

(*n*) The provision as to notice is an addition to the common law.

(*o*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 2. See, for examples (subject to the statutory provision as to notice), *Rugg v. Minett* (1809), 11 East, 210 (filling up casks); *Smith v. Surman* (1829), 9 B. & C. 561 (timber to be felled by seller); *Acraman v. Morrice* (1849), 8 C. B. 449 (severing sold parts of timber); *Laidler v. Burlinson* (1837), 2 M. & W. 602 (completing ship); *Brown Brothers v. Carron Co.* (1898), 6 Scots Law Times, 231 (steam crane to be altered by seller); compare *Young v. Matthews* (1866), L. R. 2 C. P. 127 (bricks to be burnt: intention to pass property immediately).

(*p*) *Laidler v. Burlinson*, *supra*. Such cases fall more naturally under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 2, than under *ibid.*, r. 5 (1).

(*q*) *Wait v. Baker* (1848), 2 Exch. 1, *per* PARKE, B., at pp. 8, 9. For forms of agreement as to acceptance, see *Encyclopædia of Forms and Precedents*, Vol. XI, pp. 591, 594.

(*r*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18 (covering words).

(*s*) See note (*m*), *supra*.

(*a*) See remarks on the same word in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 2; see note (*i*), p. 175, *ante*.

(*b*) A merely mental act, such as counting the items of a specific lot of goods, would seem not to be "an act or thing"; see the case of the flock of sheep put forward by Lord ALVERSTONE, C.J., and CHANNELL, J., in *R. v. Tidswell*, [1905] 2 K. B. 273, C. C. R., at pp. 277, 279. Nor is the adding up of separate sums previously ascertained "an act or thing" (*Tansley v. Turner* (1835), 2 Bing. (N. C.) 151).

(*c*) The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 2, says "to the goods"; *ibid.*, s. 18, r. 3, seems to be wider.

ascertaining the price (*d*), the property does not pass until such act or thing be done and the buyer has notice thereof (*e*).

The fact that the parties have agreed upon a provisional estimate of the price of the goods, the actual amount whereof is to be afterwards more exactly calculated, is relevant to prove a common intention that the transfer of the property shall not depend upon the final adjustment of the price (*f*).

315. Under a contract for the sale of a specific thing which is attached to, or forms part of, land at the time of the contract, and which is to be severed by the buyer, the property in the thing passes to the buyer on his severance of the thing from the land (*g*).

316. Where the passing of the property in specific goods is made dependent on full payment by the buyer of the price, which is payable by instalments, the buyer may, unless it be otherwise agreed, at any time anticipate the payment of any unpaid balance of the price (*h*).

SECT. 1.
Transfer
of the
Property
from Seller
to Buyer.

Thing
attached to
land sever-
able by buyer.

Buyer's
anticipation
of payments
passing prop-
erty.

(*d*) Where the quantity is known, weighing is not necessary to ascertain the price (*Swanwick v. Sothorn* (1839), 9 Ad. & El. 895), nor where the goods are sold for a lump sum (*Hanson v. Meyer* (1805), 6 East, 614, per Lord ELLENBOROUGH, C.J., at p. 627, citing *Hammond v. Anderson* (1803), 1 Bos. & P. (N. R.) 69). But sometimes weighing is necessary to ascertain the identity of the goods: the case then falls under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 16, 18, r. 5 (1).

(*e*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 3. See, subject to the statutory provision as to notice, for examples, *Hanson v. Meyer*, *supra* (weighing starch sold at price per cwt.); *Zagury v. Furnell* (1809), 2 Camp. 240 (counting of skins sold at price per dozen); *Simmonds v. Swift* (1826), 5 B. & C. 857 (stack sold at price per ton); *Wilthers v. Lyss* (1815), 4 Camp. 237 ("30 tons (more or less) of rosin at 13s. 9d. a cwt."); *Logan v. Le Mesurier* (1847), 6 Moo. P. C. C. 116 (raft of timber at price "per foot measured off"); compare *Gilmour v. Supple* (1858), 11 Moo. P. C. C. 551 (raft of "about 71,000 feet," but quantity already measured); *Kershaw v. Ogden* (1865), 3 H. & C. 717 (stacks of cotton waste at price per lb.: intention to pass property immediately); *Turley v. Bates* (1863), 2 H. & C. 200 (goods to be weighed by buyer: intention to pass property immediately); *Castle v. Playford* (1871), L. R. 7 Exch. 98, Ex. Ch. (property not suspended on weighing); *The Napoli* (1898), 15 T. L. R. 56 (cargo of ice sold at price per ton).

(*f*) *Martineau v. Kitching* (1872), L. R. 7 Q. B. 436, per COCKBURN, C.J., at p. 449; *Anderson v. Morice* (1874), L. R. 10 C. P. 58, 73; compare *Logan v. Le Mesurier*, *supra*, where the payment of a provisional price was controlled by other parts of the contract.

(*g*) *Jones (James) & Sons, Ltd. v. Tankerville (Earl)*, [1909] 2 Ch. 440, per PARKER, J., at p. 442; *Fletcher v. Livingston* (1891), 153 Massachusetts Reports, 388 (growing timber); *Stearns v. Washburn* (1856), 73 Massachusetts Reports, 187 (growing grass); see also *Phillips v. Morrison* (1844), 12 M. & W. 740 (coal). The position of the buyer seems to be that he has a chattel interest in the thing before severance (*Jones (James) & Sons, Ltd. v. Tankerville (Earl)*, *supra*, per PARKER, J., at pp. 443, 444). This interest is assignable (*Muskett v. Hill* (1839), 5 Bing. (N. C.) 694). It is not an interest in land (*Marshall v. Green* (1875), 1 C. P. D. 35; but compare *Morgan v. Russell & Sons*, [1909] 1 K. B. 357 (slack etc. forming actual part of land)). The case in the text falls under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 17; *ibid.*, s. 18, rr. 1, 2, do not apply; see pp. 175, 176, *ante*. As to the seller's licence to the buyer to sever, see p. 207, *post*. As to interests in land, see note (*i*), p. 142, *ante*. As to contracts for sale of land, see title SALE OF LAND, pp. 285 *et seq.*, *post*.

(*h*) *Lancashire Waggon Co., Ltd. v. Nuttall* (1880), 42 L. T. 465, C. A. If the buyer tenders the price on account of the goods, the seller cannot

SECT. 1.
Transfer
of the
Property
from Seller
to Buyer.

Option to
 turn agree-
 ment into
 sale.

When pro-
 perty passes.

317. Either party may, by the terms of an agreement to sell specific goods, have, in a specified event, an option to treat the agreement to sell as a sale (i). Thus, for example, where the seller has, on the buyer's default in paying the price, or part thereof, the option either to rescind the agreement or to sue the buyer for the price of the goods, and elects to sue for the price, his election, unless it be otherwise expressly agreed, passes the property in the goods to the buyer (k).

(v.) *Specific Goods Delivered on Approval or on Sale or Return.*

318. Unless a different intention appears (l), when goods are delivered (m) to the buyer (n) on approval, or "on sale or return" (o), or other (p) similar terms, the property therein passes (q) to the buyer—

(1) when he signifies his approval or acceptance to the seller (r), or does any other act adopting the transaction (s);

appropriate it to the price of other goods, as the maxim *solvitur in modum solventis* applies (*Lancashire Waggon Co., Ltd. v. Nuttall* (1879), 40 L. T. 291; *Croft v. Lumley* (1858), 6 H. L. Cas. 672).

(i) See *McEntire v. Crossley Brothers*, [1895] A. C. 457, 464; see also *Bianchi v. Nash* (1836), 1 M. & W. 545; *Beverington v. Dale* (1902), 7 Com. Cas. 112 (both cases of bailments).

(k) See *McEntire v. Crossley Brothers*, *supra*; see also *Walker v. Clyde* (1861), 10 C. B. (N. s.) 381 (where the seller elected to take back the goods). In the former case the goods had been delivered, but the principles stated in the text doubtless apply where the goods have not been delivered.

(l) *Sale of Goods Act*, 1893 (56 & 57 Vict. c. 71), s. 18 (covering words).

(m) Delivery to a carrier is not in this case delivery to the buyer, as it is under *ibid.*, s. 32 (see p. 222, *post*), so far at least as the computation of the time for rejection is concerned (*Jacobs v. Harbach* (1886), 2 T. L. R. 419).

(n) The person called a "buyer" here is really only a bailee, as he has not bought or agreed to buy, but has merely an option to buy (*Helby v. Matthews*, [1895] A. C. 471; *Edwards (Percy), Ltd. v. Vaughan* (1910), 26 T. L. R. 545, C. A. (both cases under the *Factors Act*, 1889 (52 & 53 Vict. c. 45), s. 9). The position of the seller is that he has made an irrevocable offer to sell (*Kirkham v. Attenborough*, *Kirkham v. Gill*, [1897] 1 Q. B. 201, C. A., *per Lord Esher*, M.R., at p. 203), and so cannot require a return of the goods, unless, *e.g.*, a course of dealing allows him to do so; see *Sale of Goods Act*, 1893 (56 & 57 Vict. c. 71), s. 55; p. 279, *post*.

(o) Whether a delivery is made under a contract for "sale or return" etc. depends upon the effect of the transaction as a whole; the fact that it is called "sale or return" is not conclusive, it may be an agency to sell for the bailor (*Weiner v. Harris*, [1910] 1 K. B. 285, C. A.). Again, the fact that the transaction is called an "agency" does not show that it may not be really one of sale or return (*Re Nevill, Ex parte White* (1871), 6 Ch. App. 397; affirmed, *sub nom. Towle & Co. v. White* (1873), 29 L. T. 78, H. L.). These two cases should be compared; see also *Re Smith, Ex parte Bright* (1879), 10 Ch. D. 566, C. A., where a *del credere* agency is distinguished from a sale. The fact that the agent is remunerated by the profit on a resale does not make him the buyer (*ibid.*); and see, generally, title AGENCY, Vol. I., pp. 152 *et seq.*

(p) *E.g.* on trial or on approbation. As to "similar terms," see p. 179, *post*.
 (q) Consequently, until that time the seller is the person to sue the carrier if the goods are lost in transit (*Swain v. Shepherd* (1832), 1 Mood. & R. 223 (goods sent on approval)).

(r) *Swain v. Shepherd, supra*. These words in the text, *supra*, include a verbal approval. It is noticeable that a verbal approval is by implication treated as an act, which perhaps is not the case with regard to an acceptance under the *Sale of Goods Act*, 1893 (56 & 57 Vict. c. 71), s. 4; see p. 129, *ante*.

(s) *Sale of Goods Act*, 1893 (56 & 57 Vict. c. 71), s. 18, r. 4 (a); *Kirkham*

(2) if he does not signify his approval or acceptance to the seller, but retains the goods without giving notice (*t*) of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time (*a*), and, if no time has been fixed, on the expiration of a reasonable time (*b*). What is a reasonable time is a question of fact (*c*).

SECT. 1.
Transfer
of the
Property
from Seller
to Buyer.

319. A delivery of goods is not made on terms similar to a delivery on approval, or "on sale or return," unless the effect of the transaction is that the bailee has the option of becoming the owner of the goods, and on terms substantially the same as those already mentioned (*d*). Accordingly the following cases are not within that rule (*e*):—

"Similar
terms."

(1) A delivery of goods to a bailee on the terms that, if they are not returned within a fixed or a reasonable time, the bailor shall have the option of treating them as sold, in which case the option, if the goods are not returned, rests with the bailor only, and the property passes when he exercises it (*f*);

(2) A delivery of goods to a bailee on the terms that the bailee shall have the option of becoming the owner of the goods on, for example, payment in cash, or his being charged for the goods in

v. Attenborough, Kirkham v. Gill, [1897] 1 Q. B. 201, C. A. (pledging of goods by bailee). For the meaning of "act adopting the transaction," see p. 180, *post*. It may be also expressly provided what act shall be considered to be one adopting the transaction, as, *e.g.*, a sale of the goods by the bailee (*Re Nevill, Ex parte White* (1871), 6 Ch. App. 397).

(*t*) A refusal to agree to the price is a rejection, and the bailee's option of purchase is thereupon determined (*Bradley and Cohn, Ltd. v. Ramsay & Co.* (1911), 28 T. L. R. 13). An actual return of the goods may be necessary by an express agreement; see *Ornstein v. Alexandra Furnishing Co.* (1895), 12 T. L. R. 128.

(*a*) *Ellis v. Mortimer* (1805), 1 Bos. & P. (N. R.) 257 (month's trial: return within month); *Johnson v. Kirkaldy* (1840), 4 Jur. 988 (return in three months or payment of first price); *Elphick v. Barnes* (1880), 5 C. P. D. 321 (trial for eight days); *Blanchensee v. Blauberg* (1885), 2 T. L. R. 36, C. A. ("on approbation or return" within ten days); *Marsh v. Hughes-Hallett* (1900), 16 T. L. R. 376 (week's approval: no rejection); see also *Rees v. Manners* (1805), 3 Smith, K. B. 119 (hire and sale or return mixed); *Humphries v. Carvalho* (1812), 16 East, 45 ("quality to be approved on Monday"), a case of rescission.

(*b*) *Moss v. Sweet* (1851), 16 Q. B. 493; *Gibson v. Bray* (1817), 8 Taunt. 76 (reasonable time not elapsed); *Bailey v. Gouldsmith* (1791), Peake, 78 [56]; *Beverley v. Lincoln Gas Co.* (1837), 6 Ad. & El. 829 (lapse of reasonable time); *Ray v. Barker* (1879), 4 Ex. D. 279, C. A. (return prevented by fraud of third person); *Re Florence, Ex parte Wingfield* (1879), 10 Ch. D. 591, C. A., *per JESSEL, M.R.*, at p. 593 (general rule stated).

(*c*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 4 (*b*). The meaning of "reasonable time" is also generally stated in *ibid.*, s. 56; see p. 280, *post*.

(*d*) *I.e.*, in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 4; *Weiner v. Gill, Same v. Smith*, [1905] 2 K. B. 172; affirmed, [1906] 2 K. B. 574, C. A.; *Edwards (Percy), Ltd. v. Vaughan* (1910), 26 T. L. R. 545, C. A.

(*e*) There being "a different intention" as to the time when the property passes (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18 (covering words)). Such cases are to be decided by ordinary common law principles, *ibid.*, s. 17, not applying, as there is no contract of sale as defined in *ibid.*, s. 1.

(*f*) *Manders v. Williams* (1849), 4 Exch. 339.

SECT. 1.
Transfer
of the
Property
from Seller
to Buyer.

"Act adopt-
ing the
transaction."

account, or the goods being invoiced to him (g), or on payment in full of instalments of rent for the hire of the goods (h);

(3) A sale of goods on the terms that the buyer shall have the power of rejecting the goods, and revesting the property in them in the seller, if the goods are not approved (i).

320. An "act adopting the transaction" means an act indicating an election on the part of the bailee to become the buyer of the goods, or otherwise inconsistent with his being other than the buyer thereof (k), as, for example, a sale or pledge of them, or any other unauthorised act in relation thereto which, or the result of which, is inconsistent with a free power to return them according to the express or implied terms of the bailment (l).

A delivery of the goods to a third person for a special purpose consistent with the terms of the original bailment is therefore not an act adopting the transaction, even although the bailee is thereby unable to return the goods; nor does the bailee in such circumstances retain them (m).

Loss etc.
of goods
delivered.

321. A bailment of goods on approval, sale or return, or similar terms, does not, unless it be otherwise agreed (n), become a sale of the goods by reason that, while in the possession of the bailee, they have perished or been damaged, if the loss or damage was not caused by the bailee's act or default (o).

(g) *Weiner v. Gill, Same v. Smith*, [1905] 2 K. B. 172; affirmed, [1906] 2 K. B. 574, C. A.; *Edwards (Percy), Ltd. v. Vaughan* (1910), 26 T. L. R. 545, C. A.; *Truman (W.), Ltd. v. Attenborough* (1910), 26 T. L. R. 601.

(h) Under a hire-purchase agreement not containing any agreement to buy, as in *Helby v. Matthews*, [1895] A. C. 471. If the bailee binds himself to pay the instalments of "rent," there is an agreement to buy and the case falls under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 17 (*Lee v. Butler*, [1893] 2 Q. B. 318, C. A.); as to hire-purchase, see titles BAILMENTS, Vol. I., pp. 554 *et seq.*; BILLS OF SALE, Vol. III., pp. 12, 13; MORTGAGE, Vol. XXI., p. 119.

(i) *Head v. Tattersall* (1871), L. R. 7 Exch. 7; *Neate v. Ball* (1801), 2 East, 117 (delay in rejection, buyer's bankruptcy); *Cranston v. Mallow and Lien*, [1912] S. C. 112 (sale with warranty and week's trial).

(k) *Weiner v. Gill, Same v. Smith*, [1905] 2 K. B. 172, *per* BRAY, J., at p. 179; *Kirkham v. Attenborough, Kirkham v. Gill*, [1897] 1 Q. B. 201, C. A., *per* Lord ESHER, M.R., at p. 203.

(l) *Kirkham v. Attenborough, Kirkham v. Gill, supra* (pledge); *Re Florence, Ex parte Wingfield* (1879), 10 Ch. D. 591, C. A., *per* JESSEL, M.R., at p. 593 (sale); *Genn v. Winkel* (1912), 107 L. T. 434, C. A. (delivery over on sale or return). An act may therefore be either one showing an intention to become the buyer, or one from which such an intention is compulsorily presumed (*ibid.*).

(m) *Weiner v. Gill, Same v. Smith*, [1906] 2 K. B. 574, C. A., *per* Lord ALVERSTONE, C.J., at p. 578; *Genn v. Winkel, supra*.

(n) As where there is a usage of trade that the goods shall in that event be treated as sold (*Bevington v. Dale* (1902), 7 Com. Cas. 112).

(o) *Elphick v. Barnes* (1880), 5 C. P. D. 321 (sale or return: death of horse); *Chapman v. Withers* (1888), 20 Q. B. D. 824; *Head v. Tattersall* (1871), L. R. 7 Exch. 7 (injury to horse). Strictly speaking, the last two cases were cases of rescission; see the general principles of the proposition in the text *supra* stated by BRAMWELL, B., in *Head v. Tattersall, supra*, at p. 12; see also *Genn v. Winkel, supra*.

SUB-SECT. 4.—*Reservation by Seller of Right of Disposal.*

322. Where there is a contract for the sale of specific goods (*p*), or where goods are subsequently appropriated (*q*) to the contract, the seller may, by the terms of the contract or appropriation (*r*), reserve the right of disposal (*s*) of the goods until certain conditions are fulfilled. In such a case, notwithstanding the delivery of the goods to the buyer (*t*), or to a carrier or other bailee for the purpose of transmission to the buyer (*a*), the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled (*b*).

The fact that, by reserving the right of disposal by the terms of the appropriation, the seller is committing a breach of contract is, in relation to the passing of the property, immaterial (*c*).

323. Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal (*d*).

SECT. 1.
Transfer
of the
Property
from Seller
to Buyer.

Suspends
passing of
property.

Bill of lading
taken to
seller's order.

(*p*) For the definition of "specific goods" see p. 121, *ante*.

(*q*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 5 (1); p. 168, *ante*.

(*r*) These words are not, it is conceived, to be interpreted *reddendo singula singulis*. Thus "terms of the contract" should apply both to specific and to subsequently appropriated goods.

(*s*) This term is a translation of *jus disponendi*, found in the cases with reference only to shipment under bills of lading. But the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19 (1), is a general provision not confined to cases of shipment, notwithstanding that *ibid.*, s. 19 (2), (3), are so confined.

(*t*) *Turner v. Liverpool Docks (Trustees)* (1851), 6 Exch. 543, Ex. Ch. (buyer's ship).

(*a*) *I.e.*, under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 5 (2); see p. 170, *ante*.

(*b*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19 (1); *Gods v. Rose* (1855), 17 C. B. 229 (payment to be on delivery of warehouseman's transfer order); *Cohen v. Foster* (1892), 61 L. J. (Q. B.) 643 (specific goods: payment before delivery); see also the cases on shipment cited in note (*d*), *infra*. Where the performance of some obligation by the buyer is not made a condition of the transfer of the property, and the property passes, it is not revested in the seller by the buyer's subsequent default (*Key v. Cotesworth* (1852), 7 Exch. 595; *Re Tappenbeck, Ex parte Banner* (1876), 2 Ch. D. 278, C. A.), unless there be an agreement to that effect (*Newington v. Levy* (1870), L. R. 6 C. P. 180, Ex. Ch. (avoidance of release)).

(*c*) *Wait v. Baker* (1848), 2 Exch. 1; *Browne v. Hare* (1859), 4 H. & N. 822, 830, Ex. Ch.; *Gabarron v. Kreeft*, *Kreeft v. Thompson* (1875), L. R. 10 Exch. 274.

(*d*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19 (2). The case set out in this provision is a particular instance of the general rule laid down in *ibid.*, s. 19 (1). The question of the seller's intention is one for the jury (*Van Casteel v. Booker* (1848), 2 Exch. 691; *Falk v. Fletcher* (1865), 18 C. B. (N. S.) 403). See, for examples, *Walley v. Montgomery* (1803), 3 East, 585 (bill of lading indorsed to buyer with advice of bill of exchange); *Ogle v. Atkinson* (1814), 5 Taunt. 759 (shipment on buyer's ship: bill of lading wrongfully taken by seller in blank); *Brandt v. Bowlby* (1831), 2 B. & Ad. 932 (indorsed bill of lading sent to seller's agent, unindorsed to buyer); *Bruce v. Wait* (1837), 3 M. & W. 15 (possession obtained by consignee after right of disposal reserved); *Ellershaw v. Magnias* (1843), 6 Exch. 570 (bill of lading pledged by seller: payment by buyer); *Wilmshurst v. Bowker* (1844), 7 Man. & G. 882, Ex. Ch. (payment

SECT. 1.

Transfer
of the
Property
from Seller
to Buyer.Delivery in
exchange for
payment.

The same principle applies generally where the seller takes in his own name, or in that of his agent, a mate's receipt, boat-master's receipt, or other document giving control of the goods (e).

324. Where by the terms of the contract or of the appropriation of the goods by the seller the delivery of the goods, or of a document giving control of the goods, is to be in exchange for payment of, or security for, the price of the goods, the seller, unless a contrary intention appears (f), reserves the right of disposal,

to be by banker's draft against bill of lading: latter sent to buyer); *Van Casteel v. Booker* (1848), 2 Exch. 691 (shipment in buyer's ship and bill of lading transferred to him); *Wait v. Baker* (1848), 2 Exch. 1 (bill of lading pledged by seller after buyer's tender of price); *Jenkyns v. Brown* (1849) 14 Q. B. 496; *Turner v. Liverpool Docks (Trustees)* (1851), 6 Exch. 543, Ex. Ch. (bill of lading transferred to purchasers of bills drawn on buyer); *Key v. Cotesworth* (1852), 7 Exch. 595 (transmission of bill of lading to buyer's agent with advice of bill of exchange); *Browne v. Hare* (1859), 4 H. & N. 822, Ex. Ch. (bill of lading indorsed by seller to buyer, and sent through seller's agent only to preserve lien); *Sheridan v. New Quay Co.* (1858), 4 C. B. (N. S.) 618 (cash against bill of lading in hands of seller's agent); *Joyce v. Swann* (1864), 17 C. B. (N. S.) 84 (bill of lading retained by seller without intention of reserving right of disposal); *Moakes v. Nicolson* (1865) 19 C. B. (N. S.) 290 (cash against bill of lading in hands of seller's agent); *Shepherd v. Harrison* (1871), L. R. 5 H. L. 116 (bill of lading and bill of exchange sent to buyer through seller's agent); *Gabarron v. Kreeft*, *Kreeft v. Thompson* (1875), L. R. 10 Exch. 274 (bill of lading to order of fictitious person and pledged by seller); *Ogg v. Shuter* (1875) 1 C. P. D. 47, C. A. (shipment "free on board": cash against bill of lading: refusal to pay); *Re Tappenbeck, Ex parte Banner* (1876), 2 Ch. D. 278, C. A. (bill of lading sent direct to buyer with advice of bill of exchange); *Mirabita v. Imperial Ottoman Bank* (1878), 3 Ex. D. 164, C. A. (bill of lading transferred to purchasers of bill of exchange drawn on buyer: tender of price by buyer); compare *Wait v. Baker*, *supra*; *Rew v. Payne, Douhuouite & Co.* (1885) 53 L. T. 932 (bill of lading and bill of exchange sent through seller's agent: wrongful dealing by buyer with cargo); *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q. B. 643, C. A. (direct transmission to buyer of both documents); *König v. Brandt* (1901), 84 L. T. 748, C. A. (direct transmission of bill of lading: advice of bill of exchange). Where the intention to reserve the right of disposal is otherwise clear, such intention is not rebutted by the invoice stating the goods to have been shipped "on account of and at the risk of the buyer," or, where they are shipped in the buyer's ship, by the bill of lading stating them to be "freight free as buyer's property" (*Shepherd v. Harrison*, *supra*; *Turner v. Liverpool Docks (Trustees)*, *supra*).

(e) *Craven v. Ryder* (1816), 6 Taunt. 433; *Ruck v. Hatfield* (1822), 6 B. & Ald. 632; *Falk v. Fletcher* (1865) 18 C. B. (N. S.) 403; *Schuster v. McKellar* (1857), 7 E. & B. 704 (all cases of mate's receipts). In *Bryans v. Nix* (1839), 4 M. & W. 775 (boat's receipt), PARKER, B., at p. 791, shows that there is no distinction between bills of lading, or carriers' or wharfingers' receipts, or any other kind of document, as evidence of an intention to pass the property in goods. Such documents as mate's receipts, when held by the owner of the goods, are like title deeds (*Ilathesing v. Laing, Laing v. Zeden* (1873), L. R. 17 Eq. 92, *per* BACON, V.-C., at p. 106). *Secus*, where held by a person having no property therein (*ibid.*). Thus, the retention of the mate's receipt by the seller after the property has passed to the buyer by shipment of the goods and a bill of lading made out in the buyer's name does not reserve to the seller any right in or over the goods (*Cowasjee v. Thompson* (1845), 5 Moo. P. C. C. 165). See the general principle of the proposition in the text stated in *Bryans v. Nix*, *supra*, at p. 791.

(f) As where the seller intends only to preserve his lien (*Browne v. Hare* (1859), 4 H. & N. 822, Ex. Ch.; *Re Middleton, Ex parte Middleton* (1864),

and the property in the goods, until payment or security be made or given accordingly (*g*).

In particular (*h*), where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading (*i*) to the buyer together, to secure (*k*) acceptance of payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him (*l*).

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Transfer
of the
Property
from Seller
to Buyer.

3 De G. J. & Sm. 201; *Tarling v. Baxter* (1827), 6 B. & C. 360; *Sweeting v. Turner* (1872), L. R. 7 Q. B. 310 (sale at auction); the goods in the last two cases being specific; see also *Anderson v. Clark* (1824), 2 Bing. 20 (assignment to factor on general account not against bill of exchange).

(*g*) Blackburn, *Contract of Sale*, 1st ed., p. 149; *Haswell v. Hunt* (1772), cited in 5 Term Rep. 231 (sale for ready money: waiver by seller of condition); *Barrow v. Coles* (1811), 3 Camp. 92 (bill of lading indorsed to buyer conditionally on acceptance and payment of draft); *Loeschman v. Williams* (1815), 4 Camp. 181 (cash on delivery); *Bishop v. Shillito* (1819), 2 B. & Ald. 329, n. (delivery of iron against redelivery of seller's acceptances), explained in *Re Middleton, Ex parte Middleton* (1864) 3 De G. J. & Sm. 201; *Howes v. Ball* (1827), 7 B. & C. 481 (exchange of goods and bills); *Bryans v. Nic* (1839), 4 M. & W. 775 (transmission to buyer of boat receipt and bill of exchange); *Godts v. Rose* (1855), 17 C. B. 229 (cheque against wharfinger's notice of transfer); *Schuster v. McKellar* (1857), 7 E. & B. 704 (payment against delivery of mate's receipt); *Sheridan v. New Quay Co.* (1858), 4 C. B. (N. S.) 618 (cash against bill of lading); *Moakes v. Nicolson* (1865), 19 C. B. (N. S.) 290 (cash against bill of lading in buyer's name in hands of seller's agent); *Sanders v. Maclean* (1883), 11 Q. B. D. 327, C. A. (c.f.i.: cash in exchange for bill of lading and policy of insurance); *Cohen v. Foster* (1892), 61 L. J. (Q. B.) 643 (specific goods: payment before delivery); *Armstrong v. Allin Brothers* (1892), 67 L. T. 738, C. A. (cash in exchange for mate's receipt: clean receipt); *Ryan v. Ridley & Co.* (1902), 8 Com. Cas. 105 (cash against shipping documents); *The Charlotte*, [1908] P. 206, C. A. (cash or approved acceptance in exchange for bill of lading and policy of insurance). As to the liability of the seller's agent for parting with the control of the goods without receiving payment against the bill of lading, see *Stearne Kuarsen Fabrick Gonda Co. v. Heintzmann* (1864), 17 C. B. (N. S.) 56.

(*h*) These two words are not in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), but *ibid.*, s. 19 (3), is only a particular instance of the general common law rule stated above.

(*i*) The language of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19 (3), is perfectly general; its application should, it is submitted, not be confined to cases under *ibid.*, s. 19 (2), i.e., where the bill of lading is taken to the order of the seller or his agent. *Ibid.*, s. 19 (3), seems to enact a particular instance of the main rule in *ibid.*, s. 19 (1). If the seller sends an unindorsed bill of lading he in effect sends none (*Shepherd v. Harrison* (1869), L. R. 4 Q. B. 196, *per* COCKBURN, C.J., at p. 204; *Brandt v. Bowlby* (1831), 2 B. & Ad. 932). Similarly, if he sends an unstamped bill of lading (*Moakes v. Nicolson, supra*).

(*k*) "To secure" means "in order to secure," and not "so as to secure." There would therefore be a question of fact.

(*l*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19 (3); *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q. B. 643, C. A. (direct transmission of both documents); *Rew v. Payne, Douthwaite & Co.* (1885), 53 L. T. 932 (acceptance of bill of exchange: an express condition); *Danish Dairies Co-operative Society v. Midland Rail. Co.* (1892), 8 T. L. R. 212 (bill of lading to buyer: bill of exchange to seller's agent: no condition); and see the cases cited in note (*d*), p. 181, *ante*. In cases under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19 (3), it is no longer

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of the
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to Buyer.

Where the bill of lading is directly transmitted to the buyer, the appropriation of the goods by the seller is not conditional on the acceptance of a bill of exchange merely because the buyer is advised that a bill of exchange has been or will be drawn upon him for the price (*m*).

SUB-SECT. 5.—*Transfer of Bills of Lading and Other Documents.*

(i.) *Bills of Lading.*

Transfer of
property
by bill of
lading.

325. Where goods have been shipped and a bill of lading (*n*) has been signed therefor, the property in the goods may, so long as the voyage continues, be transferred by a transfer of the bill of lading, made according to its tenor (*o*), and with the intention of passing thereby the property in the goods (*p*). The transfer may, however,

imperative that the bill of lading should pass through the hands of the seller's agent (*Cahn v. Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q. B. 643, C. A.). This was, as a general rule, necessary before the Act (*Key v. Cotesworth* (1852), 7 Exch. 595, 607; *Re Tappenbeck, Ex parte Banner* (1876), 2 Ch. D. 278, 288, C. A.), and it was so transmitted in *Shepherd v. Harrison* (1871), L. R. 5 H. L. 116, on which the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19 (3), is based. But compare *Bryans v. Nix* (1839), 4 M. & W. 775, where there was a direct transmission to the buyer of a bill of exchange and a boat receipt. The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19 (3), does not deal with the case where a bill of lading is sent to the buyer with advice only of the bill of exchange (see *Key v. Cotesworth, supra*; *Re Tappenbeck, Ex parte Banner, supra*; *König v. Brandt* (1901), 84 L. T. 748, C. A.), or where the buyer, on the receipt of the bill of lading, is to pay cash or to send a banker's draft (see *Wilmskurst v. Bowker* (1844), 7 Man. & G. 882, Ex. Ch.), or to make a promissory note. In all these cases it would, it seems, be a question of fact whether the delivery of the document was intended to be in exchange for payment, and the property, and not merely a lien, was intended to be secured. If the buyer wrongfully takes possession of and deals with the goods, he is guilty of a conversion, and the seller may recover their value, subject, however, to a deduction for expenses incurred by him, and which the seller himself would have incurred, such as freight and landing charges (*Rew v. Payne, Douhwaite & Co.* (1885), 53 L. T. 932; *Peruvian Guano Co. v. Dreyfus Brothers & Co.*, [1892] A. C. 166, 170, 174, 186, per Lords MACNAGHTEN and WATSON; *New York Breweries Co. v. A.-G.*, [1899] A. C. 62, per Lord HALSBURY, L.C.; see also *Hiort v. Bott* (1874), L. R. 9 Exch. 86).

(*m*) *Key v. Cotesworth, supra*; *Re Tappenbeck, Ex parte Banner, supra*; *König v. Brandt, supra*.

(*n*) A bill of lading is a symbol of the goods represented thereby (*Burdick v. Sewell* (1884), 13 Q. B. D. 159, C. A., per BOWEN, L.J., at p. 171; *Sanders v. Maclean* (1883), 11 Q. B. D. 327, C. A., per BOWEN, L.J., at p. 341. It is not a symbol of the right of property; that depends upon the contract. Thus, the issue by the master of a bill of lading without the seller's consent is ineffectual (*Craven v. Ryder* (1816), 6 Taunt. 433; *Ruck v. Hatfield* (1822), 5 B. & Ald. 632; *Schuster v. McKellar* (1857), 7 E. & B. 704). As to the stamp, see title SHIPPING AND NAVIGATION.

(*o*) If the bill be to order, by indorsement and delivery; if indorsed in blank, by delivery (Factors Act, 1889 (52 & 53 Vict. c. 45), s. 11).

(*p*) *Sewell v. Burdick* (1884), 10 App. Cas. 74. The transfer for value of a bill of lading is *prima facie* evidence that the property passed thereby (*Dracachi v. Anglo-Egyptian Navigation Co.* (1868), L. R. 3 C. P. 190). Even where the bill of lading has been signed, its transfer is not essential to the passing of the property. The other facts of the case may show that the property has passed (*Dick v. Lumsden* (1793), Peake, 250 [189]; *Meyer*

be made with the intention of passing the property conditionally, or for a specific purpose only, and not for the purpose of passing the property in the goods (*q*).

The voyage is deemed to continue so long as the goods are in the custody of the master of the vessel, or of some person on his behalf, and until possession of the goods has been taken by or on behalf of the person entitled to demand it (*r*).

SECT. 1.
Transfer
of the
Property
from Seller
to Buyer.

326. When two or more parts of a bill of lading are signed by the master, and such parts are transferred to two or more transferees in good faith and for value, the property in the goods, if it was intended to pass, passes to the transferee who is first in point of time (*s*); but no liability is imposed upon any person having the custody of the goods who, in good faith and without notice of any prior claim, delivers the goods in exchange for that part of the bill of lading which is first presented to him (*t*).

Bill of lading
taken in
parts.

(ii.) *Other Documents.*

327. The issue or transfer by the seller to the buyer of a delivery order, warrant, or certificate equivalent to a warrant (*a*), or

Do not *per se*
pass property.

v. Sharpe (1813), 5 Taunt. 74; *Nathan v. Giles* (1814), 5 Taunt. 558; *Fowler v. Knoop* (1878), 4 Q. B. D. 299, C. A.). Where the bill of lading is transferred to the buyer, the property passes, strictly speaking, by the contract and not by the transfer of the bill (*Sewell v. Burdick*, (1884), 10 App. Cas. 74, *per* Lord BRAMWELL, at p. 105; *Jenkyns v. Osborne* (1844), 7 Man. & G. 678, 697). A lien may also be preserved by means of a bill of lading, although the property passes (*London Joint Stock Bank v. British Amsterdam Maritime Agency* (1910), 16 Com. Cas. 102). As to the transfer of a bill of lading for goods at the time unascertained, see *Hayman & Son v. M'Lintock*, [1907] S. C. 936.

(*q*) Thus it may be shown that the seller reserved the right of disposal under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19 (2) (see p. 181, *ante*), or coupled the transfer with the condition of acceptance of a bill of exchange under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19 (3) (see p. 183, *ante*; *Bateman v. Green* (1867), 2 I. R. C. L. 166 (delivery of bill of lading expressly subject to acceptance of bill)). Or it may be shown that the transfer was by way of pledge (*Sewell v. Burdick*, *supra*; *Bristol and West of England Bank v. Midland Rail. Co.*, [1891] 2 Q. B. 653, C. A. (pledge of bill of lading, and transfer over by pledge)), or for another special purpose (*Hibbert v. Carter* (1787), 1 Term Rep. 745 (transfer to creditor to bind proceeds of goods); *Waring v. Cox* (1808), 1 Camp. 369; *Morison v. Gray* (1824), 2 Bing. 260 (transfer to agent to stop *in transitu*), explained in *Burgos v. Nascimento* (1908), 100 L. T. 71 (indorsement to warehouseman to receive goods); *Patten v. Thompson* (1816), 5 M. & S. 350 (transfer to factor to receive cargo); *Bruce v. Wait* (1837), 3 M. & W. 15 (transfer to agent for sale)).

(*r*) *Barber v. Meyerstein* (1870), L. R. 4 H. L. 317 (goods landed at sufferance wharf); *Hayman & Son v. M'Lintock*, *supra* (goods landed and stored in name of ship). Possession cannot be taken, nor can a wharfinger issue a warrant, or accept a delivery order, where there is a stop for freight, without payment of freight (*Barber v. Meyerstein*, *supra*). (*s*) *Barber v. Meyerstein*, *supra*; *Caldwell v. Ball* (1786), 1 Term Rep. 205.

(*t*) *Glyn Mills & Co. v. East and West India Dock Co.* (1882), 7 App. Cas. 591; see, further, as to bills of lading, title SHIPPING AND NAVIGATION.

(*a*) A certificate may by its form be either a warrant, or amount only to a statement that the goods are ready for delivery, not authorising the

SECT. 1.
Transfer
of the
Property
from Seller
to Buyer.

similar document, does not, as between the seller and the buyer (*b*), of itself pass the property in the goods (*c*); but possession obtained by the buyer under any such document will pass the property in any case in which possession of the goods themselves would pass the property (*d*).

SUB-SECT. G.—*Bills of Sale.*

Absolute bill.

328. A sale of goods may be made by deed, and the property in the goods will, subject to any contrary intention, pass to the buyer on the execution of the deed, unless it be delivered as an escrow. Such a deed is called a bill of sale (*e*).

holder to receive the goods. In such a case it is not a warrant, and *a fortiori* its issue or transfer can have no effect on the property in the goods (*Gunn v. Bolekow, Vaughan & Co.* (1875), 10 Ch. App. 491); see the definition of a warrant (*ibid.*), and compare the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 111.

(*b*) As between the seller and a second buyer, the property may pass under the Factors Act, 1889 (52 & 53 Vict. c. 45), ss. 9, 10. The wharfinger or warehouseman etc. in possession of the goods may, by his acknowledgment to the buyer of a warrant or delivery order, be estopped from denying that the goods are the buyer's property; see *Stonard v. Dunkin* (1809), 2 Camp. 344 (goods not measured: written acknowledgment by warehouseman); *Hawes v. Watson* (1824), 2 B. & C. 540 (goods unweighed: written acknowledgment to second buyer); *Gillett v. Hill* (1834), 2 Cr. & M. 530 (goods unascertained: attornment to delivery order); *Henderson & Co. v. Williams*, [1895] 1 Q. B. 521, C. A. (seller not owner; warehouseman's acknowledgment to buyer). See the law considered in *Knights v. Wiffen* (1870), L. R. 5 Q. B. 660; and see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 21 (1); p. 192, *post*; title ESTOPPEL, Vol. XIII., p. 408.

(*c*) *Tucker v. Humphrey* (1828), 4 Bing. 516, 522 (shipping note and delivery order); *McEwan & Sons v. Smith* (1849), 2 H. L. Cas. 309, *per* Lord COTTENHAM, L.C., at p. 325 (delivery order); *Kingsford v. Merry* (1856), 1 H. & N. 503, Ex. Ch. (delivery order procured by person not a buyer); *Imperial Bank v. London and St. Katharine Docks Co.* (1877), 5 Ch. D. 195, *per* JESSEL, M.R., at pp. 200, 202; *Gillman, Spencer & Co. v. Carbutt & Co.* (1889), 61 L. T. 281, C. A. (delivery order); *Busk v. Davis* (1814), 2 M. & S. 397; *Shepley v. Davis* (1814), 5 Taunt. 617 (delivery order for unascertained goods); *Withers v. Lyss* (1815), 4 Camp. 237 (delivery order to weigh and ascertain price of specific goods); *Hayman & Son v. M'Lintock*, [1907] S. C. 936 (delivery order for portion of larger bulk); compare *Swanwick v. Sothorn* (1839), 9 Ad. & El. 895 (delivery order for ascertained goods). These documents cannot have a greater effect than a bill of lading, which does not *per se* transfer the property. The property may pass also without a transfer of a warrant (*North British and Mercantile Insurance Co. v. Moffatt* (1871), L. R. 7 C. P. 25); as to the nature, generally, of the documents mentioned, see pp. 193, 225, *post*. Under certain private Acts of Parliament the indorsee of a warrant or certificate issued by a warehouseman is deemed to be the owner of the deposited goods (see London and St. Katharine Docks Act, 1864 (27 & 28 Vict. c. clxxviii.), ss. 106, 108), or to have the same right to the possession and property in the goods as if they were deposited in his own warehouse. But these provisions do not, it is conceived, affect the question of the transfer of the property as between the seller and the buyer; see the Law Quarterly Review, Vol. VIII., p. 302. For forms of delivery order, warrant or certificate, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 604 *et seq.*

(*d*) *Imperial Bank v. London and St. Katharine Docks Co.*, *supra*, *per* JESSEL, M.R., at p. 201.

(*e*) *I.e.*, an absolute bill of sale; see, generally, title BILLS OF SALE, Vol. III., pp. 5 *et seq.*

SUB-SECT. 7.—*The Effect of a Sale.*

SECT. 1.

**Transfer
of the
Property
from Seller
to Buyer***Prima facie*
transfers all
rights and
liabilities.

329. The completion of the sale confers upon the buyer in respect of the goods all the rights and liabilities (*f*) of an owner. Subject, therefore, as between him and the seller, to any special agreement, he is invested with full powers of using or of dealing with the goods (*g*), is entitled to all accretions and benefits attaching to them (*h*), and is subject to the risk of loss or damage (*i*).

The buyer's rights and liabilities as owner of the goods may, as between him and the seller, be limited by special agreement (*k*). Such an agreement does not, however, run with the property in the goods, so as to bind any subsequent buyer, even with notice thereof, or so as to qualify his right of property in the goods (*l*). But a patentee may, on the sale of the patented goods, by the terms of his licence to the buyer, restrict the user of the goods by the buyer, or by any subsequent buyer, even without notice of any limitation of the licence (*m*).

(*f*) *White v. Crisp* (1854), 10 Exch. 312 (possession by buyer of sunken ship likely to cause damage).

(*g*) *Betts v. Willmott* (1871), 6 Ch. App. 239, *per* Lord HATHERLEY, L.C., at p. 245; *Ajello v. Worsley*, [1898] 1 Ch. 274.

(*h*) *Sweeting v. Turner* (1872), L. R. 7 Q. B. 310, *per* BLACKBURN, J., at p. 313; *The Vindobala* (1887), 13 P. D. 42. See *Black v. Homersham* (1878), 4 Ex. D. 24 (dividend on shares declared before transfer). The principle in the text is the same in the Civil law; see Dig. 19, 1, 13, 18; 28, 5, 38, 5.

(*i*) See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 20; p. 188, *post*.

(*k*) *Elliman, Sons & Co. v. Currington & Son, Ltd.*, [1901] 2 Ch. 275; *Dodsley v. Varley* (1840), 12 Ad. & El. 632.

(*l*) *Spencer's Case* (1583), 5 Co. Rep. 16 a, 3rd resolution; Co. Litt. 223 a (condition against alienation); *Splidt v. Bowles* (1808), 10 East, 279 (freight earned by ship sold); *Thompson v. Dornay* (1845), 14 M. & W. 403 (bill of lading at C. L.); *Iybbe v. Hart* (1885), 29 Ch. D. 8, 12, C. A. (tenant's covenant not to sell hay); *Taddy & Co. v. Sterious & Co.*, [1904] 1 Ch. 354 (condition fixing price on resale); *McGruther v. Pitcher*, [1904] 2 Ch. 306, C. A. (same: sub-buyer's notice); followed by the Supreme Court of the United States in *Dr. Miles Medical Co. v. Park & Sons Co.* (1911), 220 United States Reports, 373; see also *National Phonograph Co., Ltd. v. Edison-Bell Consolidated Phonograph Co., Ltd.* (1906), 96 L. T. 218; and compare *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co.* (1913), 29 T. L. R. 270 (buyer seller's agent).

(*m*) *Incandescent Gas Light Co. v. Cantelo* (1895), 11 T. L. R. 381 *British Motor Syndicate, Ltd. v. Taylor & Son*, [1901] 1 Ch. 122, C. A. (innocent sub-buyer); *British Mutoscope and Biograph Co., Ltd. v. Homer*, [1901] 1 Ch. 671 (sub-buyer with notice); *Badische Anilin und Soda Fabrik v. Isler*, [1906] 1 Ch. 605; *National Phonograph Co. of Australia v. Menck* (1911), 27 T. L. R. 239, P. C., where the general rule as to restrictions on rights of ownership and the cases are fully considered. The restrictions on ownership are not by virtue of any contract with the patentee; they are "a limitation of the grant of the licence to use" (*British Mutoscope and Biograph Co., Ltd. v. Homer*, [1901] 1 Ch. 671, *per* FARWELL, J.); and the restrictions are not presumed (*National Phonograph Co. of Australia v. Menck, supra*). A limitation of the right of user does not affect the right of property in the goods (*British Mutoscope and Biograph Co., Ltd. v. Homer, supra, per* FARWELL, J.). If there is no limitation of the licence, the buyer, and any subsequent buyer, may deal with the goods as if they were not the subject of a patent (*Thomas v. Hunt* (1864), 17 C. B. (N. S.) 183). As to implied authority to sell in small quantities goods subject to a trade-mark, and received from the manufacturer in bulk, see *Condy and Mitchell, Ltd. v. Taylor & Co., Ltd.* (1887), 3 T. L. R. 665; and see, generally, title PATENTS AND INVENTIONS, Vol. XXII., pp. 190 *et seq.*

SECT. 1.

SUB-SECT. 8.—*Incidence of the Risk.*Transfer
of the
Property
from Seller
to Buyer.

Primâ facie
attaches to
the property.
Insurance.

'C.f.i.'

Risk of
unascertained
goods.

(i.) *In General.*

330. Unless otherwise agreed (*n*), the goods remain at the seller's risk until the property (*o*) therein is transferred to the buyer; but where the property (*o*) is transferred to the buyer the goods are at his risk, whether delivery (*p*) has been made or not (*q*).

331. The fact that one party or the other is, by the terms of the contract, to insure the goods is relevant to show that it was intended that he should take the risk (*r*).

In particular, where goods are contracted for on the terms that they are to be shipped, and that the price is to include the amount of the freight, and the premium of insurance, the risk *primâ facie* (*s*) attaches to the buyer at and from the time of shipment of the goods (*t*).

332. Goods may, by agreement, be at the risk of the buyer although they are, at the time of the incidence of the risk, unascertained, and the property therein has, in consequence, not passed to the buyer (*a*).

(*n*) *Martineau v. Kitching* (1872), L. R. 7 Q. B. 436 (transfer of risk after two months); *Castle v. Playford* (1872), L. R. 7 Exch. 98, Ex. Ch. (risk on receipt of bill of lading); *Anderson v. Morice* (1876), 1 App. Cas. 713 (risk only on completion of cargo). As to the risk of separate instalments of the goods in the course of delivery, see *Anderson v. Morice*, *supra*. Much the same considerations apply as where the question is whose is the property; see pp. 172, 173, *ante*.

(*o*) *I.e.*, the general property; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1); p. 120, *ante*.

(*p*) *I.e.*, voluntary transfer of possession; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1); p. 119, *ante*.

(*q*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 20. The rule of the civil law, *res perit domino*, is *primâ facie* also the rule of English law; see *Martineau v. Kitching*, *supra*, *per* BLACKBURN, J., at p. 454.

(*r*) *Fragano v. Long* (1825), 4 B. & C. 219; *Allison v. Bristol Marine Insurance Co.* (1876), 1 App. Cas. 209, *per* BLACKBURN, J., at p. 229; *Anderson v. Morice* (1875), L. R. 10 C. P. 609, Ex. Ch., *per* QUAIN, J., at p. 613; (1876), 1 App. Cas. 713, *per* Lords O'HAGAN and SELBORNE, at pp. 773, 746.

(*s*) Not necessarily, for the seller may take the risk of delivery, as where the price is made payable only if the goods arrive; see p. 189, *post*.

(*t*) Under what is called a "c.f.i." (cost, freight, insurance) or "c.i.f." contract (*Wanke v. Wingren* (1889), 58 L. J. (Q. B.) 519; *Tregelles v. Sewell* (1862), 7 H. & N. 574; *Corcoran v. Proser* (1873), 22 W. R. 222, Ex. Ch., *per* LAWSON, J., at p. 223; *Crozier, Stephens & Co. v. Auerbach*, [1908] 2 K. B. 161, C. A., overruling *Barrow v. Myers & Co.* (1888), 4 T. L. R. 441; *Biddell Brothers v. E. Clemens Horst Co.*, [1911] 1 K. B. 934, C. A., *per* KENNEDY, L.J. (dissenting), at p. 956; reversed, [1912] A. C. 18). Under such a contract the seller "takes the risk of a rise or fall in the price of the goods, or of freight for their carriage, or of the rate of insurance" (*Houlder Brothers & Co., Ltd. v. Public Works Commissioner, Public Works Commissioner v. Houlder Brothers & Co., Ltd.*, [1908] A. C. 276, P. C.). As to the nature of the contract, and the duties of the parties, see the explanation in *Ireland v. Livingston* (1872), L. R. 5 H. L. 395, 406; *Biddell Brothers v. E. Clemens Horst Co.*, [1911] 1 K. B. 214, *per* HAMILTON, J., at p. 220; and see pp. 211, 223, *post*.

(*a*) *Stock v. Inglis* (1884), 12 Q. B. D. 564, C. A.; affirmed, *sub nom. Inglis v. Stock* (1885), 10 App. Cas. 263.

333. Where, by the contract, the goods are to be shipped by the seller "free on board," the risk *primâ facie* attaches to the buyer on the shipment, whether the goods are at that time specific or unascertained (*b*).

334. When the contract, expressly or by implication, provides that the price of the goods, or some part of it, shall be payable only if the goods arrive at their destination, or are actually delivered to the buyer, or on similar terms, the risk during the transit attaches to the seller, to the extent of so much of the price as is so contingently payable, although the property in the goods may have passed to the buyer (*c*).

The mere fact that the price is payable on the delivery of shipping documents (*d*), or at a time calculated with reference to the arrival of the goods at their destination (*e*), or their actual delivery to the buyer (*f*), or is to be ascertained by weighing, or the doing of some act or thing to or in relation to them after their arrival (*g*), does not throw the risk during transit on the seller (*h*).

335. If the price of the goods is payable before delivery, and no intention appears in the contract that the price shall be repaid, or shall cease to be payable, if delivery is not made, and delivery is not made, the buyer must bear the risk, where the seller agreed to deliver the goods only on a contingency, which fails without the seller's fault (*i*), or, the goods being specific, the seller is discharged by law from delivering the goods (*k*).

SECT. 1.
Transfer
of the
Property
from Seller
to Buyer.

Shipment
"f.o.b."

Where price
payable only
on arrival.

Risk where
price prepaid.

(*b*) *Stock v. Inglis* (1884), 12 Q. B. D. 564, C. A.; *Inglis v. Stock* (1885), 10 App. Cas. 263; *Cowasjee v. Thompson* (1845), 5 Moo. P. C. C. 165; The decision in *Stock v. Inglis*, *supra*, also depended on the course of dealing, the existence of which, however, Lord BLACKBURN, in *Inglis v. Stock*, *supra*, seems to doubt. As to insurance during sea transit, see p. 223, *post*.

(*c*) *Calcutta and Burmah Steam Navigation Co. v. De Mattos* (1863), 32 L. J. (Q. B.) 322; *Dupont v. British South Africa Co.* (1901), 18 T. L. R. 24. Accordingly the seller cannot recover the part contingently payable, if the goods do not arrive; on the other hand, the buyer cannot recover the part absolutely payable, if paid, and is liable for it, if unpaid.

(*d*) *Anderson v. Morice* (1875), L. R. 10 C. P. 609, Ex. Ch., *per* QUAIN, BLACKBURN, and LUSH, J.J.

(*e*) *Fragano v. Long* (1825), 4 B. & C. 219; see also *Hale v. Rawson* (1858), 4 C. B. (N. S.) 85.

(*f*) *Houlder Brothers & Co., Ltd. v. Public Works Commissioner, Public Works Commissioner v. Houlder Brothers & Co., Ltd.*, [1908] A. C. 276, 291, P. C.

(*g*) *Castle v. Playford* (1872), L. R. 7 Exch. 98, Ex. Ch.

(*h*) Such provisions may be intended only to regulate the time of payment, or the amount of the price, as where the other terms of the contract show that the property or risk was intended to pass to the buyer on the dispatch of the goods to him (*Alexander v. Gardner* (1835), 1 Bing. (N. C.) 671 (property); *Calcutta and Burmah Steam Navigation Co. v. De Mattos*, *supra*, *per* BLACKBURN, J. (risk as to half price); *Castle v. Playford*, *supra* (whole risk)); or the seller contracted only conditionally to deliver (*Boyd v. Siffkin* (1809), 2 Camp. 326 (sale "on arrival" at price per ton "from landing scale"))).

(*i*) *Whincup v. Hughes* (1871), L. R. 6 C. P. 78, *per* WILLES, J., at p. 84 (return of apprentice premium); *Wheeler v. Fradd* (1898), 14 T. L. R. 302, C. A. (loan expressly repayable in shares in future company); *Oppert v. Beaumont* (1887), 3 T. L. R. 674, C. A. (commission payable if certain moneys received).

(*k*) Under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 7; see

SECT. 1.

Transfer
of the
Property
from Seller
to Buyer.

Risk where
buyer may
rescind con-
tract.

Where risk
attaches.

Where, however, the contract is void *ab initio*, the buyer may recover any part of the price which he has paid (*l*).

336. Where the buyer is entitled in a certain event, under an express power, to revest the property in the goods in the seller, the risk of loss or damage to the goods, not caused by the buyer's fault, while they are in the buyer's possession, and before he has an opportunity of exercising his election, attaches to the seller as the contingent owner of the goods (*m*).

(ii.) *Loss Averted by Delay in Delivery.*

337. Where delivery (*n*) has been delayed through the fault (*o*) of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might (*p*) not have occurred but for such fault (*q*).

p. 146, ante. The principle is a general one, and depends upon the rule of law that the doctrine in *Taylor v. Caldwell* (1863), 3 B. & S. 826, "only releases the parties from future performance of the contract. Therefore the doctrine of failure of consideration does not apply—the law treats the contract as a good and subsisting contract with regard to things done and rights accrued in accordance with it up to that time" (*Chandler v. Webster*, [1904] 1 K. B. 493, C. A., *per* COLLINS, M.R., at pp. 499, 500). The contract is not one which can be treated as rescinded *ab initio* (*ibid.*, *per* ROMER, L.J., at p. 501). The principle has been applied in coronation seat cases (*Chandler v. Webster*, *supra*; *Clark v. Lindsay* (1903), 88 L. T. 198); to contracts for work and labour (*Anglo-Egyptian Navigation Co. v. Rennie* (1875), L. R. 10 C. P. 271), to prepaid freight (*Byrne v. Schiller* (1871), L. R. 6 Exch. 319, Ex. Ch.), and to prepayment of school fees (*Price v. Wilkins* (1888), 58 L. T. 680); and see, further, title CONTRACT, Vol. VII., p. 430.

(*l*) As under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 6; see *p. 145, ante*; *Strickland v. Turner* (1852), 7 Exch. 208 (sale of annuity which had ceased); *Clark v. Lindsay*, *supra*; followed in *Griffith v. Brymer* (1903), 19 T. L. R. 434 (coronation seat cases); *The Salvador* (1909), 26 T. L. R. 149 (price of towage); see the distinction between a repayment under a contract which is avoided, and under one which is void, stated in *Blakeley v. Muller & Co.*, [1903] 2 K. B. 760, n.; *Chandler v. Webster*, *supra*, *per* COLLINS, M.R., at p. 499.

(*m*) *Head v. Tattersall* (1871), L. R. 7 Exch. 7, 14.

(*n*) Defined as "voluntary transfer of possession"; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1); *p. 119, ante*.

(*o*) Defined as "wrongful act or default"; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1); *p. 120, ante*. The word "wrongful" imports "the infringement of some right" (*Mogul Steamship Co. v. McGregor, Gow & Co.* (1889), 23 Q. B. D. 598, C. A., *per* BOWEN, L.J., at p. 612). "Default" is a purely relative term, like negligence (*Re Young and Harston's Contract* (1885), 31 Ch. D. 168, C. A., *per* BOWEN, L.J., at p. 174), and has been defined, in the case of a sale of land, as "meaning nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction" (*ibid.*).

(*p*) Thus there need be no necessary connection between the delay and the loss; see *McConihe v. New York and Erie Railroad Co.* (1859), 20 New York State Reports, 495. The word "might" would seem to throw on the party in fault the onus of proving that the loss would have occurred if there had been no fault.

(*q*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 20 (first proviso); see *Rogers v. Van Hoesen* (1815), 12 Johnson's Reports (New York), 221 (fish spoilt by seller's delay). This proposition is similar to that in the Civil law; see the French Civil Code, art. 1302, and the case of the horse struck

(iii.) *Liability of Either Party as Bailee.*

338. Nothing in the Sale of Goods Act, 1893, s. 20, affects the duties and liabilities of either seller or buyer as a bailee of the goods of the other party (*r*).

A seller in possession of the buyer's goods is in respect thereof probably subject to the obligations of a bailee for reward until the expiration of the time expressly or by implication appointed for the buyer to take delivery. After the expiration of that time the seller is probably subject to the obligations of a gratuitous bailee (*s*).

Similarly, a buyer in possession of the seller's goods (*a*) is probably a bailee for reward until the expiration of the time expressly or by implication appointed for the passing of the property. After a rightful rejection of the goods, and the expiration of a reasonable time for the seller to remove them, the buyer, it is submitted, becomes a gratuitous bailee (*b*).

SECT. 1.
Transfer
of the
Property
from Seller
to Buyer.

Obligations
of either
party as
bailee.

SECT. 2.—*Transfer of Title.*SUB-SECT. 1.—*General Rule as to Title.*

339. Subject to the other statutory provisions (*c*), and without by lightning in the seller's stables put in Pothier, *Contrat de Vente*, art. 58. It is not identical with the proposition in *Martineau v. Kitching* (1872), L. R. 7 Q. B. 436, *per* BLACKBURN, J., at p. 456, where the learned judge speaks of delaying the passing of the *property*. Where the property has passed, the effect of the clause is probably to cast upon the seller, if he delays delivery, a liability from which he would ordinarily be exempt as a bailee of the buyer's goods, as, *e.g.*, if the goods are stolen or burnt while in his possession.

Generally
seller must
be owner.

(*r*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 20 (second proviso).

(*s*) 3 Salk. 61; *Koon v. Brinkerhoff* (1886), 39 Hun, 130; Story on Sales, ss. 300 a, 300 b, 393; Pothier, *Contrat de Vente*, arts. 53—55; see also *Wiche v. Dennis Brothers* (1913), 29 T. L. R. 250 (bailment after contract). As to the obligations of a bailee for reward, see title BAILMENT, Vol. I., p. 544; Story on Bailments, ss. 23, 442; and of a gratuitous bailee, see title BAILMENT, Vol. I., pp. 531 *et seq.*; Story on Bailments, ss. 23, 62, 79. The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 20, does not define the degree of responsibility of the seller or buyer, and there is little authority on the subject. On principle it would seem that the seller should be a bailee for reward, as part of the consideration for the price is the custody of the goods until the time of delivery; for the analogous case of a carrier who warehouses the goods on arrival without further charge, see title CARRIERS, Vol. IV., p. 21; and, as to the liability of a vendor of land before conveyance, see *Clark v. Ramuz*, [1891] 2 Q. B. 456, C. A.; and see title SALE OF LAND, pp. 363 *et seq.*, *post*. After the time for the buyer to take the goods has elapsed the consideration for the custody is exhausted, the custody then becoming solely for the benefit of the buyer ("*illud sciendum est, cum moram emptor adhibere coepit, jam non culpam sed dolum malum tantum præstandum a venditore*" (Dig. 18, 6, 17; see also *ibid.*, 18, 6, 5)).

(*a*) As, *e.g.*, under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 4 (see p. 178, *ante*), or under a hire-purchase contract.

(*b*) This seems to follow from the principles stated in note (*s*), *supra*. BAYLEY, J., says in *Okell v. Smith* (1815), 1 Stark. 107, that, after a rightful rejection of the goods, the goods are at the risk of the seller. But it is conceived that the learned judge was thinking of accidents, and not of the obligations of the buyer as a bailee.

(*c*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 22 (market overt), 23 (voidable title), 24 (revesting of property in stolen etc. goods), 25 (sales by sellers or buyers in possession), 26 (sales by execution debtors), 48 (2) (sale by seller exercising lien).

SECT. 2.
Transfer
of Title.

prejudice to the provisions of the Factors Acts (*d*), or of any enactment (*e*) enabling the apparent owner of goods to dispose of them as if he were the owner thereof, or the validity of any contract of sale under any special common law (*f*), or statutory (*f*), power of sale, or under the order of a court (*g*) of competent jurisdiction (*h*), where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent (*i*) of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded (*k*) from denying the seller's authority to sell (*l*).

(*d*) 52 & 53 Vict. c. 45; 53 & 54 Vict. c. 40 (Scotland). The provisions of the English Factors Act, 1889 (52 & 53 Vict. c. 45), are *ibid.*, ss. 2 (dispositions by mercantile agent), 8 (disposition by seller in possession), 9 (disposition by buyer in possession), 10 (transfer over of document of title), *ibid.*, ss. 8—10 being substantially the same as the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 25 (1), (2), 47 (proviso), respectively. One effect of the proviso to the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 21, is to make *ibid.*, s. 21, govern *ibid.*, s. 24 (1), as to which see p. 198, *post*; *Payne v. Wilson*, [1895] 1 Q. B. 653. As to dispositions by mercantile agents, see title AGENCY, Vol. I., pp. 205 *et seq.*

(*e*) *E.g.*, the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (reputed ownership). By the effect of *ibid.*, ss. 44, 54, an undischarged bankrupt may, until his trustee intervenes, deal with any property acquired since the bankruptcy to *bond fide* buyers, whether with or without knowledge of the bankruptcy (*Cohen v. Mitchell* (1890), 25 Q. B. D. 262, C. A.; *Re Behrend's Trust, Surman v. Biddell*, [1911] 1 Ch. 687); and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 139, 164, 165.

(*f*) See pp. 194, 195, *post*.

(*g*) R. S. C., Ord. 50, r. 2 (perishable etc. goods); County Court Rules, Ord. 12, r. 2 (same); R. S. C., Ord. 13, r. 13 (admiralty actions *in rem*: default of appearance); R. S. C., Ord. 57, r. 12 (goods seized in execution and claimed by third person); County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 156; and County Court Rules, Ord. 27, r. 13 (same); R. S. C., Ord. 55, r. 5A (sale of mortgaged property); see title PRACTICE AND PROCEDURE, Vol. XXIII., p. 143.

(*h*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 21 (2).

(*i*) *Hooper v. Gumm, McLellan v. Gumm* (1867), 2 Ch. App. 282 (authority by mortgagee); *National Mercantile Bank v. Hampson* (1880), 5 Q. B. D. 177; *Gough v. Wood & Co.*, [1894] 1 Q. B. 713, C. A. (mortgagor selling in ordinary way of business); distinguished, *Ellis v. Glover and Hobson, Ltd.*, [1908] 1 K. B. 388, C. A.; compare *Taylor v. McKeand* (1880), 5 C. P. D. 358; *Payne v. Fern* (1881), 6 Q. B. D. 620 (mortgagor's sale not in ordinary way of business).

(*k*) Under an estoppel *in pais*, the owner having clothed the seller with an ostensible authority to sell, and the buyer having acted on the faith of it (*Cole v. North Western Bank* (1875), L. R. 10 C. P. 354, 362, Ex. Ch.; *Pickering v. Busk* (1812), 15 East, 38 (goods entered in agent's name)); compare *Boyson v. Coles* (1817), 6 M. & S. 14; *Zwinger v. Samuda* (1817), 7 Taunt. 265 (issue by pledgee of delivery order in blank); see also *Union Credit Bank v. Mersey Docks and Harbour Board, Same v. Same and North and South Wales Bank*, [1899] 2 Q. B. 205; *Gregg v. Wells* (1839), 10 Ad. & El. 90 (owner standing by); *Waller v. Drakeford* (1853), 1 E. & B. 749 (owner assisting in sale); *Woodley v. Coventry* (1863), 2 H. & C. 164 (seller's assent to sub-sale of unascertained goods); *Knights v. Wiffen* (1870), L. R. 5 Q. B. 660 (same); *Hooper v. Gumm, McLellan v. Gumm, supra* (estoppel on mortgagee); *Farmeloe v. Bain* (1876), 1 C. P. D. 445 (no representation by seller to sub-buyer); *Gillman, Spencer & Co. v. Carbutt & Co.* (1889), 61 L. T. 281, C. A. (issue by seller of delivery order

SECT. 2.
Transfer
of Title.

Bills of lading
etc. not
generally
negotiable.
Seller's
subsequently
acquired
title.

340. Except in the case of dispositions under the Factors Act, 1889 (*m*), and also subject to any usage of trade (*n*), bills of lading, warrants, and delivery orders, and other similar documents, are not negotiable instruments that, by their transfer to a buyer, pass to him a better title to the goods than the seller had (*o*).

341. A person who, not being the owner, sells goods, not purporting to do so as agent of the owner, or otherwise than as owner of the goods, is estopped, as between himself and the buyer, from afterwards alleging that he was not the owner at the time of the sale (*p*). And if the buyer has not repudiated the contract, and the seller becomes the owner of the goods subsequently to the sale, his right of property thereupon vests in the buyer (*q*).

no representation); *Armstrong v. Allan Brothers* (1892), 67 L. T. 738, C. A. (seller's assent to sub-sale); *Henderson & Co. v. Williams*, [1895] 1 Q. B. 521, C. A. (goods in seller's name with owner's consent); *Farquharson Brothers & Co. v. King & Co.*, [1902] A. C. 325 (no holding out of agent's authority to sell). As to estoppel where the owner puts the indicia of title in the agent's possession, with authority, though limited, to deal with them, see *Rimmer v. Webster*, [1902] 2 Ch. 163. As to estoppel by ambiguous communications, see *Ireland v. Livingston* (1872), L. R. 5 H. L. 395; *Falck v. Williams*, [1900] A. C. 176, P. C.; *Miles v. Haslehurst & Co.* (1906), 23 T. L. R. 142. As to estoppel *in pais* generally, see title ESTOPPEL, Vol. XIII., pp. 375 *et seq.*

(*l*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 21 (1); see *Star Corn Millers Society v. Moore & Co.* (1886), 2 T. L. R. 620 (supposed buyer a company, but non-existent); compare title AGENCY, Vol. I., p. 204. As to the title to a pirate's ship, when not taken in piracy, see *R. v. McCleverty, The "Telegrafo" or "Restauracion"* (1871), L. R. 3 P. C. 673, 685.

(*m*) 52 & 53 Vict. c. 45, ss. 2 (1) (disposition by mercantile agent), 8, 9 (dispositions by sellers and buyers respectively), 10 (dispositions by transferees of documents of title).

(*n*) *Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.* (1877), 5 Ch. D. 205 (warrant negotiable by custom).

(*o*) *Newsom v. Thornton* (1805), 6 East, 17, 44 (bill of lading only a symbol of the goods); *Ogle v. Atkinson* (1814), 5 Taunt. 759 (transfer of bill of lading to third person inoperative when property has passed to buyer); *Cole v. North Western Bank* (1875), L. R. 10 C. P. 354, 363, Ex. Ch. (bill of lading: rule stated); *Gurney v. Behrend* (1854), 3 E. & B. 622; *The Argentina* (1867), L. R. 1 A. & E. 370 (authority to transfer bill of lading); *Finlay v. Liverpool and Great Western Steamship Co.* (1870), 23 L. T. 251; *Barber v. Meyerstein* (1870), L. R. 4 H. L. 317 (bills of lading in a set); *Jenkyns v. Usborne* (1844), 7 Man. & G. 678; *M'Ewan & Sons v. Smith* (1849), 2 H. L. Cas. 309 (delivery order); *Fuentes v. Montis* (1868), L. R. 3 C. P. 268, 279, *per WILLES, J.*; *Johnson v. Credit Lyonnais Co.* (1877), 3 C. P. D. 32, C. A. (warrant). *A fortiori*, documents are not negotiable which do not represent the goods at all, as, e.g., mere engagements to deliver unascertained goods (*Farmeloe v. Bain* (1876), 1 C. P. D. 445; *Dixon v. Bovill* (1856), 3 Macq. 1, H. L.), or mere certificates that goods are ready for delivery (*Gunn v. Bolckow, Vaughan & Co.* (1875), 10 Ch. App. 491); see, further, as to the effect of delivery of documents of title, pp. 184, 185, *ante*, 225 *et seq.*, *post*. As to negotiable instruments generally, see title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 462 *et seq.*, 564 *et seq.*

(*p*) *Edmonds v. Best* (1862), 7 L. T. 279. *Quære*, whether a third person may, in an action at the suit of the seller, rely upon this estoppel. As to estoppel generally, see title ESTOPPEL, Vol. XIII., pp. 321 *et seq.*

(*q*) *Whitehorn Brothers v. Davison*, [1911] 1 K. B. 463, C. A.; followed in *Bradley and Oohn, Ltd. v. Ramsay & Co.* (1912), 106 L. T. 771, C. A.; compare the cases in equity with regard to subsequently acquired titles

SMCT. 2.
Transfer
of Title.

Non-disclosure by the seller to the buyer of a want of title, of which the seller is aware, and the buyer is not, is a fraud on the buyer (*r*).

Fraudulent
non-disclosure
of want of
title.

Common law
powers,

SUB-SECT. 2.—Common Law and Statutory Powers of Sale.

342. The following persons, not being owners, have, under conditions, power at common law to sell the goods of others, that is to say, pawnees, who may sell the goods pledged on the pawner's default (*s*); executors or administrators selling as such (*a*); sheriffs, who may after seizure sell the goods of the execution debtor in the execution of a writ (*b*); and masters of ships, who may sell the ship or cargo in cases of absolute necessity (*c*).

Statutory
powers.

The following persons have, subject to the provisions contained in the various Acts conferring the powers, statutory powers of sale, namely, high bailiffs of county courts with regard to goods seized in execution (*d*); sheriffs, by public auction only, unless it be otherwise ordered, where the goods are seized for a sum exceeding £20, including legal incidental expenses, or at a private sale by leave of a judge (*e*); distrainers for rent or rates (*f*); innkeepers for the

to land (*Morse v. Faulkner* (1792), 3 Swan. 429, n.; *Re Bridgewater's Settlement, Partridge v. Ward*, [1910] 2 Ch. 342, and cases cited); see, generally, title **ESTOPPEL**, Vol. XIII., pp. 375 *et seq.* Where the contract under which the seller becomes entitled to the property is voidable by the original seller, it is of course necessary, to perfect the buyer's title, that he should have taken in good faith under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 23 (*Whitehorn Brothers v. Davison*, [1911] 1 K. B. 463, C. A.); see note (*o*), p. 196, *post*.

(*r*) *Morley v. Attenborough* (1849), 3 Exch. 500, 510, citing (*inter alia*) *Springwell v. Allen* (1648), Aleyn, 91; 2 East, 448, n.; *Ward v. Hobbs* (1877), 3 Q. B. D. 150, C. A., *per* BRETT, L.J., at p. 161.

(*s*) *Pothontier v. Dawson* (1816), Holt (N. F.), 383; *Pigot v. Cubley* (1864), 15 C. B. (N. S.) 701; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585, *per curiam*; see title **PAWNS AND PLEDGES**, Vol. XXII., pp. 244, 245.

(*a*) *Solomon v. Attenborough*, [1912] 1 Ch. 451, C. A.; affirmed [1913] A. C. 76; *Nugent v. Gifford* (1738), 1 Atk. 463; *Whale v. Booth* (1784), 4 Term Rep. 625, n.; *Doe d. Woodhead v. Fallows* (1832), 2 Cr. & J. 481, *per curiam* (administrator). The sale must be *bonâ fide* on the part of the buyer (*Doe d. Woodhead v. Fallows, supra*); see, generally, title **EXECUTORS AND ADMINISTRATORS**, Vol. XIV., pp. 296 *et seq.*

(*b*) *Manning's Case* (1609), 8 Co. Rep. 94 b, 96 b (sale good though judgment set aside); *Doe d. Emmett v. Thorn* (1813), 1 M. & S. 425 (writ irregular); *Doe v. Douston* (1818), 1 B. & Ald. 230 (conveyance after day for return of writ); *Farrant v. Thompson* (1822), 5 B. & Ald. 826; *Manders v. Williams* (1849), 4 Exch. 339 (wrongful sale passes no property); *Ward v. Dalton* (1849), 7 C. B. 643 (unascertained goods); *Re Townsend, Ex parte Hall* (1880), 14 Ch. D. 132, C. A. (seizure necessary); see, generally, title **EXECUTION**, Vol. XIV., pp. 31, 57; **SHERIFFS AND BAILIFFS**, p. 823, *post*.

(*c*) *The Gratitude* (1801), 3 Ch. Rob. 240, 259; *Hunter v. Prinsep* (1808), 10 East, 378 (wrongful sale & conversion); *Vlierboom v. Chapman* (1844), 13 M. & W. 230 (perishable goods); *Australasian Steam Navigation Co. v. Morse* (1872), L. R. 4 P. C. 222; *Atlantic Mutual Insurance Co. v. Huth* (1880), 16 Ch. D. 474, C. A. (rule stated); *Acetos v. Burns* (1878), 3 Ex. D. 282, C. A. (communication with owner); see, generally, title **SHIPPING AND NAVIGATION**.

(*d*) See title **COUNTY COURTS**, Vol. VIII., p. 564.

(*e*) See title **EXECUTION**, Vol. XIV., p. 57.

(*f*) See title **DISTRESS**, Vol. XI., p. 180.

board and lodging of their guests (*g*); impounders of animals for food and water supplied to the animals (*h*); pawnbrokers, but by public auction only where the goods are pledged for more than 10s. (*i*); the police with regard to unmuzzled dogs in London, or stray dogs throughout the kingdom (*k*); liquidators of companies in winding up by the court (*l*); mortgagees (*m*); administrators of convicts' estates (*n*); trustees of bankrupts (*o*); and warehousemen and wharfingers with regard to goods landed subject to unpaid freight and their charges (*p*).

SECT. 2.
Transfer
of Title.

Orders may be made by a court for the sale of goods which are perishable, or which should for good reason be sold at once (*q*); of the property involved in an Admiralty action *in rem* in default of appearance (*r*); of goods seized in execution and claimed by a third person under a bill of sale or otherwise (*s*); of mortgaged property on the application of the mortgagee, or in a foreclosure action (*a*); and of goods forfeited to the Crown under the Merchandise Marks Act, 1887 (*b*).

Orders of
court.

SUB-SECT. 3.—*Sale in Market Overt.*

343. Where goods (*c*) other than horses (*d*) are sold in market overt (*e*) according to the usage of the market, the buyer acquires a good title to the goods, provided that he buys them in good

When it
passes the
property.

(*g*) See title INNS AND INNKEEPERS, Vol. XVII., pp. 326, 327.

(*h*) See title ANIMALS, Vol. I., p. 384.

(*i*) See title PAWNS AND PLEDGES, Vol. XXII., p. 252.

(*k*) See title ANIMALS, Vol. I., pp. 398, 400.

(*l*) See title COMPANIES, Vol. V., p. 446.

(*m*) See title MORTGAGE, Vol. XXI., p. 248.

(*n*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429; PRISONS, Vol. XXIII., p. 262.

(*o*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 119.

(*p*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 497, 498; see also various local Acts, as, e.g., London and St. Katharine's Docks Act, 1864 (27 & 28 Vict. c. clxxviii.), s. 142; Sufferance Wharves, Port of London, Act, 1858 (21 Vict. c. xli.), s. 8; and see title WATERS AND WATERCOURSES.

(*q*) See titles COUNTY COURTS, Vol. VIII., p. 503; PRACTICE AND PROCEDURE, Vol. XXIII., p. 143.

(*r*) See title ADMIRALTY, Vol. I., p. 99.

(*s*) See titles COUNTY COURTS, Vol. VIII., p. 563; INTERPLEADER, Vol. XVII., pp. 604 *et seq.*

(*a*) See title MORTGAGE, Vol. XXI., p. 291.

(*b*) 50 & 51 Vict. c. 28, ss. 2 (4), 12 (3); see title TRADE MARKS, TRADE NAMES, AND DESIGNS. For other instances of statutory powers of sale, see, generally, Acts dealing with particular subjects.

(*c*) For the definition, see p. 112, *ante*.

(*d*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 22 (2). The law is regulated by stats. (1555) 2 & 3 Phil. & Mar. c. 7; (1588—9) 31 Eliz. c. 12. The language of stat. (1588—9) 31 Eliz. c. 12 is wider than that of stat. (1555) 2 & 3 Phil. & Mar. c. 7, and is not confined to the sale of stolen horses (2 Co. Inst. 717; *Moran v. Pitt* (1873), 42 L. J. (Q. B.) 47). Thus, the buyer in market overt of a horse not shown to have been stolen must prove as against the original owner that the regulations of stat. (1588—9) 31 Eliz. c. 12 were carried out (*Moran v. Pitt, supra*). As to the construction of these Acts, see, further, *Joseph v. Adkins* (1817), 2 Stark. 76; *Young v. Bond* (1896), 12 T. L. R. 160 (horse stolen by trick); and, as to the sale of horses in market overt, see title MARKETS AND FAIRS, Vol. XX., pp. 31, 54.

(*e*) As to sales in market overt, see, generally, title MARKETS AND FAIRS, Vol. XX., pp. 53 *et seq.*

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Transfer
of Title.

faith (*f*), and without notice (*g*) of any defect or want of title on the part of the seller (*h*).

If, after a sale in market overt, the seller becomes again the owner of the goods, the title of the original owner revives (*i*).

SUB-SECT. 4.—*Sale or Pledge under a Voidable Title.*

Seller or
pledgor
having void-
able title.

344. Where the seller of goods has a voidable title (*k*) thereto, but his title has not been avoided (*l*) at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith (*m*) and without notice (*n*) of the seller's defect of title (*o*).

(*f*) For the purposes of the Act, a thing is done "in good faith" if it be done "honestly, whether negligently or not" (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (2)).

(*g*) *I.e.*, knowledge, whether actual or imputed; see *Jones v. Gordon* (1877), 2 App. Cas. 616.

(*h*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 22 (1). *Ibid.*, s. 22, does not apply to Scotland (*ibid.*, s. 22 (3)). A title acquired in England or Ireland will, however, be recognised in Scotland (*Todd v. Armour* (1882), 9 R. (Ct. of Sess.) 901).

(*i*) 2 Co. Inst. 713.

(*k*) This expression "voidable title" has been defined as a title acquired under a *de facto* contract purporting to pass the property, but which is liable to be set aside, *e.g.*, on the ground of fraud (*Cundy v. Lindsay* (1878), 3 App. Cas. 459, *per* Lord CAIRNS, L.C., at p. 464; *Kingsford v. Merry* (1856), 11 Exch. 577, 579). A voidable title constitutes a real ownership, and not an apparent one within the order and disposition clause of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (*Load v. Green* (1846), 15 M. & W. 216 (decided under the Bankrupt Act, 1825 (6 Geo. 4, c. 16), s. 72)); as to reputed ownership, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 173 *et seq.* A voidable title is thus distinguished from a void title, *e.g.*, where fraud altogether nullifies consent to a contract, and so creates no title at all, as where there is mistake as to the identity of the person contracted with (*Cundy v. Lindsay, supra*), or where a person professing to be agent for a named person, with whom alone the owner professes to deal, obtains fraudulent possession of the goods (*Higgon v. Burton* (1857), 26 L. J. (EX.) 342; *Hardman v. Booth* (1863), 1 H. & C. 803; *Morrison v. Robertson*, [1908] S. C. 332). So also, in the absence of fraud, the owner of goods may intend to pass to another only the possession and not the property in the goods (*Boyson v. Coles* (1817), 6 M. & S. 14).

(*l*) A person may elect to avoid or affirm a contract at any time after he knows of the fraud, and until, either expressly or by implication, he affirms the contract. So long as he does not affirm it, he may keep the matter open, subject to any intervening rights of third persons (*Clough v. London and North Western Rail. Co.* (1871), L. R. 7 Exch. 26, Ex. Ch.). He may avoid the contract even after notice of an act of bankruptcy committed by the other parties, and whether before or after a receiving order, for the trustee takes only the voidable title (*Re Eastgate, Ex parte Ward*, [1905] 1 K. B. 465; *Tilley v. Bowman, Ltd.*, [1910] 1 K. B. 745). After avoidance the fraudulent buyer cannot bring detinue against the seller, but the seller must return the purchase-money paid, or set it off against the redemption moneys, where the goods have been pledged (*Tilley v. Bowman, Ltd., supra*). The seller may by his pleading elect to avoid the contract, and is not bound to do any act *in pais*. The avoidance takes place when the election is made and communicated to the other party (*Clough v. London and North Western Rail. Co., supra*; *Scarf v. Jardine* (1882), 7 App. Cas. 345, *per* Lord BLACKBURN, at p. 361).

(*m*) For definition of "in good faith," see p. 120, *ante*.

(*n*) *I.e.*, knowledge, or means of knowledge, wilfully disregarded (*Jones v. Gordon, supra*).

(*o*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 23. Accordingly, the

SECT. 2.
Transfer
of Title.

Similar principles apply to a pledgor, whose title is voidable by the person from whom he bought the goods. In such case the seller's right of avoiding the sale is subject to the rights of the buyer's pledgee in good faith and without notice (*p*).

A title may be voidable not only with respect to the whole right of property in the goods, but also with respect to a limited interest therein, as, for example, where the seller of goods has fraudulently obtained possession of them from a person having, as against him, a special property therein (*q*).

345. The owner of goods which, or the proceeds whereof, are subject to an equitable right of a third person may pass a good title thereto to a buyer in good faith and without notice of the equitable right (*r*). Disposition as affecting an equitable right.

seller with a voidable title may recover the price from the buyer (*Hooper v. Lane* (1857), 6 H. L. Cas. 443, *per* BRAMWELL, B., at p. 462); see on this provision, *Load v. Green* (1846), 15 M. & W. 216 (avoidance by seller before buyer's disposition); *White v. Garden* (1851), 10 C. B. 919 (bill on fictitious person given in payment: buyer's resale); *Stevenson v. Newnham* (1853), 13 C. B. 285, Ex. Ch. (fraudulent preference: resale before avoidance); *The Argentina* (1867), L. R. 1 A. & E. 370 (resale and transfer of bill of lading by fraudulent buyer); *Clough v. London and North Western Rail. Co.* (1871), L. R. 7 Exch. 26, Ex. Ch. (collusion by consignee with fraudulent buyer); *Attenborough v. St. Katharine's Dock Co.* (1878), 3 C. P. D. 450, C. A. (agreement by fraudulent buyer to pledge: equitable rights of third person); *Moyce v. Newington* (1878), 4 Q. B. D. 32 (buyer gives cheque on bank where no account); *Loughnan v. Barry and Byrne* (1872), 6 I. R. C. L. 457 (worthless cheque: trover by seller against buyer's agent); *Babcock v. Lawson* (1880), 5 Q. B. D. 284, C. A. (possession fraudulently obtained by pledgor who pledges to another); see also *Zwinger v. Samuda* (1817), 7 Taunt. 265; *Pease v. Gloahac, The "Marie Joseph"* (1866), L. R. 1 P. C. 219 (sale by pledgor in fraudulent possession); *King's Norton Metal Co. v. Edridge, Merrett & Co.* (1897), 14 T. L. R. 98, C. A. (purchase by buyer under an alias); *Tilley v. Bowman, Ltd.*, [1910] 1 K. B. 745 (representation that buyer had a customer). Notwithstanding the word "provided" in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 23, the burden is on the person seeking to avoid the contract to show that the sub-buyer or pledgee did not take in good faith (*Whitehorn Brothers v. Davison*, [1911] 1 K. B. 463, C. A., *per* BUCKLEY, L.J.). The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 23, covers part of the ground covered by *ibid.*, s. 25 (2); see p. 201, *post*. Under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 25 (2), however, the buyer must be in possession of the goods or documents of title, and must deliver or transfer them to the third person. There is no such provision in *ibid.*, s. 23: and see *White v. Garden*, *supra*, where the seller was in possession.

(*p*) *Attenborough v. St. Katharine's Dock Co.*, *supra*; *Tilley v. Bowman, Ltd.*, *supra*; *Truman (W.), Ltd. v. Attenborough* (1910), 26 T. L. R. 601; *Whitehorn Brothers v. Davison*, *supra*; and see the other cases cited in note (*o*), p. 196, *ante*. The same principle would apply to other dispositions by a buyer with a voidable title.

(*q*) *Pease v. Gloahac, The "Marie Joseph"*, *supra*; *Babcock v. Lawson* (1880), 5 Q. B. D. 284, C. A. An ownership voidable in part cannot be treated differently from an ownership voidable as to the whole (*Pease v. Gloahac, The "Marie Joseph"*, *supra*, at p. 230).

(*r*) *Lempriere v. Pasley* (1788), 2 Term Rep. 485, 490; *Joseph v. Lyons* (1884), 15 Q. B. D. 280, C. A.; *Hallas v. Robinson* (1885), 15 Q. B. D. 288, C. A. (equitable mortgage of chattels and subsequent legal mortgage to another); *Chartered Bank of India, Australia and China v. Henderson* (1874), L. R. 5 P. C. 501; *Henderson & Co. v. Comptoir d'Escompte de Paris* (1873), L. R. 5 P. C. 253 (pledge of bill of lading by buyer displacing

SECT. 2.

Transfer
of Title.

On offender's
conviction
for larceny.

SUB-SECT. 5.—Revesting of Property in Stolen Goods.

346. Where goods (s) have been stolen (t) and the offender is prosecuted to conviction, the property in the goods subject to the provisions of the Criminal Appeal Act, 1907 (u), reverts (v) in the person who was the owner of the goods or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or (c) otherwise (d).

Where goods
obtained by
fraud.

347. Notwithstanding any enactment to the contrary (e), where goods have been obtained by fraud, or other wrongful means not amounting to larceny (f), the property in such goods does not

equitable right of seller in respect of proceeds of resale); *Hathesing v. Laing, Laing v. Zeden* (1873), L. R. 17 Eq. 92 (transfer of bill of lading as against holder of mate's receipt); compare *Lutscher v. Comptoir d'Escompte de Paris* (1876), 1 Q. B. D. 709 (no subsequent legal title).

(s) For definition of "goods," see p. 112, *ante*; and see *Moss v. Hancock*, [1899] 2 Q. B. 111 (coin sold as a curiosity).

(t) The expression "stolen" includes common law larceny, larceny by a trick, and larceny by a bailee under the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 3; see the definition of larceny in title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 627; of larceny by a trick, *ibid.*, p. 633; of larceny by a bailee, *ibid.*, p. 631.

(a) 7 Edw. 7, c. 23, s. 6; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 437; see also *R. v. Elliott*, [1908] 2 K. B. 452.

(b) As from the time of the conviction; see title MARKETS AND FAIRS, Vol. XX., p. 55.

(c) As, e.g., by a purchase abroad which is valid by the *lex loci*; see p. 111, *ante*.

(d) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 24 (1); *Scattergood v. Sylvester* (1850), 15 Q. B. 506 (trover against buyer in market overt); and see, further, title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 686 *et seq.* The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 24 (1), is by *ibid.*, s. 21 (2) (a), subject to the provisions of the Factors Act, 1889 (52 & 53 Vict. c. 45); see p. 192, *ante*. Consequently a disposition by a buyer who has "agreed to buy" under the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 9 (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 25 (2)), prevails against the owner's title on the conviction of the buyer for larceny as a bailee (*Payne v. Wilson*, [1895] 1 Q. B. 653; reversed on another point [1895] 2 Q. B. 537, C. A.). Where the property has not passed to the person in possession of the goods, as where he bought them out of market overt, the enactment in the text is not required (*Vilmont v. Bentley* (1887), 18 Q. B. D. 322, C. A., *per* Lord ESHER, M.R.; affirmed *sub nom. Bentley v. Vilmont* (1887), 12 App. Cas. 471 (decided on the Larceny Act, 1861 (24 & 25 Vict. c. 96))). Thus a *bonâ fide* buyer out of market overt of stolen goods is liable to the original owner in trover if he resell them, even before the conviction of the thief (*Peer v. Humphrey* (1835), 2 Ad. & El. 495; *White v. Spettigue* (1845), 13 M. & W. 603; *Cundy v. Lindsay* (1878), 3 App. Cas. 459; compare *Horwood v. Smith* (1788), 2 Term Rep. 750); see, generally, title TROVER AND DETINUE.

(e) These words repeal the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 100, and the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 27 (3), so far as they apply to the revesting of the property in goods obtained by means other than larcenous.

(f) The context shows that "fraud" is governed by the following words, and is confined in meaning to false pretences, the property being intended to pass to the offender. See the definition of larceny by a trick in title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 633, and of false pretences, *ibid.*, pp. 634, 690. Where, therefore, the property does not pass to the offender the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 24 (2), does not apply.

revest in the person who was the owner of the goods, or his personal representative, by reason only (g) of the conviction of the offender (h).

SECT. 2.
Transfer
of Title.

SUB-SECT. 6.—Disposition by Seller in Possession.

348. Where a person (i), having sold goods, continues, or is (k), in possession (i) of the goods, or of the documents of title (i) to the goods, the delivery or transfer (l) by that person, or by a mercantile agent (i) acting for him, of the goods or documents of title under any sale, pledge, or other disposition (i) thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith (i) and without notice (i) of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner (m) of the goods to make the same (n).

Disposition
by seller in
possession.

(g) But it may on other grounds, as, *e.g.*, where the owner has disaffirmed the offender's voidable title under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 23 (see p. 196, *ante*), before any innocent person has acquired a title to the goods (*R. v. George* (1901), 65 J. P. 729). The avoidance of the transaction may be by an application for restitution to the court which tries the offender (*ibid.*). If a third person has *bonâ fide* acquired a good title, as the property does not revest, so there can be no restitution order (*R. v. Walker* (1901), 65 J. P. 729). As to restitution orders, see, generally, title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 684 *et seq.*, 702; and, as to the effect of appeals, see *ibid.*, p. 437.

(h) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 24 (2); see *Parker v. Patrick* (1793), 5 Term Rep. 175 (goods obtained by fraud and pledged: trover by pledgee against owner lies), as explained in *Load v. Green* (1846), 15 M. & W. 216, by PARKE, B., and approved in *White v. Garden* (1851), 10 C. B. 919; *Moyce v. Newington* (1878), 4 Q. B. D. 32 (passing of property: *bonâ fide* buyer before conviction has good title), a case which the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 24 (2), has re-established (*R. v. Walker, supra*); see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 685, 702.

(i) See the notes to the corresponding words in Factors Act, 1889 (52 & 53 Vict. c. 45), s. 9; and see p. 200, *post*.

(k) This word shows that the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 8, applies, not only to the case where the seller remains in possession of the goods or documents, but where he obtains them, *semble*, even tortiously, after the sale.

(l) What would seem to be contemplated is a physical delivery or transfer to the second donee after the sale to the buyer. It is not sufficient to change the character in which the second buyer or other donee already holds the goods, as, *e.g.*, where the seller, after a sale to a third person, pledges the goods, which were before the sale in the possession of the pledgee (*Nicholson v. Harper*, [1895] 2 Ch. 415). Apparently, "delivery" applies to "goods," and "transfer" to documents of title (*ibid.*, *per* NORTH, J., as reported in 73 L. T. 19); "transfer" may, however, apply to goods when conveyed by deed (*Kitto v. Bilbie, Hobson & Co.* (1895), 72 L. T. 266, *per* VAUGHAN WILLIAMS, J.). It should also be noticed that it is not the contract that is made valid under this section, but the delivery or transfer under the contract. Accordingly it is not necessary that the donee should enter into the contract on the faith of the documents of title (*Cahn v. Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q. B. 643, C. A.).

(m) *I.e.*, the buyer, the seller *ex hypothesi* "having sold."

(n) Factors Act, 1889 (52 & 53 Vict. c. 45), s. 8; *Nicholson v. Harper, supra*. The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 25 (1), is identical, with the omission of the words "or under any agreement for sale, pledge, or other disposition thereof" after "or other disposition

SECT. 2.

Transfer
of Title.Disposition
by buyer in
possession.

SUB-SECT. 7.—Disposition by Buyer in Possession.

349. Where a person (*o*), having bought or agreed to buy (*p*) goods, obtains, with the consent (*q*) of the seller, possession (*r*) of the goods or the documents of title (*s*) to the goods, the delivery or transfer (*t*) by that person, or by a mercantile agent (*a*) acting for him, or of the goods or documents of title under any sale, pledge,

thereof." The Factors Act, 1889 (52 & 53 Vict. c. 45), s. 8, extends the Factors Act, 1877 (40 & 41 Vict. c. 39), s. 3 (now repealed), which applied only to sellers in possession of documents of title, and was enacted to do away with the decision in *Johnson v. Credit Lyonnais Co.* (1877), 3 C. P. D. 32, C. A., that a seller was not "an agent entrusted." The Factors Act, 1889 (52 & 53 Vict. c. 45), s. 8, should be compared with the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 48 (2); see p. 263, *post*. Under the latter clause the seller can pass a good title only if the original buyer be in default. Moreover, he is, it is conceived, under no liability to the original buyer for breach of contract, whereas, under the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 8, he is.

(*o*) The term "person" includes any body of persons, corporate or unincorporate (Factors Act, 1889 (52 & 53 Vict. c. 45), s. 1 (6)).

(*p*) Where the buyer has bought, no question of title can be involved, except that special rights may by agreement be reserved to the seller, consistent with the property and possession being in the buyer (*Dodsley v. Varley* (1840), 12 Ad. & El. 632). But where the buyer has only agreed to buy, the question of property is involved. The words "agreed to buy" do not include the delivery of goods on approval etc. under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 4 (see p. 178, *ante*), as *ex hypothesi* such a person has only an option to buy (*Helby v. Matthews*, [1895] A. C. 471; *Edwards (Percy), Ltd. v. Vaughan* (1910), 26 T. L. R. 545, C. A.). The buyer must bind himself to pay the price (*Lee v. Butler*, [1893] 2 Q. B. 318, C. A.), even although it may be called hire or rent (*McEntire v. Crossley Brothers*, [1895] A. C. 457). But it is sufficient if he has bound himself in fact, although the contract may be unenforceable by action under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4 (*Hugill v. Masker* (1889), 22 Q. B. D. 364, C. A.); see pp. 142, 143, *ante*.

(*q*) See p. 202, *post*.

(*r*) For the meaning of "possession" under the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 1 (2), see title AGENCY, Vol. I., p. 205, note (t). As to whether a buyer obtains possession of goods, within the meaning of the Factors Act, 1889 (52 & 53 Vict. c. 45), where the contract is for a machine which is to be affixed to his land, so as to be a fixture, before the property passes, see *Clark v. Bulmer* (1843), 11 M. & W. 243.

(*s*) These words have the same meaning as in the Factors Acts (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1)); see p. 119, *ante*. The important words are the concluding ones. The document of title must represent the goods. As to documents "used as proof of the possession or control of goods" under the definition, see *Re Hamilton Young & Co., Ex parte Carter*, [1905] 2 K. B. 772, C. A.

(*t*) See the corresponding words in the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 8; and see p. 199, *ante*. "The transfer of a document may be by indorsement, or where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to bearer, then by delivery" (Factors Act, 1889 (52 & 53 Vict. c. 45), s. 11).

(*a*) The term "mercantile agent" has the same meaning as in the Factors Acts (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 25 (3); see title AGENCY, Vol. I., p. 152). The word "his" in the definition (for which see *ibid.*) should be noted. It would seem that, where a disposition is made through a mercantile agent, the agent must be one whose ordinary business is to sell, consign, buy or pledge the particular class of goods. Had the words been "business of a mercantile agent" (as in the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 2 (1)), the agent's authority would be wider; see *Oppenheimer v. Attenborough & Son*, [1908] 1 K. B. 221, C. A., *per* BUCKLEY, L.J., at p. 230.

or other disposition (b) thereof (c), or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith (d), and without notice (e) of any lien or other right (f) of the original seller in respect of the goods, has the same effect as if (g) the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner (h).

(b) The consideration for a sale, pledge, or other disposition "in pursuance of the Act" may be "either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration" (Factors Act, 1889 (52 & 53 Vict. c. 45), s. 5). For the definition of "pledge," see titles AGENCY, Vol. I., p. 205; PAWNS AND PLEDGES, Vol. XXII., p. 241. As the transaction under the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 9, must be by way of a delivery or transfer, an hypothecation is excluded. As to pledges for antecedent debts, or in exchange, see p. 202, *post*. An advance of the sale moneys by an auctioneer on a deposit of goods with him for sale is not a pledge (*Waddington & Sons v. Neale & Sons* (1907), 96 L. T. 786). By the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 3, "a pledge of the documents of title to goods shall be deemed to be a pledge of the goods." This provision primarily applies to pledges by mercantile agents, but it is conceived that it governs the case of a pledge by a buyer who has satisfied the conditions of the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 9 (*Inglis v. Robertson*, [1898] A. C. 616); see also title PAWNS AND PLEDGES, Vol. XXII., p. 240.

(c) The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 25 (2), omits here "or under any agreement for sale, pledge, or other disposition thereof." *BRUCE, J.*, decided in *Shenstone & Co. v. Hilton*, [1894] 2 Q. B. 452, that the words "agreement for sale" are not confined to agreements for sale by the person delivering the goods to the person receiving them, but include a delivery to an auctioneer for sale; but compare *Waddington & Sons v. Neale & Sons*, *supra*.

(d) For the definition, see p. 120, *ante*. In the case of joint disponees the bad faith of one of them is deemed to affect the title of all (*Oppenheimer v. Frazer and Wyatt*, [1907] 2 K. B. 50, C. A.).

(e) *I.e.*, knowledge, actual, or imputed by reason of the means of knowledge being wilfully disregarded; see *May v. Chapman* (1847), 16 M. & W. 355, *per* PARKE, B., at p. 361; *Jones v. Gordon* (1877), 2 App. Cas. 616.

(f) Including a right of property (*Cahn v. Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q. B. 643, C. A.), or a right to avoid the buyer's title under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 23; see p. 196, *ante*; see also *Barrow v. Coles* (1811), 3 Camp. 92, where the transferee of a bill of lading had notice of an indorsed condition suspending the passing of the property to the transferor.

(g) *I.e.*, is "as valid as if he were expressly authorised by the owner of the goods to make the same" (Factors Act, 1889 (52 & 53 Vict. c. 45), s. 2 (1)). Where the buyer has only "agreed to buy," the owner is of course the seller.

(h) Factors Act, 1889 (52 & 53 Vict. c. 45), s. 9, identical with the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 25 (2), with the addition of the words quoted in note (c), *supra*. The Factors Act, 1889 (52 & 53 Vict. c. 45), s. 9, extends the Factors Act, 1877 (40 & 41 Vict. c. 39), s. 4 (now repealed), which applied only to a buyer in possession of a document of title, and did not require a delivery or transfer by him, and was enacted to do away with the effect of the decision in *Jenkyns v. Ushorne* (1844), 7 Man. & G. 678, that a buyer was not an "agent entrusted" with goods or a document of title; see *Lee v. Butler*, [1893] 2 Q. B. 318, C. A. (hire-purchase and conditional sale); followed in *Thompson and Shackell, Ltd. v. Veale* (1896), 74 L. T. 130, C. A.; *Wylde v. Legge* (1901), 84 L. T. 121; compare *Helby v. Matthews*, [1895] A. C. 471; *Payne v. Wilson*, [1895] 2 Q. B. 537, C. A. (hire with option to buy); *Hull Rope Works Co. v. Adams* (1895), 73 L. T. 446 (disposition; attachment of purchased rope to buyer's

SECT. 2.

Transfer
of Title.Meaning of
"consent."Pledge by
buyer for
antecedent
debt, or in
exchange.

350. Consent by the seller to the possession by the buyer of the goods or documents of title means a consent in fact (i). Accordingly such a consent is valid, notwithstanding that it is induced by fraud (k), provided the fraud be not such as to nullify the consent (l), or is given subject to the fulfilment by the buyer of some condition subsequent, and such condition is not fulfilled (m).

351. Where a person who has agreed to buy goods pledges them (n) for an antecedent debt or liability (o), the pledgee acquires no further right to the goods than could have been enforced by the pledgor at the time of the pledge (p).

ship); *Shenstone & Co. v. Hilton*, [1894] 2 Q. B. 452 (sending goods to auctioneer for sale an agreement for sale or disposition); but compare *Waddington & Sons v. Neale & Sons* (1907), 96 L. T. 786; *Strohmenger v. Attenborough* (1894), 11 T. L. R. 7 (pledge by woman living with buyer, and having actual authority); *Kitto v. Bilbie, Hobson & Co.* (1895), 72 L. T. 266 (no delivery, and no intention to dispose); *Capital and Counties Bank, Ltd. v. Warriner* (1896), 12 T. L. R. 216 (pledge by buyer of warehouseman's warrant for unsevered bulk); *Robinson v. Restell* (1896), 12 T. L. R. 174 (possession not with seller's consent); *Inglis v. Robertson*, [1898] A. C. 616 (document of title obtained without privity of seller). It seems that an assignment for the benefit of creditors is not a "disposition" (*Kitto v. Bilbie, Hobson & Co.*, *supra*); see also title AGENCY, Vol. I., p. 225.

(i) *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q. B. 643, C. A. But, as the buyer has only to "obtain" possession of the goods or the documents of title to the goods with the seller's consent (Factors Act, 1889 (52 & 53 Vict. c. 45), s. 9), any subsequent revocation of the consent is immaterial (*Cahn v. Pockett's Bristol Channel Steam Packet Co.*, *supra*, per COLLINS, L.J., at p. 658), unless, of course, the buyer's donee is aware of this, as such knowledge would negative his good faith; and see title AGENCY, Vol. I., pp. 205, 206. With regard to the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 2 (4), the elaborate discussion which the question of consent underwent in *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, *supra*, seems to show that the fact of the seller's consent must be proved affirmatively by the buyer's donee. *Quære*, also, whether the reference in the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 2 (4), to "the owner" does not show that that clause refers to dispositions by mercantile agents under *ibid.*, s. 2 (1), only.

(k) *Pease v. Gloaghe, The "Marie Joseph"* (1866), L. R. 1 P. C. 219; *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, *supra*, per COLLINS, L.J., at p. 659.

(l) As, e.g., amounting to larceny by a trick (*Cahn v. Pockett's Bristol Channel Steam Packet Co.*, *supra*, per COLLINS, L.J., at p. 659; *Oppenheimer v. Frazer and Wyatt*, [1907] 2 K. B. 50, C. A.).

(m) *Gurney v. Behrend* (1854), 3 E. & B. 622; *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, *supra* (acceptance of bill of exchange).

(n) I.e., under the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 9, the buyer being in the position of a mercantile agent, the pledge of the documents of title is deemed to be a pledge of the goods (Factors Act, 1889 (52 & 53 Vict. c. 45), s. 3; *Inglis v. Robertson*, [1898] A. C. 616). As to pledges by mercantile agents or factors, see title PAWNS AND PLEDGES, Vol. XXII., pp. 239, 240.

(o) The definitions of "pledge" (see note (b), p. 201, *ante*) and of "consideration" (see note (b), p. 201, *ante*) authorise the pledge for an antecedent debt, or in exchange.

(p) This proposition is based upon the assumption that the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 4, is incorporated with *ibid.*, s. 9, that is to say, that the buyer under *ibid.*, s. 9, is a "mercantile agent" under *ibid.*, s. 4. For the provisions of *ibid.*, s. 4, see title AGENCY, Vol. I., p. 206. There is no judicial decision on the point, but the whole tendency of the cases is to treat a buyer, who has satisfied the requirements of the

Where such a person pledges the goods in consideration of the delivery or transfer of other goods, or of a document of title (*q*), or of a negotiable security, the pledgee acquires no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange (*r*).

SECT. 2.
Transfer
of Title.

SUB-SECT. 8.—*Effect on Title of Writs of Execution.*

352. A writ of *fiery facias* or other writ of execution against goods binds the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff (*s*) to be executed; and, for the better manifestation of such time, it is the duty of the sheriff, without fee, upon the receipt of any such writ, to indorse upon the back thereof the hour, day, month, and year when he received the same (*t*).

Execution
debtor's
goods, when
bound by
writ.

No such writ prejudices the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had, at the time when he acquired his title, notice that such writ, or any other writ by virtue of which the goods of the execution debtor might be seized or attached, had been delivered to, and remained unexecuted in the hands of, the sheriff (*t*).

Part IV.—Performance of the Contract.

SECT. 1.—*General Duties of Seller and Buyer.*

353. It is the duty (*u*) of the seller to deliver (*a*) the goods (*b*)

General rule.

Factors Act, 1889 (52 & 53 Vict. c. 55), s. 9, as a mercantile agent within the other provisions of the Factors Act, 1889 (52 & 53 Vict. c. 45); for the effect of *ibid.*, ss. 4, 9, and the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 47, see note (*o*), p. 260, *post*.

(*g*) See note (*n*), p. 202, *ante*.

(*r*) Factors Act, 1889 (52 & 53 Vict. c. 45), s. 5, relating to exchanges by "mercantile agents" by way of pledge. This proposition is based upon the assumption that *ibid.*, s. 5 and s. 9, are to be read together.

(*s*) "Sheriff" includes, for this purpose, any officer charged with the enforcement of a writ of execution (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 26 (2)). It therefore includes bailiffs of county courts, sequestrators under a *sequestrari facias*, and the bishop under a *fiery facias*, or *sequestrari facias de bonis ecclesiasticis*. As to the various forms of execution generally, see title EXECUTION, Vol. XIV., pp. 37 *et seq.*; and as to sheriffs and bailiffs generally, see title SHERIFFS AND BAILIFFS, pp. 791 *et seq.*, *post*.

(*t*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 26 (1); see title EXECUTION, Vol. XIV., pp. 42, 81. For the meaning of "hour," "day," "month," and "year," see title TIME.

(*u*) The duty is enforceable by action, like all duties declared by the Act (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 57); p. 280, *post*; see also Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 50 (1) (action for non-acceptance), s. 51 (1) (action for non-delivery); pp. 267, 269, *post*. The duty will not, of course, arise unless the contract is enforceable under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4; see p. 127, *ante*.

(*a*) Delivery is voluntary transfer of possession (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1)); see p. 119, *ante*.

(*b*) I.e., the goods contracted for. Thus, if they are existing goods, similar goods afterwards acquired cannot be delivered (*Thomson Brothers v. Thomson* (1885), 13 R. (Ct. of Sess.) 88), and the goods must conform to

SECT. 1.
General
Duties of
Seller and
Buyer.

Delivery and
 payment
 concurrent
 conditions.

and of the buyer to accept(c) and pay(d) for them in accordance with the terms of the contract of sale(e).

354. Unless otherwise agreed(f), delivery of the goods and payment of the price are concurrent conditions(g), that is to say, the

the contract in description (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 13; see p. 154, *ante*), and quality or fitness (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 14, 15; see pp. 157 *et seq.*, *ante*); they must be in a deliverable state (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 5(1); see p. 168, *ante*), and be of the proper quantity and not mixed with other goods (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 30; see p. 212, *post*); and the seller must have the right to sell them (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 12(1), 21(1); see pp. 153, 192, *ante*). As to when the seller is by law excused from delivering specific goods, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 7; p. 146, *ante*. For the specific performance of a contract to deliver ascertained goods, see p. 272, *post*.

(c) Under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 35 (see p. 230, *post*); not under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4 (see p. 127, *ante*). Acceptance under the latter provision goes to the formation of the contract only, and not to its performance.

(d) As to the fixing of the price, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 8, 9; pp. 147, 148, *ante*. The liability to pay *prima facie* arises only when the property has passed (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 1, 49; *Laird v. Pim* (1841), 7 M. & W. 474, *per* PARKER, B., at p. 478); but by agreement it may be payable independently of that fact or of delivery (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 49(2)); see p. 267, *post*. The price is payable, even after the destruction of the goods, the property in which has not passed, if the buyer took the risk (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 20; see p. 188, *ante*, p. 235, *post*). An agreed price includes materials incorporated, but not contracted for (*Wilmot v. Smith* (1828), 3 C. & P. 455). As to the buyer's liability to pay the price to a third person by agreement, see *Kleinwort, Sons & Co. v. Reddaway & Co.* (1904), 9 Com. Cas. 292, C. A.; and, as to payment by the proceeds of a resale to be made by the seller's agent, see *Hoffman v. Heyman* (1822), 2 Dow. & Ry. (K. B.) 74.

(e) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 27. For specific rules as to delivery and acceptance, see pp. 206 *et seq.*; 228 *et seq.*, *post*. The parties may make what bargain they please. Thus, they may agree that delivery shall be made to a carrier (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 32; see pp. 222 *et seq.*, *post*), or at the destination of the goods (*Calcutta and Burmah Steam Navigation Co. v. De Mattos* (1862), 32 L. J. (Q. B.) 322, *per* BLACKBURN, J., at p. 328), or they may agree that delivery to a carrier shall be sufficient, yet that the price, in whole or in part, shall not be payable unless the goods arrive at their destination (*ibid.*). Again, the contract may be conditional (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 1(2); see p. 113, *ante*); thus, *e.g.*, delivery may be made conditional on the buyer's request (*Bowdell v. Parsons* (1808), 10 East, 359). Where the mode of delivery is not stated in the contract, it may be shown by trade usage (*Robinson v. United States* (1871), 13 Wallace, 363). As to trade usage generally, see title CUSTOM AND USAGES, Vol. X., pp. 549 *et seq.*

(f) Thus, the buyer may agree to pay the price at a date fixed, which will or may arrive before the time for delivery, in which case Rule 1 in *Portage v. Cole* (1669), 1 Wms. Saund., ed. 1871, p. 551, applies, and delivery will not be a condition precedent to payment (*Smith v. Woodhouse* (1806), 2 Bos. & P. (N. R.) 233, Ex. Ch.; *Dicker v. Jackson* (1848), 6 C. B. 103); or the seller may agree to deliver similarly irrespectively of payment, *i.e.*, to sell on credit, in which case, under the same rule, payment is not a condition precedent to delivery (*Staunton v. Wood* (1851), 16 Q. B. 638). Usage may, however, make a future payment contemporaneous with delivery (*Field v. Lelean* (1861), 6 H. & N. 617, Ex. Ch.); but compare *Spartali v. Benecke* (1850), 10 C. B. 212). An agreement to sell on credit may be inferred from the very circumstances of the case, *as, e.g.*, where a man dines at a restaurant (*R. v. Jones*, [1898] 1 Q. B. 119, C. C. R.).

(g) Because delivery and payment are to be made at the same time, and

seller must be ready and willing to give possession of the goods to the buyer in exchange (*h*) for the price, and the buyer must be ready and willing to pay the price in exchange for the possession of the goods (*i*). Similarly delivery of the goods and acceptance thereof are concurrent conditions (*k*).

SECT. 1.
General
Duties of
Seller and
Buyer.

Where the goods are deliverable by instalments the same concurrent conditions *prima facie* exist with regard to each instalment (*l*).

The readiness and willingness of one party to deliver or accept the goods may itself be dependent on a condition precedent to be performed by the other party (*m*).

Notwithstanding that, by the terms of the contract, there is a provision for credit, that provision is excluded if subsequently the buyer becomes insolvent (*n*). Insolvency of buyer.

so neither is a condition precedent to the other. All that is necessary is that the parties concur in the joint act (Rule 5 in *Pordage v. Cole* (1669), 1 Wms. Saund., ed. 1871, p. 551; *Rawson v. Johnson* (1801), 1 East, 203, *per* LE BLANC, J., at p. 212); whereas, in the case of a condition precedent, performance or tender, as equivalent to performance, must be proved (*Pickford v. Grand Junction Rail. Co.* (1841), 8 M. & W. 372, *per* PARKE, B.). The words "ready and willing" imply not only the disposition, but the capacity to do the act (*De Medina v. Norman* (1842), 9 M. & W. 820, *per* Lord ABINGER, C.B., at p. 827; *Lawrence v. Knowles* (1839), 5 Bing. (N. C.) 399; *Measures Brothers, Ltd. v. Measures*, [1910] 2 Ch. 248, C. A.).

(*h*) Not necessarily exchange then and there, but exchange in a business sense (*Ryan v. Ridley & Co.* (1902), 8 Com. Cas. 195). Where the price is payable in exchange for shipping documents, either expressly, or by the effect of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 28, the seller performs his contract by tendering the documents, although the goods may be then incapable of inspection and acceptance (*Polenghi Brothers v. Dried Milk Co., Ltd.* (1904), 92 L. T. 64; *E. Clemens Horst Co. v. Biddell Brothers*, [1912] A. C. 18).

(*i*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 28; *Rawson v. Johnson*, *supra* (no tender by buyer necessary); followed in *Waterhouse v. Skinner* (1801), 2 Bos. & P. 447; *Wilks v. Atkinson* (1815), 1 Marsh. 412 (request to deliver); *Lawrence v. Knowles*, *supra* (buyer's insolvency); *Hannuio v. Goldner* (1843), 11 M. & W. 849 (no time specified for delivery or payment); *Startup v. Macdonald* (1843), 6 Man. & G. 593, Ex. Ch.; *Staunton v. Wood* (1851), 16 Q. B. 638 (delivery a condition precedent); *Parker v. Rawlings* (1827), 4 Bing. 280 (payment at fixed date: no time for delivery); *Dunlop v. Grote* (1845), 2 Car. & Kir. 153 (same: no tender of goods necessary); *Boyd v. Lett* (1845), 1 C. B. 222; *Jackson v. Allaway* (1844), 6 Man. & G. 942 (seller need not aver tender); *Nelson v. Patrick* (1847), 3 C. B. 772; *Meniaeff v. Reade* (1849), 7 C. B. 139 (divisible performance of concurrent condition); *Baker v. Firminger* (1859), 28 L. J. (ex.) 130 (resale by seller not inconsistent with readiness and willingness where goods unascertained); *Forrest & Son, Ltd. v. Aramayo* (1900), 83 L. T. 335, C. A. (buyer does not name ship); *Mess v. Duffus & Co.* (1901), 6 Com. Cas. 165 (effect of buyer's insolvency); *King v. Reedman* (1883), 49 L. T. 473 (course of dealing as showing time of payment). The fraudulent taking by the buyer from the seller's premises of other goods in lieu of the goods contracted for does not amount to a rescission of the contract or prevent the buyer from showing he is ready and willing to accept and pay for the goods contracted for (*Lewis v. Clifton* (1854), 14 C. B. 245). See also on this subject, *Greaves v. Ashlin* (1813), 3 Camp. 426, and *Ford v. Yates* (1841), 2 Man. & G. 549, explained in *Lockett v. Nicklin* (1848), 2 Exch. 93.

(*k*) See the cases cited in note (*i*), *supra*.

(*l*) *Brandt v. Lawrence* (1876), 1 Q. B. D. 344, C. A.

(*m*) *Great Northern Rail. Co. v. Harrison* (1852), 12 C. B. 576, Ex. Ch. (goods "as required" by buyer).

(*n*) *Re Edwards. Ex parte Chalmers* (1873), 8 Ch. App. 289; *Re Phoenix*

SECT. 2.
Delivery.

What
operates as
delivery.

SECT. 2.—*Delivery.*SUB-SECT. 1.—*In General.*

355. Delivery (*o*) of the goods may be made by the seller doing any act or thing whereby the goods are put into the custody or under the control of the buyer or his agent in that behalf (*p*), or whereby the buyer or his agent is enabled to obtain such custody or control (*q*).

Delivery may also be made by means of any act or thing which the parties agree shall be treated as a delivery (*r*).

Where the goods are at the time of the contract of sale in the possession of the buyer or his agent, the completion of the sale operates *prima facie* as a delivery of the goods (*s*).

SUB-SECT. 2.—*Place of Delivery.*

In general.

356. Whether it is for the buyer to take possession of the goods, or for the seller to send them to the buyer, is a question depending

Bessemer Steel Co., Ex parte Carnforth Hæmatite Iron Co. (1876), 4 Ch. D. 108, C. A.

(*o*) See p. 119, *ante*.

(*p*) *Atkinson v. Maling* (1788), 2 Term Rep. 462 (delivery of ship at sea by bill of sale); *Goodall v. Skelton* (1794), 2 Hy. Bl. 316 (goods packed in buyer's cloths, but left with seller); *Proctor v. Jones* (1826), 2 C. & P. 532 (goods marked with buyer's name, but left with seller); *Simmons v. Swift* (1826), 5 B. & C. 857 (weighing to precede delivery: no weighing); *Holderness v. Shackels* (1828), 8 B. & C. 612 (marking goods with buyer's name, and setting them aside, subject to charges); *Boulter v. Arnott* (1833), 1 Cr. & M. 333 (goods packed in buyer's boxes, but left with seller); *Dixon v. Yates* (1833), 5 B. & Ad. 313 (marking with buyer's name, but no delivery order); *Townley v. Crump* (1835), 4 Ad. & El. 58 (issue by seller of warrant for goods in his possession).

(*q*) *Smith v. Chance* (1819), 2 B. & Ald. 753 (consent of tenant to removal of hay withheld); *Salter v. Woollams* (1841), 2 Man. & G. 650 (tenant's licence for removal of hay read at sale); *Wood v. Tassell* (1844), 6 Q. B. 234 (attornment to buyer by seller's agent); *Thöl v. Hinton* (1855), 4 W. R. 26 (warehouseman's wrongful refusal to attorn to warrant); *Buddle v. Green* (1857), 27 L. J. (EX.) 33 (wharfinger's refusal to attorn to delivery order); *Wood v. Baxter* (1883), 49 L. T. 45 (authority to take crop, and possession taken); see also *Re Magnus, Ex parte Salaman*, [1910] 2 K. B. 1049, C. A. (possession by trustee of settlor's after-acquired goods). As to delivery by means of a key, see *Ellis v. Hunt* (1789), 3 Term Rep. 464, *per* Lord KENYON, C.J., at p. 468; *Chaplin v. Rogers* (1800), 1 East, 192, *per* Lord KENYON, C.J., at p. 195; *Gough v. Everard* (1863), 2 H. & C. 1 (key of wharf); *Ancona v. Rogers* (1876), 1 Ex. D. 285, C. A. (key of room); *Hilton v. Tucker* (1888), 39 Ch. D. 669 (key of room: non-exclusive use of key); compare *Milgate v. Kebble* (1841), 3 Man. & G. 100 (seller retains outer key, gives inner); and see *Lloyds Bank, Ltd. v. Swiss Bankverein, Union of London and Smiths Bank, Ltd. v. Swiss Bankverein* (1913), 108 L. T. 143, C. A., *per* FARWELL, L.J., at p. 146; and see, generally, Pollock and Wright on Possession in the Common Law, pp. 60 *et seq.* As to delivery where the goods are held by a third person, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 29 (3); p. 210, *post*; and, as to delivery to a carrier, Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 32; pp. 222 *et seq.*, *post*.

(*r*) *Castle v. Swarder* (1860), 5 H. & N. 281, *per* BRAMWELL, B., at p. 288 (delivery in field); reversed on the facts (1861), 6 H. & N. 828, Ex. Ch.; *Bull v. Sibbs* (1799), 8 Term Rep. 327 (delivery to sub-buyer); *Bartlett v. Holmes* (1853), 13 C. B. 630; *Salter v. Woollams, supra* (delivery by mere transfer of warrant). See, further, note (*e*), p. 204, *ante*.

(*s*) *Manton v. Moore* (1796), 7 Term Rep. 67; *Oain v. Moon*, [1896] 2 Q. B. 283; *Kilpin v. Bailey*, [1892] 1 Q. B. 582 (gifts); see also the French Civil Code, art. 1606.

SECT. 2.
Delivery.

in each case on the contract, express or implied, between the parties (a). Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence (b). If, however, the contract is for specific goods, which, to the knowledge of the parties when the contract is made, are in some other place, then that place is the place of delivery (c).

357. Where by the terms of the contract the goods are to be taken by the buyer from the seller's land or premises, the contract of sale (d) by implication confers on the buyer a licence by the seller to the buyer to enter upon the land or premises to remove the goods (e). Such licence is irrevocable, at any rate as regards any part of the goods, the property in which has passed to the buyer (f).

Delivery on
seller's land
or premises.

(a) The rule assumed and stated by text-writers previously to the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), was that *prima facie* it is the duty of the buyer to take the goods, and that the seller's duty is fulfilled by his putting the goods at the disposal of the buyer at the place of delivery; see *Wood v. Tassell* (1844), 6 Q. B. 234; *Smith v. Chance* (1819), 2 B. & Ald. 753, *per* HOLROYD, J., at p. 755; *Wilkinson v. Lloyd* (1845), 7 Q. B. 27, 44. There seems to be nothing in the wording of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), to displace this rule.

(b) This provision adopts a rule previously assumed as being the common law (Benjamin, *Contract of Sale*, 2nd ed., p. 684; 5th ed., p. 682). By the French Civil Code, art. 1609, the place of delivery, in the absence of intention, is the place where the goods are at the time of sale; see also Pothier, *Contrat de Vente*, 52. So also by the Indian Contract Act, 1872 (No. IX. of 1872), s. 94 (which was intended to embody English law), the place of delivery is, in the case of a sale or agreement to sell, the place of the situation of the goods at the time of such sale or agreement, or, if the goods are not then in existence, at the place of their production; see also on this subject, *Hatch v. Oil Co.* (1879), 100 United States Reports [10 Otto], 124.

(c) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 29 (1).

(d) Even where *ibid.*, s. 4, is not satisfied, the licence to enter is valid until revoked (*Carrington v. Roots* (1837), 2 M. & W. 248, *per curiam* (decided under the Statute of Frauds (29 Car. 2, c. 3), s. 4)).

(e) *Liford's Case* (1614), 11 Co. Rep. 46 b, 52 a; Plowd. 16 a; *Jones (James) & Sons, Ltd. v. Tankerville (Earl)*, [1909] 2 Ch. 440, *per* PARKER, J., at p. 442. A licence to enter land does not confer an interest in land under the Statute of Frauds (29 Car. 2, c. 3), s. 4 (*McManus v. Cooke* (1887), 35 Ch. D. 681, *per* KAY, J., at p. 688; *Warr (Frank) & Co., Ltd. v. London County Council*, [1904] 1 K. B. 713, C. A.); and see title LANDLORD AND TENANT, Vol. XVIII., pp. 338, 339.

(f) *Thomas v. Sorrell* (1673), Vaugh. 330, Ex. Ch., *per* VAUGHAN, C.J., at p. 351; *Wood v. Manley* (1839), 11 Ad. & El. 34. Whether a licence is *ab initio* irrevocable as regards goods which have not become the buyer's property seems to be doubtful: in *Jones (James) & Sons, Ltd. v. Tankerville (Earl)*, *supra*, PARKER, J., in a considered *dictum*, suggests on the authorities that the mere fact of a contract of sale for standing timber or growing hay to be cut by the buyer may confer such an interest at law on the buyer that a licence to cut is *ab initio* irrevocable. *Marshall v. Green* (1876), 1 C. P. D. 35, undoubtedly involves a decision to that effect, but the point about the irrevocableness of the licence does not seem to have been argued; and in *Web v. Paternoster* (1619), Palm. 71, the buyer had cut and stacked the hay on the seller's land, thereby becoming the owner of the hay (*Wallis v. Harrison* (1838), 4 M. & W. 538, *per* PARKE, B., at p. 544). In America the licence is treated as divisible, and thus revocable so far as it has not been acted on (*Giles v. Simonds* (1860), 81 Massachusetts Reports, 441; *Drake v. Wells* (1865), 93 Massachusetts Reports, 141; *Fletcher v. Livingston* (1891), 153 Massachusetts Reports,

SECT. 2.

Delivery.

Place of
delivery
uncertain.

358. Where the place of delivery is not indicated by the contract, and is within the option of the seller or of the buyer respectively, it is a condition precedent to the liability of the buyer or of the seller respectively to accept or to deliver the goods that he should receive notice of the place of delivery (*g*).

SUB-SECT. 3.—*Time of Delivery.*

General rule
as to time.

359. Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed (*h*), the seller is bound to send them within a reasonable time (*i*). Similarly, where the seller is not bound to send the goods, but the buyer is to take possession of them from the seller or a third person, the seller is deemed to promise that the buyer, if he applies for the goods within a reasonable time, shall receive them (*k*).

388). The point is, however, of little practical importance, as a buyer sued for trespass could counterclaim for a breach of contract by the revocation of the licence (*Smart v. Jones* (1864), 15 C. B. (N. S.) 717; *Kerrison v. Smith*, [1897] 2 Q. B. 445).

(*g*) *Davies v. McLean* (1873), 21 W. R. 264 (goods sold "ex quay or warehouse": seller's option); *Armitage v. Insole* (1850), 14 Q. B. 728: followed in *Sutherland v. Allhusen* (1866), 14 L. T. 666 (goods deliverable "f.o.b." at a specified port: buyer's duty to name ship); compare *Hobson v. Riordan* (1886), 20 L. R. Ir. 255; *Great Northern Rail. Co. v. Harrison* (1852), 12 C. B. 576, Ex. Ch. (goods deliverable as required); *Forrest & Son, Ltd. v. Aramayo* (1900), 83 L. T. 335, C. A. (delivery f.o.b.: buyer's option); *Wackerbarth v. Masson* (1812), 3 Camp. 270 (goods "f.o.b. a foreign ship"); *Sharp v. Christmas* (1892), 8 T. L. R. 687, C. A. (boat to be sent within certain time: no notice by buyer); see also *Knox v. Mayne* (1873), 7 I. R. C. L. 557 (buyer entitled to name port of discharge).

(*h*) The question of the agreed time of delivery is one of construction. Various rules have been laid down; see title TIME.

(*i*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 29 (2); *Ellis v. Thompson* (1838), 3 M. & W. 445. Reasonable time is a question of fact (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 56; see p. 280, *post*). The circumstances surrounding the contract must be considered (*Ellis v. Thompson, supra*), and also facts subsequently causing delay without the seller's fault (*Hick v. Raymond and Reid*, [1893] A. C. 22, *per* Lord Watson, at p. 33; *Re Carver & Co. and Sassoon & Co.* (1911), 17 Com. Cas. 59 (stranding and refloating of ship causing delay)). The rule stated in the text may be changed by express agreement, or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 55; see p. 279, *post*), as *e.g.*, where the time of delivery is made indefinite, and is within the option of the buyer (*Jones v. Gibbons* (1853), 8 Exch. 920); see the text, *infra*; and the same principle no doubt applies where the option is the seller's. Again, the rule of reasonable time only applies where the making delivery, or the taking of possession, depends for its performance entirely on the party bound thereto. If delivery is to be made by means of some act in which both are to concur, and to which each binds himself, the only liability imposed is that each shall use reasonable diligence to perform his part in the joint act (*Ford v. Ooteworth* (1868), L. R. 4 Q. B. 127, 133). The rule laid down by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 29 (2), is subject to the principle declared in *Jackson v. Union Marine Insurance Co.* (1874), L. R. 10 C. P. 125, Ex. Ch. (see p. 116, *ante*), so that excessive delay, though not caused by the seller, may frustrate the buyer's adventure and entitle him to refuse acceptance (*Re Carver & Co. and Sassoon & Co., supra*).

(*k*) *Buddle v. Green* (1857), 27 L. J. (EX.) 33.

Due performance by the seller of his duty in that behalf is a condition precedent to the buyer's liability to accept and pay for the goods (l). SECT. 2.
Delivery.

360. Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact (m). Hour of demand or tender.

361. Where the time of delivery is indefinite, and within the option of the buyer (n), as, for example, where the goods are deliverable "on request," or "as required" (o), or on similar terms, the seller is not bound to deliver the goods until the buyer calls for delivery. If he calls for delivery, the seller must deliver within a reasonable time thereafter (p). Seller's or buyer's option.

If the buyer does not call for delivery within a reasonable time after the contract, the seller may give him notice to do so (q). If the buyer fails to call for delivery within a reasonable time after the notice, the seller may repudiate the contract, if it be an entire one (r).

Similar principles, *mutatis mutandis*, apply to the buyer's liability

(l) *Ellis v. Thompson* (1838), 3 M. & W. 445; *Macdonald v. Longbottom* (1859), 1 F. & F. 538.

(m) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 29 (4). Previously to the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), the reasonableness of the hour was a question of law, and elaborate rules for determining it were laid down in *Startup v. Macdonald* (1843), 6 Man. & G. 593, Ex. Ch.

(n) As to notice of a purely collateral event on which delivery depends, see title CONTRACT, Vol. VII., p. 434.

(o) The buyer must of course have agreed to buy. The rule in the text does not apply if "as required" means "if required" (*Moon v. Camberwell Borough Council* (1903), 89 L. T. 595, C. A.).

(p) *Shep. Touch.* (ed. Preston) 381; *Birks v. Trippet* (1666), 1 Wms. Saund. 32, 33 b; *Bowdell v. Parsons* (1808), 10 East, 359; *Great Northern Rail. Co. v. Harrison* (1862), 12 C. B. 576, Ex. Ch.; see also *Honck v. Muller* (1881), 7 Q. B. D. 92, C. A. (alternative times). The seller dispenses with a request if he wrongfully resells the goods (*Bowdell v. Parsons*, *supra*), or declares his inability to deliver (*Leeson v. North British Oil and Candle Co.* (1874), 8 I. R. C. L. 309).

(q) *Prima facie*, the buyer has the whole of his life to call for delivery (*Shep. Touch.* (ed. Preston) 378; *Llanelly Rail. and Dock Co. v. London and North Western Rail. Co.* (1875), L. R. 7 H. L. 550). The rule as to reasonable time is excluded; consequently the seller is not discharged because the buyer does not call for delivery within a reasonable time after the contract (*Jones v. Gibbons* (1853), 8 Exch. 920). But the buyer's liability may be hastened by notice (*Shep. Touch.* (ed. Preston) 378; *Jones v. Gibbons*, *supra*).

(r) *Jones v. Gibbons*, *supra*. Where, however, the property has passed, the seller may, at his option, keep the goods, and charge the buyer the expenses of their custody (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 37); see p. 232, *post*. Where the goods are deliverable by instalments to be separately paid for, the contract is divisible, and a partial breach by the buyer does not necessarily entitle the seller to repudiate (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 31 (2); *Eastern Counties Rail. Co. v. Philipson* (1855), 16 C. B. 2); see p. 220, *post*. It is otherwise where the price is not apportioned, for in such a case the consideration for delivery is indivisible, and a partial breach is a total breach, and the seller may repudiate (*Chanter v. Leese* (1839), 5 M. & W. 698, Ex. Ch.; *Kingdom v. Cox* (1848), 5 C. B. 522).

SECT. 2. to accept the goods where the time of delivery is indefinite and
Delivery. within the option of the seller (s).

SUB-SECT. 4.—Goods in Possession of Third Person.

Third person
must attorn.

362. Where the goods at the time of the sale (t) are in the possession of a third person, there is no delivery by the seller to the buyer unless and until the third person acknowledges (a) to the buyer that he holds the goods on his behalf (b); but this provision does not affect the operation of the issue or transfer of any document of title (c) to goods (d).

An acknowledgment by the third person of the buyer's title to the goods must be given with the consent of both seller and buyer (e).

If the person in possession of the goods wrongfully refuses to acknowledge the buyer's title, the buyer may repudiate the contract (f).

Duty of
parties with
regard to
acknowledg-
ment.

The seller and the buyer must, each of them, so far as it depends on him, do all that is necessary to enable the buyer to

(s) *E.g.*, a contract for the sale of a waste product, deliverable when the seller has it to spare.

(t) *I.e.*, at the time when the property passes. "Sale" by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1), includes a bargain and sale and sale and delivery. The latter part of the definition is here, from the nature of the case, excluded.

(a) In technical language, the third person must attorn to the buyer. An acknowledgment while the goods are unascertained is ineffectual, except as against the third person by way of estoppel (*Busk v. Davis* (1814), 2 M. & S. 397; compare *Swanwick v. Sothorn* (1839), 9 Ad. & El. 895 (goods ascertained); *Hayman & Son v. M'Lintock*, [1907] S. C. 936).

(b) *Farina v. Home* (1846), 16 M. & W. 119 (no attornment to warrant); *Hammond v. Anderson* (1803), 1 Bos. & P. (N. R.) 69 (buyer weighs all the goods and takes part); *Lackington v. Atherton* (1844), 7 Man. & G. 360 (delivery order: third person not seller's agent); *Smith v. Chance* (1819), 2 B. & Ald. 753 (conditional attornment by bailee: condition not performed by seller); *Wood v. Tassell* (1844), 6 Q. B. 234 (attornment and part delivery); *Buddle v. Green* (1857), 27 L. J. (EX.) 33 (refusal to attorn to delivery order); *Poulton & Son v. Anglo-American Oil Co.* (1911), 27 T. L. R. 216, C. A.; see also *Salter v. Woollams* (1841), 2 Man. & G. 650, where the third person attorned before the sale, and afterwards withdrew his consent.

(c) As defined in the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 1 (4); see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1), and pp. 119, 185, 193, *ante*, p. 225, *post*, where the effect of various documents is stated. The question under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 29 (3), being one between seller and buyer, a bill of lading would seem to be the only document of title in point, that being the document which *per se* transfers possession. All other documents, such as warrants, delivery orders etc., require an attornment by the bailee; see *Farina v. Home*, *supra*; *Lackington v. Atherton*, *supra*; *Buddle v. Green*, *supra*; and *Harman v. Anderson* (1809), 2 Camp. 243; *Bentall v. Burn* (1824), 3 B. & C. 423 (delivery order); *Haig v. Wallace* (1831), 2 Hud. & B. 671 (delivery order: goods in customs warehouse).

(d) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 29 (3).

(e) *Godts v. Rose* (1855), 17 C. B. 229 (no assent by buyer to condition of transfer); *Poulton & Son v. Anglo-American Oil Co.* (1911), 27 T. L. R. 216, C. A. (no assent by seller).

(f) *Pattison v. Robinson* (1816), 5 M. & S. 105, 110.

obtain the third person's acknowledgment of the buyer's title (*g*). If the acknowledgment is rightly withheld by reason of the buyer's default in that behalf, the seller, having done all that was incumbent on him, may treat the delivery as made (*h*).

SECT. 2.
Delivery.

SUB-SECT. 5.—*Expenses in Connexion with Delivery.*

363. Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state (*i*) must be borne by the seller (*k*).

Of putting
goods into
deliverable
state.

364. Unless it is otherwise agreed, the expenses of and incidental to making delivery of the goods must be borne by the seller; the expenses of and incidental to receiving delivery, or incurred subsequently to delivery, must be borne by the buyer (*l*).

Of making
or taking
delivery.

In particular, where goods are contracted for on the terms that they are to be shipped "free on board," the seller must defray the expenses of and up to shipment (*m*); and, where the price is to include the freight and the insurance, or, as it is said, on "c.f.i.," or "c.i.f.," terms, the seller, as between himself and the buyer, is chargeable with the amount of the freight and the insurance charges, and the buyer, if he has paid either of those charges, may take credit therefor (*n*).

(*g*) *Smith v. Chance* (1819), 2 B. & Ald. 753 (seller's default in removing impediment to delivery); *London Founders Association, Ltd and Palmer v. Clarke* (1888), 20 Q. B. D. 576, C. A., *per* LOPES, L.J., at p. 584 (registration of shares); *Winks v. Hassall* (1829), 9 B. & C. 372 (non-payment by buyer of customs duties); *Bartlett v. Holmes* (1853), 1 C. L. R. 159; (non-surrender by buyer of warrant); *Buddle v. Green* (1857), 27 L. J. (EX.) 33 (presentation of delivery order within reasonable time); *Stray v. Russell* (1860), 1 E. & E. 888, 916, Ex. Ch. (transfer of shares).

(*h*) *Bartlett v. Holmes*, *supra*. Similarly, if the acknowledgment is withheld by reason of the seller's default, there is no delivery (*Smith v. Chance*, *supra*).

(*i*) *I.e.*, into such a state that the buyer would under the contract be bound to take delivery (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (4)).

(*k*) *Ibid.*, s. 29 (5). There is no previous English authority for the rule here enacted, but the clause is probably declaratory of the common law (Story on Sale, s. 297 (a)). It should be noticed that the clause does not deal with the expenses of delivery itself; see the text, *infra*.

(*l*) *Neill v. Whitworth* (1865), 18 C. B. (N. S.) 435; affirmed (1866), L. R. 1 C. P. 684, Ex. Ch. (cotton "to be taken from the quay"); *Playford v. Mercer* (1870), 22 L. T. 41 (goods sold "from the deck": harbour dues); *Acme Wood Flooring Co. v. Sutherland Innes Co.* (1904), 9 Com. Cas. 170 ("c.f.i. to buyer's wharf"); *Re Shell Transport and Trading Co. and Consolidated Petroleum Co.* (1904), 20 T. L. R. 517 (cost of making fit the place of delivery); *White v. Williams*, [1912] A. C. 814, P. C. ("cost of stevedoring": construction of contract). See also the French Civil Code, art. 1608; and the German Civil Code, s. 448.

(*m*) *Cowasjee v. Thompson* (1845), 5 Moo. P. C. C. 165, 173; *Re Cock, Ex parte Rosevear China Clay Co.* (1879), 11 Ch. D. 560, C. A., *per* BACON, C.J.; *Stock v. Inglis* (1884), 12 Q. B. D. 564, C. A., *per* BRETT, M.R., at p. 573.

(*n*) *Ireland v. Livingston* (1872), L. R. 5 H. L. 395, *per* BLACKBURN, J., at p. 406; *Wanke v. Wingren* (1880), 58 L. J. (Q. B.) 519; *Houlder Brothers & Co., Ltd. v. Public Works Commissioner, Public Works Commissioner v. Houlder Brothers & Co., Ltd.*, [1908] A. C. 276, 290, P. C. Wharfage charges incurred after shipment and the delivery by the seller of

SECT. 2.

SUB-SECT. 6.—*Delivery of Wrong Quantity or of Mixed Goods.***Delivery.**

Delivery of
less than
contracted for.

365. Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them (o), but if the buyer accepts the goods so delivered he must (p) pay for them at the contract rate (q).

Delivery of
more than
contracted for.

Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may (p) accept the goods included in the contract and reject the rest, or he may (p) reject the whole. If the buyer accepts the whole of the

the shipping documents fall on the buyer (*Acme Wood Flooring Co. v. Sutherland Innes Co.* (1904), 9 Com. Cas. 170, *per* BRUCE, J.).

(o) Because every contract for a quantity of goods is *prima facie* an entire contract for that quantity (*Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434, *per* Lord SELBORNE, L.C., at p. 439; *Baldey v. Parker* (1823), 2 B. & C. 37; *Bigg v. Whisking* (1853), 14 C. B. 195). Conversely, the buyer cannot call for a portion of the goods without being ready and willing to accept all (*Kingdom v. Cox* (1848), 5 C. B. 522). Where the deficiency is so small as to be negligible the court applies the maxim *de minimis non curat lex* (*Jackson v. Rotax Motor and Cycle Co.*, [1910] 2 K. B. 937, C. A.; *Harland and Wolff, Ltd. v. Burstall & Co.* (1901), 17 T. L. R. 338, *per* BIGHAM, J.). The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 30 (1), must also be read subject to *ibid.*, s. 31, under which the goods may be deliverable by instalments; see p. 215, *post*.

(p) Subject to any usage of trade, special agreement, or course of dealing between the parties (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 30 (4)). Thus, by agreement, the quantity stated may be intended to be, not an absolute, but a maximum quantity, so that the buyer may be bound to accept less than the stated quantity (*Graham v. Jackson* (1811), 14 East, 498; *Morgan v. Gath* (1865), 3 H. & C. 748 (any unmerchandise goods to be rejected); *Beckh v. Page* (1859), 5 C. B. (N. S.) 708 (so many bales "or any less number that may arrive"); *Arbuthnot v. Streckeisen* (1866), 35 L. J. (c. P.) 305 (154 bales, if previous contract for 123 satisfied); *Symes v. Hulley* (1860), 2 L. T. 509 (order for such quantity up to 30 as are equal to sample); *A.-G. v. Stewards & Co., Ltd.* (1901), 18 T. L. R. 131, H. L. (so many tons, or such less quantity as may be required). Again, by usage of trade, a delivery order for "about" the quantity of goods sold from a warehouse may be good (*Moore v. Campbell* (1854), 10 Exch. 323). As to delivery by instalments, see pp. 215 *et seq.*, *post*.

(q) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 30 (1); *Bragg v. Cole* (1821), 6 Moore (C. P.), 114 (buyer to take goods: takes and retains part); *Shipton v. Casson* (1826), 5 B. & C. 378 (acceptance of less quantity); *Richardson v. Dunn* (1841), 2 Q. B. 218 (same: buyer's silence and delay); *Gorriessen v. Perrin* (1857), 2 C. B. (N. S.) 681 (bales: packages too small); *Morgan v. Gath* (1865), 3 H. & C. 748 (acceptance); *Reuter v. Sala* (1879), 4 C. P. D. 239, C. A. (rejection); *Lister and Biggs v. Barry & Co.* (1886), 3 T. L. R. 99 (weight of tea: usage excluding the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 30 (1)); *Harland and Wolff, Ltd. v. Burstall & Co.* (1901), 84 L. T. 324 (470 out of 500 loads of timber). The buyer is liable, not for the price as such, but for the value of the goods (*Shipton v. Casson*, *supra*, at p. 383), and the contract rate is the best evidence of this. As to the liability of the principal to accept a less quantity where the seller is his agent, see *Ireland v. Livingston* (1870), L. R. 5 Q. B. 516, Ex. Ch.; (1872) L. R. 5 H. L. 395; *Johnston v. Kershaw* (1867), L. R. 2 Exch. 82. The option given being to accept all the delivery, or to reject it, the buyer cannot claim to accept part only (*Champion v. Short* (1807), 1 Camp. 53; *Aitken, Campbell & Co., Ltd. v. Boullen and Gatenby*, [1908] S. C. 490 (a case under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11 (2)). But he may do so with the consent of the seller, in which case a new implied contract arises under *ibid.*, s. 3.

goods so delivered he must(*r*) pay for them at the contract rate(*s*).

SECT. 2.

Delivery.

Mixed goods.

Where the seller delivers to the buyer the goods he contracted to sell mixed(*t*) with goods of a different description(*u*) not included in the contract, the buyer may(*r*) accept the goods which are in accordance with the contract and reject the rest, or he may(*r*) reject the whole(*a*).

366. The quantity of goods contracted for is determined by the construction of the contract(*b*).

Particular rules as to quantity.

(*r*) See note (*p*), p. 212, *ante*.

(*s*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 30 (2); *Dixon v. Fletcher* (1837), 3 M. & W. 146; *Hart v. Mills* (1846), 15 M. & W. 85 (new contract for part); *Cunliffe v. Harrison* (1851), 6 Exch. 903 (rejection); *Rylands v. Kretzman* (1865), 19 C. B. (N. S.) 351 (addition of unmerchable goods); *Lomas & Co. v. Barff, Ltd., Frangopulo & Co. v. Lomas & Co.* (1901), 17 T. L. R. 437; (1902) 18 T. L. R. 461, C. A. (latitude in quantity allowed, and exceeded); *Cross v. Eglin* (1831), 2 B. & Ad. 106 (same: "about 300 quarters, more or less"). The maxim *de minimis non curat lex* applies to excess delivery (*Shipton, Anderson & Co. v. Weil Brothers & Co.*, [1912] 1 K. B. 574). The option being to accept the quantity contracted for, with a rejection of the excess, or to reject the whole delivery, the buyer cannot claim to accept only part of the contract quantity, or of the excess; but he can, under a new contract, accept the whole delivery, or part of it.

(*t*) The fact that the buyer has a right of selection shows that "mixed" is not confined to cases of inseparable admixture. It is also conceived that the addition of articles which may be regarded as put in as dunnage for secure packing is not a mixture (*Levy v. Green* (1859), 1 E. & E. 969, Ex. Ch., *per WILLES, J.*, at p. 974).

(*u*) Inferiority in quality may not be a difference in description. Thus the inclusion in the delivery, to make up the contract quantity, of goods of the same kind, but of inferior quality, is not a mixture under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 30 (3), and the buyer has no right of selection, though he may reject the whole delivery (*Aitken, Campbell & Co., Ltd. v. Boullen and Gatenby*, [1908] S. C. 490).

(*a*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 30 (3); *Levy v. Green, supra* (crocery); *Shannon v. Barlow* (1864), 15 I. C. L. R. 478 (books and stationery); *Nicholson v. Bradfield Union* (1866), L. R. 1 Q. B. 620 (coal of different kinds); *Imperial Ottoman Bank v. Cowan* (1874), 31 L. T. 336, Ex. Ch. (one bill of lading for contract and other goods: agreement to waive irregularity); *Tarling v. O'Riordan* (1878), 2 L. R. Ir. 82, C. A. (clothing of wrong size); *Jackson v. Rotax Motor and Cycle Co.*, [1910] 2 K. B. 937, C. A., *per FARWELL, L.J.*, at p. 948 (motor horns of wrong pattern). If the buyer, even inadvertently, consumes part of the mixed goods, he must pay the value of the part consumed (*Nicholson v. Bradfield Union, supra*). The option here is the same as under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 30 (2), and, as under that clause, the buyer may accept, under a new implied contract, the whole of the delivery; see note (*s*), *supra*. It is doubtful whether the buyer has a right of selection under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 30 (3), where goods of a different description go to make up the contract quantity, which is not exceeded. Where goods of the same description, but of inferior quality, are added to the contract quantity, the case seems to fall under *ibid.*, s. 30 (2); see the text, *supra*.

(*b*) As to construction generally, see titles CONTRACT, Vol. VII., pp. 509 *et seq.*; DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 433 *et seq.*

(*c*) The following rules are based upon the judgment of the Supreme Court of the United States in *Brawley v. United States* (1877), 96 United States Reports [6 Otto], 168,

SECT. 2.
Delivery.

circumstances or a particular standard (*d*). If, in such a case, a specified quantity is also mentioned, with the addition of qualifying words, such as "about," "more or less," or similar words, such quantity *prima facie* (*a*) represents only an anticipative estimate of quantity, and is not a term of the contract (*f*); but such an estimate may specify a minimum quantity (*g*).

In other cases, the quantity of goods mentioned in the contract is material (*h*), subject, where qualifying words are used, to a reasonable latitude with regard to quantity (*i*), or where, by the terms of the contract, usage of trade, or otherwise, the qualifying words mean a definite latitude, to that latitude (*j*).

(*d*) As, *e.g.*, an entire lot deposited in a particular warehouse, all the goods manufactured by the seller, or that may be shipped by the seller, or required by the buyer, etc.; see *Tancred, Arrol & Co. v. Steel Co. of Scotland* (1890), 15 App. Cas. 125 (buyer's requirements); *Wood v. Copper Miners' Co.* (1854), 14 C. B. 428 (supply for particular manufacture); *Eastern Counties Rail. Co. v. Philipson* (1855), 16 C. B. 2 (buyer's requirements). It is a matter of construction whether "required" means "requested" or "wanted" (*Whitehouse v. Liverpool New Gas-Light and Coke Co.* (1848), 5 C. B. 798 (requirements not confined to existing works); compare *Von Mehren & Co. v. Edinburgh Roperie and Sail Cloth Co., Ltd.* (1902), 4 F. (Ct. of Sess.) 232 (requirements so confined); see also the cases cited in note (*f*), *infra*. If the buyer renders the ascertainment by the standard impossible, the seller is discharged; see *Pringle v. Taylor* (1809), 2 Taunt. 150.

(*e*) But the contract may show that the quantity mentioned is material (*Bourne v. Seymour* (1855), 16 C. B. 337 ("500 tons, understood to be the full and complete cargo of the *J. P.*")).

(*f*) *Hayward v. Scougall* (1809), 2 Camp. 56 (all hemp shipped on seller's account, not exceeding 300 tons); *Gwillim v. Daniell* (1835), 2 Cr. M. & R. 61 (all naphtha made by seller "say from 1,000 to 1,200 gallons a month"); *Bealey v. Stuart* (1862), 7 H. & N. 753 ("whole of chlorine still-waste as it comes from the stills"); *McConnel v. Murphy* (1873), L. R. 5 P. C. 203 (all the spars manufactured by seller, averaging 16 inches, "say about" etc.); *Borrowman v. Drayton* (1876), 2 Ex. D. 15, C. A. ("cargo of from 2,500 to 3,000 barrels": governing word "cargo"); *Levi and Browne Island Guano Co. v. Berk & Co.* (1886), 2 T. L. R. 898, C. A. ("cargo expected to arrive *per A.*, about 450 tons": governing word "cargo"); *McLay & Co. v. Perry & Co.* (1881), 44 L. T. 152 (specific heap of iron "understood to be about 150 tons"); *Tancred, Arrol & Co. v. Steel Co. of Scotland*, *supra* ("whole steel required for Forth Bridge, the estimated quantity 30,000 tons more or less"); compare *A.-G. v. Stewards & Co., Ltd.* (1901), 18 T. L. R. 131, H. L.; *Berk v. International Explosives Co.* (1901), 7 Com. Cas. 20 (buyer's requirements, "estimated at 500 to 750 tons").

(*g*) *Leeming v. Snaith* (1851), 16 Q. B. 275 (all combing skin pulled by seller, "say not less than 100 packs"). As to a maximum quantity, see note (*p*), p. 212, *ante*.

(*h*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 30; see p. 212, *ante*.

(*i*) *Reuter v. Sala* (1879), 4 C. P. D. 239, C. A., *per* THESIGER, L.J., at p. 244; *Brawley v. United States* (1877), 96 United States Reports [6 Otto], 168; *Moore v. Campbell* (1854), 10 Exch. 323 (sale of goods in warehouse: trade usage to give delivery order for "about" the quantity mentioned); *Cross v. Eglin* (1831), 2 B. & Ad. 106 ("about 300 quarters, more or less": latitude exceeded). It is submitted that what is a reasonable latitude is a question of fact.

(*j*) *Société Anonyme L'Industrielle Russo-Belge v. Scholefield* (1902), 7 Com. Cas. 114, C. A. ("about" = 5 per cent.); *Lomas & Co. v. Barff, Ltd., Frangopulo & Co. v. Lomas & Co.* (1901), 17 T. L. R. 437; reversed on another point (1902), 18 T. L. R. 461, C. A.

367. A contract for the sale of a "cargo" is *prima facie* a contract for the sale of the entire lading of the vessel on the particular voyage (*k*). A contract may be one for the sale of a cargo, whether or not the word "cargo" is mentioned in the contract (*l*).

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Delivery.

Sale of a
"cargo."

368. The parties may by agreement mutually take the risk of the quantity of the goods being on delivery more or less than the specified quantity on which the price was calculated (*m*).

Mutual risk
of correctness
of quantity.

SUB-SECT. 7.—*Instalment Deliveries.*

(i.) *In General.*

369. Unless otherwise agreed (*n*), the buyer of goods is neither bound to accept delivery thereof by instalments (*o*), nor entitled to demand the delivery of an instalment (*p*).

Ordinarily
not allowable.

An agreement to accept delivery by instalments may, in the absence of an express agreement (*q*), be inferred from the conduct of the parties and the circumstances of the case (*r*); and in particular

(*k*) *Borrowman v. Drayton* (1876), 2 Ex. D. 15, C. A. ("cargo of from 2,500 to 3,000 barrels": non-acceptance): *Kreuger v. Blanck* (1870), L. R. 5 Exch. 179 ("small cargo, in all about 60 cubic fathoms": 83 fathoms loaded); *Sargent v. Reed* (1745), 2 Stra. 1228 (cargo: whole loading); compare also *Levi and Browse Island Guano Co. v. Berk & Co.* (1886), 2 T. L. R. 898, C. A.; *Covas v. Bingham* (1853), 2 E. & B. 836. It was said in *Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.* (1886), 12 App. Cas. 128, P. C., that "cargo" was a word susceptible of different meanings. But the question in that case was whether the property or risk passed in a portion of the lading while being shipped. It was not doubted that the buyer might ultimately have rejected part of a cargo. As to the passing of the property in a cargo, see p. 173, *ante*.

(*l*) *Ireland v. Livingston* (1870), L. R. 5 Q. B. 516, Ex. Ch.

(*m*) *Covas v. Bingham*, *supra* ("cargo, about 1,300 quarters, quantity to be taken from the bill of lading").

(*n*) For forms relating to delivery by instalments, see *Encyclopædia of Forms and Precedents*, Vol. XI., pp. 587, 589, 598, 599.

(*o*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 31 (1). By *ibid.*, s. 30 (1), the buyer is not bound to accept, in performance of the seller's contract, less than the full quantity. By *ibid.*, s. 31 (1), he is entitled to receive the goods in one delivery; see *Reuter v. Sala* (1879), 4 C. P. D. 239, C. A. (buyer not bound to accept 20 tons of pepper out of 25); *Honck v. Muller* (1881), 7 Q. B. D. 92, C. A., *per* BRAMWELL, L.J., at p. 99 (coat out of suit of clothes ordered); compare *Brandt v. Lawrence* (1876), 1 Q. B. D. 344, C. A. (shipment by "steamer or steamers": buyer bound to accept instalment), as explained in *Reuter v. Sala*, *supra*; *Liedemann v. Gray* (1857), 3 Jur. (N. S.) 219, Ex. Ch. (no objection by buyer on tender of an instalment).

(*p*) *Kingdom v. Cox* (1848), 5 C. B. 522; *Reuter v. Sala*, *supra*, *per* THESIGER, L.J., at p. 247; *Honck v. Muller*, *supra*, *per* BRAMWELL, L.J., at p. 99. The conduct of the buyer shows that he is not ready and willing to perform all his contract. The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 31, does not in terms apply to cases in which the amount of the instalments is or is not specified, but the same principle applies. Thus, if the goods are deliverable "as required," and the buyer fails to require an instalment, the seller may or may not be entitled under *ibid.*, s. 31 (2) (see p. 220, *post*), to repudiate the contract, according as the buyer's breach is or is not a vital one (*Eastern Counties Rail. Co. v. Philipson* (1855), 16 C. B. 2).

(*q*) *Brandt v. Lawrence*, *supra*; *Jackson v. Rotax Motor and Cycle Co.*, [1910] 2 K. B. 937, C. A. (goods "as required").

(*r*) *Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance*

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from the delivery of part of the goods as an instalment, and acceptance thereof by the buyer without objection that complete delivery was not made (s).

(ii.) *Particular Rules.*

Qualifying words.

370. Where qualifying words, such as "about," "more or less," and similar words, are used in a contract for a quantity of goods deliverable by stated instalments, it depends upon the construction of the contract whether the qualifying words apply to the whole quantity of goods, or to the amount of the instalments (t).

Position of buyer where price not apportioned to instalments.

371. Where the goods are deliverable by instalments, and the price of each instalment is not separately payable, although the price may be calculated with reference to separate portions of the goods, the buyer may reject any instalment delivered if the full quantity of the goods be not made up (a), but he must pay at the contract rate for such of the goods as he has dealt with as owner, or otherwise accepted (b). If he retains the goods delivered beyond the time appointed for complete delivery, or otherwise beyond a reasonable time for complete delivery, he must pay for them at the contract rate (c).

How far each delivery a separate contract.

372. For the purpose of delivery or acceptance each instalment is deemed to be the subject of a separate contract. Accordingly, the seller is bound to deliver, and the buyer to accept, each instalment duly demanded or tendered in the course of performance of the contract (d).

Co. (1886), 12 App. Cas. 128, 138, P. C.; *Nicholson v. Bradfield Union* (1866), L. R. 1 Q. B. 620 (supply of coals to workhouse); *Tarling v. O'Riordan* (1878), 2 L. R. Ir. 82, C. A., *per* BALL, L.C., at p. 86, and MORRIS, C.J., at p. 89 (contract for existing and future goods); *Thornton v. Simpson* (1816), 6 Taunt. 556 (50 tons to be shipped, and ship's name to be declared).

(s) *Tarling v. O'Riordan*, *supra*, *per* BALL, L.C., at p. 86; *Champion v. Short* (1807), 1 Camp. 53; *Bragg v. Cole* (1821), 6 Moore (C. P.), 114.

(t) *Société Anonyme L'Industrielle Russo-Belge v. Scholefield* (1902), 7 Com. Cas. 114, C. A. (held that the qualifying words applied only to the full quantity).

(a) *Oxendale v. Wetherell* (1829), 9 B. & C. 386, *per* PARKE, B.; approved in *Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.* (1886), 12 App. Cas. 128, 138, P. C. Where the price is payable only after full delivery, or where no time of payment is specified, which amounts to the same thing, a full delivery by the seller is a condition precedent to the payment of any part of the price (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 30 (1); see p. 212, *ante*; and see the general principle stated in *Chanter v. Leese* (1839), 5 M. & W. 698, Ex. Ch.). The mere receipt by the buyer of an instalment is not a final acceptance of it (*Hardman v. Bellhouse* (1842), 9 M. & W. 596, *per* ALDERSON, B., at p. 600).

(b) *Nicholson v. Bradfield Union*, *supra*, at p. 625; see also *Clarke v. Westrope* (1856), 18 C. B. 765.

(c) *Oxendale v. Wetherell*, *supra*; compare *Waddington v. Oliver* (1805), 2 Bos. & P. (N. R.) 61 (no retainer by buyer).

(d) *Jackson v. Rotax Motor and Cycle Co.*, [1910] 2 K. B. 937, C. A., following *Tarling v. O'Riordan*, *supra*; *Brandt v. Lawrence* (1876), 1 Q. B. D. 344, C. A., as explained in *Reuter v. Sala* (1879), 4 C. P. D. 239, C. A.; *Braithwaite v. Foreign Hardwood Co.*, [1905] 2 K. B. 543, C. A. Thus the fact of an acceptance of previous instalments does not

373. Notwithstanding that the instalments of the goods are to be separately paid for (e), or that some of the instalments have been delivered, the buyer may, on the seller's default in the delivery of any instalment, and on returning any instalments previously received (f), repudiate the contract *ab initio*, and recover any part of the price paid (g), where the seller's breach constitutes a total failure of the consideration, as where the instalments of the goods are portions of a quantity which in its nature is an indivisible whole (h), or a full delivery whereof is otherwise of the essence of the contract (i).

SECT. 2.

Delivery.

When buyer may rescind contract *ab initio*.

374. Where the amount of the instalments is not specified in the contract, it is a question dependent upon its construction whether the instalments must be distributed rateably over the period appointed for the delivery of the whole quantity of the goods (k).

Amount of instalments.

If rateable instalments are not contemplated by the contract, the amount of any instalment tendered or demanded must be reasonable, having regard to the time and circumstances of such tender or demand (k), and in particular to the amount of the goods contracted for, and the period specified for complete delivery (l).

375. Where the seller has the option of delivering the goods, either as a whole or by instalments, and elects to deliver them as a whole, and the goods are rejected by the buyer as not being in accordance with the contract, the seller's election is revocable, and he may subsequently, in the absence of a mutual intention to abandon the contract, in due time tender other goods, or an instalment thereof (m).

Seller's election of single or instalment delivery.

preclude the rejection of subsequent ones (*Jackson v. Rotax Motor and Cycle Co.*, [1910] 2 K. B. 937, C. A.); and the fact that subsequent instalments are not delivered does not excuse the buyer for not having accepted previous ones (*Brandt v. Lawrence* (1876), 1 Q. B. D. 344, C. A.); but the buyer need not accept any instalment where it is apparent at the time of tender that the subsequent instalments would not be delivered (*ibid.*, as explained in *Reuter v. Sala* (1879), 4 C. P. D. 239, C. A.).

(e) *Poussard v. Spiers* (1876), 1 Q. B. D. 410, shows that the division of payment does not prevent a rescission *ab initio* where the partial breach goes to the root of the contract.

(f) On general principles of law (*Hunt v. Silk* (1804), 5 East, 449; *Clarke v. Dickson* (1858), E. B. & E. 148).

(g) The cases mentioned in the text, *supra*, are probably covered by the language of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 31 (2) ("treat the whole contract as repudiated"), these words being wide enough to apply to a rescission *ab initio*.

(h) As, e.g., a book to be published in parts, or a machine deliverable in parts, or a suit of clothes; as to the last, see *Honck v. Muller* (1881), 7 Q. B. D. 92, C. A., *per* BRAMWELL, L.J., at p. 99.

(i) There is no decided authority on this point, but it follows from principle; see *Mersey Steel and Iron Co. v. Naylor, Benson & Co.* (1884), 9 App. Cas. 434, *per* Lord BLACKBURN, at p. 444. Notwithstanding the division of the price, delivery of all the goods would in some cases be the consideration for the buyer's promise to accept any of them; see the principle stated in *Ohanter v. Leese* (1839), 5 M. & W. 698, Ex. Ch.

(k) *Calaminus v. Dowlais Iron Co.* (1878), 47 L. J. (Q. B.) 575, where the circumstances indicative of an intention that the instalments should not be rateable are stated.

(l) *Oddington v. Paleologo* (1867), L. R. 2 Exch. 193, *per* MARTIN, B., at p. 197.

(m) It is submitted that this follows from *Borrowman v. Free* (1878), 4

SECT. 2.

Delivery.

"Average"
or "about
equal" instal-
ments.

376. Where goods are deliverable by "average" or "about equal" instalments with reference to specified times of delivery, or on similar terms, it is a question of fact whether, at any particular time, the contract quantities have, in a reasonable commercial sense, been delivered; or whether at such time there is any excess or deficiency, so as to constitute a breach of contract (*n*).

It is submitted that if there is an excess which has been accepted, such excess will be taken into account in the calculation of the quantities in connexion with subsequent deliveries.

Pro tanto
discharge
of contract
by breach.

377. The contract, so far as it applies to any particular instalment of the goods, is discharged where default has been made in the delivery or acceptance of the instalment (*o*); or an event has happened which, by the terms of the contract, excuses delivery (*p*). Accordingly the seller cannot afterwards claim to deliver the instalment, nor can the buyer demand it.

The fact that the parties have silently omitted to enforce and to require the delivery of any instalment of the goods, or have by mutual consent forborne its delivery at the contract time, is relevant, but not conclusive, to show a mutual agreement to rescind the contract, so far as it applies to the instalment undelivered (*a*).

Q. B. D. 500, C. A.; *Reuter v. Sala* (1879), 4 C. P. D. 239, C. A.; see also *Ashmore & Son v. Cox (C. S.) & Co.*, [1899] 1 Q. B. 436, 440. In *Reuter v. Sala*, *supra*, the tender of the 20 tons as an instalment, after the rejection of the 25 tons, would, it seems, have been good if the tender had been in time; see, especially, *Reuter v. Sala*, *supra*, at pp. 245, 248; note (*d*), p. 216, *ante*.

(*n*) *Barningham v. Smith* (1874), 31 L. T. 540; *Nederlandsche Cacao-fabrik v. Challen (David), Ltd.* (1898), 14 T. L. R. 322. In *Ireland & Son v. Merryton Coal Co.* (1894), 21 R. (Ct. of Sess.) 989, the term "average or about equal monthly quantities" seems to have been treated as meaning in substance "about equal monthly quantities," as the buyer was held to be bound to buy in against the seller every month.

(*o*) *Simpson v. Crippin* (1872), 42 L. J. (Q. B.) 28, *per* BLACKBURN, J., at p. 33; *Barningham v. Smith*, *supra*, *per* BRAMWELL, B., at p. 543; *De Oleaga v. West Cumberland Iron and Steel Co.* (1879), 4 Q. B. D. 472, 475; *Nederlandsche Cacao-fabrik v. Challen (David), Ltd.*, *supra*, *per* BIGHAM, J., at p. 323. *A fortiori*, where each delivery is to be deemed a separate contract (*Higgin v. Pumpherston Oil Co.* (1893), 20 R. (Ct. of Sess.) 532, *per* the LORD PRESIDENT, at p. 535). The liability in damages of the party in default of course remains, as also the right of the other party to repudiate the contract, under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 31 (2), if the breach was a vital one. *Tyers v. Rosedale and Ferryhill Iron Co.* (1875), L. R. 10 Exch. 195, Ex. Ch., is not inconsistent with the proposition stated in the text: in that case the plaintiff was not in default.

(*p*) *De Oleaga v. West Cumberland Iron and Steel Co.*, *supra* ("dangers or accidents of the mines"); *Stephens, Maxson & Co. v. Great Western Colliery Co.* (1899), 15 T. L. R. 432 (strike); *Belgaard v. Green, Holland & Co.* (1908), *Times*, 26th November ("hindrances interfering with production"). If the seller has the option of omitting delivery, wholly or partially, he may do so wholly, although he is able to make a partial delivery (*ibid.*). *De Oleaga v. West Cumberland Iron and Steel Co.*, *supra*, shows the distinction between a provision which excuses, and one which merely entitles the seller to postpone, delivery.

(*a*) See and compare *Higgin v. Pumpherston Oil Co.*, *supra*; *Tyers v. Rosedale and Ferryhill Iron Co.*, *supra*.

SECT. 2.
Delivery.

Postponement
of delivery of
instalments.

378. When the delivery of an instalment of the goods is postponed subsequently to the contract, and no period of postponement is fixed by the parties, the instalment must be delivered within a reasonable time (*b*).

When postponement is made under a power in the contract exercisable during the existence of a specified state of affairs, the reasonable time runs from the state of affairs coming to an end (*c*). Where it is made on the request of one party assented to by the other, the time runs from the last request for postponement (*d*).

Where postponement is made on the coming into existence of a specified state of affairs, and a reasonable time for the delivery and acceptance of the undelivered residue of the goods elapses before the state of affairs has come to an end, the contract is wholly discharged as against both parties (*e*).

An assent to a request for postponement is revocable, unless it amounts to a new contract; accordingly, the party assenting may afterwards require the other party to deliver or accept the goods on the terms of the contract (*f*).

379. Payment of the price due for previous deliveries is not, in the absence of an agreement to that effect (*g*), a condition precedent to the liability of the seller to deliver subsequent instalments of the goods (*h*). But, if the buyer becomes insolvent, such a condition is thereupon implied by law (*i*).

Payment not
ordinarily a
condition
precedent.

(*b*) *Tyers v. Rosedale and Ferryhill Iron Co.* (1875), L. R. 10 Exch. 195, Ex. Ch. (request); *De Oleaga v. West Cumberland Iron and Steel Co.* (1879), 4 Q. B. D. 472 (event provided for); *King v. Parker* (1876), 34 L. T. 887 (same: strike); *Hickman v. Haynes* (1875), L. R. 10 C. P. 598 (request). A continued postponement is, however, some evidence of a mutual intention to rescind; see note (*a*), p. 218, *ante*; as to the facts to be considered in determining a reasonable time, see *De Oleaga v. West Cumberland Iron and Steel Co.*, *supra*.

(*c*) *De Oleaga v. West Cumberland Iron and Steel Co.*, *supra*.

(*d*) *Hickman v. Haynes*, *supra*. It was decided in *Plevins v. Downing* (1876), 1 C. P. D. 220, that the request must, if the original contract be relied on, be made during the contract period by the party to be charged only; but compare *Tyers v. Rosedale and Ferryhill Iron Co.* (1873), L. R. 8 Exch. 305, *per* MARTIN, B., at p. 318; and see S. C. (1875), L. R. 10 Exch. 195, Ex. Ch., *per* BLACKBURN, J., at p. 197.

(*e*) *De Oleaga v. West Cumberland Iron and Steel Co.*, *supra*; *King v. Parker*, *supra*; *Geipel v. Smith* (1872), L. R. 7 Q. B. 404 (charterparty). To enforce the contract after excessive delay might have the effect of making it applicable to circumstances which the parties did not contemplate (*Jackson v. Union Marine Insurance Co.* (1873), L. R. 8 C. P. 572). The parties must therefore be presumed to have intended from the first that an unreasonable delay should discharge them (*Behn v. Burness* (1863), 3 B. & S. 751, Ex. Ch., at p. 758).

(*f*) *Ogle v. Vane (Earl)* (1867), L. R. 2 Q. B. 275; affirmed (1868), L. R. 3 Q. B. 272, Ex. Ch.; *Hickman v. Haynes*, *supra*.

(*g*) *Ebbw Vale Steel, Iron and Coal Co. v. Blairston Iron and Tinplate Co.* (1901), 6 Com. Cas. 33, C. A.

(*h*) *Re Edwards, Ex parte Chalmers* (1873), 8 Ch. App. 289, 293, *per* MELLISH, L.J.; *Mersey Steel and Iron Co. v. Naylor, Benson & Co.* (1884), 9 App. Cas. 434; *Clarke v. Burn* (1866), 14 L. T. 439. But a positive refusal to pay for subsequent instalments would be a repudiation of the contract by the buyer under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 31 (2) (*Wilbers v. Reynolds* (1831), 2 B. & Ad. 882).

(*i*) *Re Edwards, Ex parte Chalmers*, *supra*; *Re Phoenix Bessemer Steel Co., Ex parte Carnforth Hematite Iron Co.* (1876), 4 Ch. D. 108, C. A.;

SECT. 2.

Delivery.

When either party may repudiate for partial breach.

(iii.) *Repudiation for Partial Breach.*

380. Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective (*k*) deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case, depending on the terms of the contract (*l*) and the circumstances of the case, whether the breach of contract is a repudiation (*m*) of the whole contract, or whether it is a severable breach (*n*) giving rise to a claim for compensation, but not to a right in the other party to treat the whole contract (*o*) as repudiated (*p*).

see note (*o*), p. 242, and note (*k*), p. 263, *post*. Cash must be paid or tendered (*ibid.*; *Re Nathan, Ex parte Stapleton* (1879), 10 Ch. D. 586, C. A.).

(*k*) It is noticeable that no provision appears to be made for the case where the seller wholly omits to deliver an instalment, but the same principle applies.

(*l*) Where the question whether a breach is a vital one depends upon the construction of a contract in writing, it is one for the court (*Emery (George D.) Co. v. Wells* [1906], A. C. 515, P. C.).

(*m*) The breach may consist in an express refusal to perform the contract according to its terms; or in an implied refusal, to be inferred from the party's conduct (*Mersey Steel and Iron Co. v. Naylor* (1882), 9 Q. B. D. 648, C. A., *per* JESSEL, M. R., at p. 657). "The test is whether the conduct of one party to the contract is really inconsistent with an intention to be bound any longer by the contract" (*ibid.*, *per* BOWEN, L. J., at p. 670). A failure to perform a vital part of the contract necessarily amounts to an implied repudiation (*Mersey Steel and Iron Co. v. Naylor, Benson & Co.* (1884), 9 App. Cas. 434, *per* Lord BLACKBURN, at p. 443; quoted in *Rhymney Rail. Co. v. Brecon and Merthyr Tydfil Rail. Co.* (1900), 83 L. T. 111, 117, C. A.). A breach is vital where it renders the performance of the rest of the contract something substantially different from what the party not in fault contracted for (*Bettini v. Gye* (1876), 1 Q. B. D. 183, 188; *Mersey Steel and Iron Co. v. Naylor, Benson & Co.*, *supra*, *per* Lord BLACKBURN, at p. 443).

(*n*) There is no necessary inference that a partial breach is a severable breach (*Millar's Karri and Jarrah Co.* (1902) v. *Weddel, Turner & Co.* (1909), 100 L. T. 128, *per curiam*), or that it is a vital one (*Cornwall v. Henson*, [1900] 2 Ch. 298, C. A., *per* COLLINS, L. J., at p. 304).

(*o*) It is not clear whether these words mean the whole contract *ab initio*, or only the unfulfilled part of the contract. The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 31 (2), is based upon a series of cases in which the question was whether a partial breach by one party exonerated the other party from further performance; but the language of the provision seems to be wide enough to cover cases in which the partial breach by either party amounts to a total failure of the consideration moving from him.

(*p*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 31 (2); *Mersey Steel and Iron Co. v. Naylor, Benson & Co.*, *supra*. The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 30 (1), lays down the general rule that delivery by the seller of the full quantity is *primâ facie* a condition precedent to the buyer's duty to accept and pay for any of them. Conversely, as the duties of the parties are correlative (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 28; see pp. 204, 205, *ante*), the seller is *primâ facie* not bound to deliver any unless the buyer is ready and willing to accept and pay for all (*Kingdom v. Cox* (1848), 5 C. B. 522). But this is so because the consideration is entire on both sides, and a partial breach is a total breach. Under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 31 (2), the consideration has been divided; consequently a breach as regards one or more instalments of the goods is not necessarily the breach of a condition precedent to the liability of the other party to accept or deliver the remainder. In such a case "each delivery is really like a delivery under

SECT. 2.
Delivery.

In particular, a breach in relation to one or more instalments of such a kind, or committed in such circumstances, as to lead to a reasonable inference that similar breaches will be committed in relation to subsequent instalments, justifies the party not in fault in treating the contract as repudiated by the party in fault, and he may himself repudiate the whole contract (*q*). The rule may apply even where there is a provision in the contract that each instalment of the goods shall be deemed to be the subject of a separate contract (*r*).

a separate contract, to be paid for separately, and in respect of the non-delivery of which the parties may well be assumed to have contemplated a payment in damages rather than a rescission of the whole contract" (*Reuter v. Sala* (1879), 4 C. P. D. 239, C. A., *per THESSIGER, L.J.*, at p. 246). The party therefore who commits a breach which is merely partial is allowed by law to aver that he is ready and willing to perform the rest of the contract, subject to compensating the other party for the partial breach. Illustrations of the principle enacted in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 31 (2), though not always within its terms, are *Withers v. Reynolds* (1831), 2 B. & Ad. 882 (price payable on each delivery: buyer insists on credit); *Kent v. Godts* (1855), 26 L. T. (o. s.) 88 (buyer's rejection of first instalment based on mistake); *Hoare v. Rennie* (1859), 5 H. & N. 19 (shipment by seller of defective quantity in first month); *Jonassohn v. Young* (1863), 4 B. & S. 296 (shipping inferior coal and detaining buyer's ship); *Clarke v. Burn* (1866), 14 L. T. 439 (payment for previous delivery not shown to be a condition); *Simpson v. Crippin* (1872), L. R. 8 Q. B. 14 (buyer takes quarter of first delivery); *Freeth v. Burr* (1874), L. R. 9 C. P. 208 (refusal to pay for first instalment explained); *Morgan v. Bain* (1874), L. R. 10 C. P. 15 (notice of buyer's insolvency, and no tender of cash); *Leeson v. North British Oil and Candle Co.* (1874), 8 I. R. C. L. 309 (goods as ordered from time to time: seller declares he cannot deliver balance); *Bloomer v. Bernstein* (1874), L. R. 9 C. P. 588 (notice of buyer's insolvency and other facts); *Corcoran v. Proser* (1873), 22 W. R. 222, (buyer's claim to deduct value of short weight); *Re Phoenix Bessemer Steel Co., Ex parte Carnforth Hematite Iron Co.* (1876), 4 Ch. D. 108, C. A. (credit asked for, but no declaration of buyer's insolvency); *Honck v. Muller* (1881), 7 Q. B. D. 92, C. A. (buyer takes no coal in first month of three); *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434 (hesitation on erroneous grounds of law to pay); *Dickinson v. Fanshaw* (1892), 8 T. L. R. 271, C. A. (non-acceptance of full quantity of some instalments by reason of trade depression); *Booth v. Bowron* (1892), 8 T. L. R. 641 ("cash on delivery": buyer takes credit); *Mess v. Duffus & Co.* (1901), 6 Com. Cas. 165 (mere declaration of insolvency no repudiation); *Dominion Coal Co., Ltd. v. Dominion Iron and Steel Co., Ltd. and National Trust Co., Ltd.*, [1909] A. C. 293, P. C. (notice to seller that future deliveries not according to contract would not be accepted). The three cases of *Hoare v. Rennie*, *supra*; *Simpson v. Crippin*, *supra*; *Honck v. Muller*, *supra*, have given rise to much controversy. They present this common feature, that the breach of the contract was a breach at the outset. Perhaps *Simpson v. Crippin*, *supra*, may be distinguished from *Hoare v. Rennie*, *supra*; *Honck v. Muller*, *supra*, on the ground that, if the buyer had afterwards taken all the residue of the goods contracted for, his default in the first instalment would have amounted to no more than about 6 per cent. of the whole quantity, whereas in *Hoare v. Rennie*, *supra*, it would have been 21 per cent., and in *Honck v. Muller*, *supra*, 33 per cent., "not a trifle," *per BRAMWELL, L.J.*, at p. 100.

(*q*) *Millar's Karri and Jarrah Co.* (1902) v. *Weddel, Turner & Co.* (1909), 100 L. T. 128 (buyer's right to reject both instalments on breach as to first: recovery of money paid); *Berk & Co., Ltd. v. Day and White* (1897), 13 T. L. R. 475 (goods sold "for shipment to France" by buyer: repudiation by seller on buyer's breach).

(*r*) *Berk & Co., Ltd. v. Day and White*, *supra*.

SECT. 2.

Delivery.

Primâ facie
a delivery
to buyer.

Seller must
follow buyer's
instructions.

Seller's duty
as to contract
with carrier.

SUB-SECT. 8.—*Delivery to Carrier(s).*

381. Where in pursuance of a contract of sale (t) the seller is authorised or required to send (a) the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is *primâ facie* (b) deemed to be a delivery (c) of the goods to the buyer (d).

382. The seller must duly follow any instructions of the buyer as to the mode of transmission of the goods consistent with the terms of the contract. If he fails to do so, the goods are at his risk during the transit (e).

383. Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omits to do so, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself (f), or may hold the seller responsible in damages (g).

(s) See, further, title CARRIERS, Vol. IV., pp. 94 *et seq.*

(t) Delivery of the goods to a carrier for transmission to a person on sale or return, approval etc., is not a delivery to the consignee, there being, at the time of delivery, no contract of sale (*Swain v. Shepherd* (1832), 1 Mood. & R. 223; *Jacobs v. Harbach* (1886), 2 T. L. R. 419 (time of return runs from actual receipt)).

(a) The seller not being necessarily bound to send the goods (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 29 (1)); see pp. 206, 207, *ante*.

(b) The presumption is that the carrier is the buyer's agent to take delivery (*Vale v. Bayle* (1775), 1 Cowp. 294 (indicated mode of conveyance); *Dawes v. Peck* (1799), 8 Term Rep. 330; *Dunlop v. Lambert* (1839), 6 Cl. & Fin. 600, 620; *Wait v. Baker* (1848), 2 Exch. 1, *per PARKE, B.*, at p. 7). This presumption applies even where the carrier wrongfully refuses to give the buyer actual possession on arrival (*Groning v. Mendham* (1816), 5 M. & S. 189). The presumption may be rebutted, as where the seller agrees to deliver the goods at their destination, or reserves the right of disposal under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19 (1), (2); see p. 181, *ante*. In either of these cases the carrier is the agent of the seller, or, as the case may be, of the person indicated by the bill of lading, and not of the buyer (*Gabarron v. Kreeft*, *Kreeft v. Thompson* (1875), L. R. 10 Exch. 274, *per CLEASBY, B.*, at p. 285; *Dunlop v. Lambert*, *supra*, *per Lord COTTENHAM, L.C.*, at p. 620).

(c) It is also *primâ facie* an appropriation of the goods passing the property (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 5 (2); see p. 170, *ante*), and an actual receipt by the buyer under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4; see p. 133, *ante*.

(d) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 32 (1). Delivery to a carrier discharges the seller from his duty to deliver, but he may, by agreement, take the risk of the goods' arrival; see notes to *ibid.*, s. 20, p. 188, *ante*; and see *ibid.*, s. 33, p. 223, *post*. As to acceptance under *ibid.*, s. 4, where goods are delivered to a carrier, see p. 133, *ante*.

(e) *Ullock v. Reddelein* (1828), Dan. & Ll. 6 (goods sent by wrong route); compare *Hills v. Lynch* (1864), 26 New York Reports (Superior Court), 42; *Wheelhouse v. Parr* (1886), 141 Massachusetts Reports, 593. If the instructions are duly followed the risk is with the buyer (*Vale v. Bayle*, *supra*); see also *Cooke v. Ludlow* (1806), 2 Bos. & P. (N. R.) 119 (indicated ship full: goods by custom sent by next (in this case the buyer was negligent)).

(f) This has the effect of throwing the risk of the transit, in the case mentioned, on the seller.

(g) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 32 (2); *Clarke v.*

384. Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods are deemed to be at his risk during such transit (*h*).

SECT. 2.
Delivery.

Insurance :
during sea
transit.

SUB-SECT. 9.—*Deterioration of Goods in Transit.*

385. Where the seller of goods agrees to deliver them at his own risk (*i*) at a place other than that where they are when sold (*j*), the buyer must nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit (*k*). The seller must bear the risk of any extraordinary or unusual deterioration during transit (*l*).

Risk where
seller agrees
to deliver at
destination.

Hutchins (1811), 14 East, 475 (omission by seller to insure special value of goods as required by the carrier); compare *Cothay v. Tute* (1811), 3 Camp. 129 (omission to insure: course of dealing); *Buckman v. Levi* (1813), 3 Camp. 414 (delivery to person not shown to be carrier's agent). The rule has been thus stated, that it is the seller's duty "to take the usual and ordinary precaution . . . to do whatever is necessary to secure the responsibility of the carriers for the safe delivery of the goods, and to put them into such a course of conveyance as that in case of a loss the defendant (buyer) might have his indemnity against the carriers" (*Clarke v. Hutchins*, *supra*, per Lord ELLENBOROUGH, C.J., at p. 476); see also the Indian Contract Act, 1872 (Act No. IX. of 1872), s. 91. As the seller's duty under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 32 (2), is only to act reasonably in the circumstances to provide against loss or damage in transit, it is conceived that he is under no liability to enter into such a contract with the carrier as insures an indemnity to the buyer in all events, as, *e.g.*, against loss or damage by the act of God, or other perils excepted in the case of carriers. The buyer's alternative seems to be to treat the delivery as invalid, or as valid; in the latter case the seller being held responsible in an action of tort for negligence or conversion. As to insurance on sea transit, see the text, *infra*.

(*h*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 32 (3). This is a rule of Scottish law adopted by the Act (Bell on Sale, p. 89; Bell's Principles, Vol. I., s. 118; Brown's Sale of Goods Act, 1893, pp. 161—164). The rule is excluded by the terms of an f.o.b., "c.f.i.," or "ex ship" contract (*Wimble v. Rosenberg*, [1913] 1 K. B. 279). The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 32 (3), like *ibid.*, s. 32 (2), negatives in the particular case the ordinary presumption that risk attaches to the property; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 20; see p. 188, *ante*. It is also noticeable that the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 32 (3), implies that, in some cases of sea transit, the seller is not bound to insure on behalf of the buyer, whereas under *ibid.*, s. 32 (2), which is not in terms confined to land transit, the seller must make "a reasonable contract" with the carrier, a duty which, according to the common law cases, includes sometimes the duty to insure.

(*i*) Where the seller agrees to deliver the goods at their destination, the property ordinarily does not pass until delivery be made accordingly (see p. 174, *ante*); and the risk *prima facie* attaches to the property. The seller may, of course, even where the property has passed (which is apparently the case contemplated here), take the risk (*Calcutta and Burmah Steam Navigation Co. v. De Mattos* (1862), 32 L. J. (Q. B.) 322, per BLACKBURN, J., at p. 328). That risk is here qualified.

(*j*) The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 33, does not say "where they are at the time of the contract," so the rule in the text seems to apply only where the property has passed; see the definition of "sale," p. 117, *ante*.

(*k*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 33; see *Bull v. Robison*

(*l*) For note (*l*), see p. 224.

SECT. 2.

Delivery.

Risk where
perishable
goods are to
be dispatched.

386. Notwithstanding that the seller may have agreed merely to dispatch the goods to the buyer by delivering them to a carrier or other agent for transmission on behalf of the buyer, nevertheless, where the goods are perishable, the seller is deemed to take the risk of the goods not arriving in the ordinary circumstances of transit (*m*), and of their not remaining for a reasonable time after arrival in a merchantable condition (*n*).

Sub-SECT. 10.—*Buyer's Position with regard to Insurance by Seller.*

Buyer not
entitled to
seller's insur-

387. The mere fact that the buyer has bought, or agreed to buy, the goods does not entitle him to the benefit of any insurance thereof effected by, or available to, the seller at the time of the contract of sale. There must be a term, express or implied, in the contract that he shall have such benefit (*o*).

Whether any particular insurance has been contracted for and the extent to which insurance has been so contracted for are questions depending upon the construction of the contract (*p*).

(1854), 10 Exch. 342 (iron rusted by transit), where, it is conceived, the property did not pass until the arrival of the goods, so that the case may be strictly not an authority under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 33.

(*l*) *Bull v. Robison* (1854), 10 Exch. 342; *Walker v. Langdales Chemical Manure Co.* (1873), 11 Macph. (Ct. of Sess.) 906 (carcase of whale becoming putrid by delay).

(*m*) Loss caused by any unusual or exceptional cause would fall on the owner of the goods, i.e., the buyer (*Beer v. Walker* (1877), 46 L. J. (Q. B.) 677). The risk of necessary deterioration would *a fortiori* fall upon the buyer; see p. 224, *ante*; *Dickson v. Zizinia* (1851), 10 C. B. 602 (Indian corn warranted merchantable on shipment).

(*n*) *Beer v. Walker, supra*. No more definite rule than that stated in the text can be gathered from this case, which was followed in *Burrows v. Smith* (1894), 10 T. L. R. 246 (partridges). In the latter case, however, the partridges must have been unmerchantable at the time of their dispatch. The rule is an illustration of the principle laid down in *Calcutta and Burmah Steam Navigation Co. v. De Mattos* (1863), 32 L. J. (Q. B.) 322, *per* BLACKBURN, J., at p. 328, that the parties may make what bargain they please; and so may the law, to carry out their presumed intention. *Quære* whether in *Beer v. Walker, supra*, the rabbits were not unmerchantable on dispatch, in spite of the finding by the county court judge that they were then sound.

(*o*) *Powles v. Innes* (1843), 11 M. & W. 10; *North of England Oil-cake Co. v. Archangel Insurance Co.* (1875), L. R. 10 Q. B. 249; *Rayner v. Preston* (1881), 18 Ch. D. 1, C. A., following *Poole v. Adams* (1864), 33 L. J. (CH.) 639; Marine Insurance Act, 1906 (6 Edw. 7, c. 41), ss. 15, 51. A common instance of such an agreement is a c.f.i. contract; as to this contract see, further, p. 227, *post*. Where there is no such agreement, an assignment of the policy after the loss is inoperative as against the insurer (*North of England Oil-cake Co. v. Archangel Insurance Co., supra*). Goods insured may, however, be sold, together with the policy of insurance, after a loss (*Lloyd v. Fleming* (1872), L. R. 7 Q. B. 299; Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 50 (1)); and see title INSURANCE, Vol. XVII., p. 361.

(*p*) *Yuill & Co. v. Robson*, [1908] 1 K. B. 270, C. A.; *Vincentelli & Co. v. Rowlett & Co.* (1911), 16 Com. Cas. 310 (meaning of "all risks": construction of contract); *Ionides v. Harford* (1859), 29 L. J. (EX.) 36 (policy from A. to B. and C.: c.f.i. from A. to B.); *Ralli v. Universal Marine Insurance Co.* (1862), 4 De G. F. & J. 1, C. A.; *Cantiere Meccanico Brindisino v. Janson*, [1912] 3 K. B. 452, C. A. (seller's obligation to give valid policy).

SECT. 2.
Delivery.

388. The buyer is, as between himself and the seller, entitled to the full benefit of the insurance on the goods effected by, or available to, the seller, notwithstanding that the moneys secured thereby may exceed the contract price, where he has contracted for the goods as being, or to be, so insured (*q*); and, even where he has not so contracted, he is entitled to all the moneys secured where the seller has in the performance of the contract unconditionally delivered the policy to the buyer, to whom the property in the goods and the insurable interest has passed (*r*).

Seller's insurance exceeding contract price.

389. Even where the buyer has contracted for the benefit of an insurance on the goods by the seller, he is not, unless it is specially agreed, entitled, as against the seller, to the benefit of any insurance supplementary to the contract, that is to say, effected by the seller for his own purposes independently of the contracts; and, if the buyer has in fact received from the insurer the moneys secured thereby, he must hold them for the seller (*s*).

Seller's independent insurance

SUB-SECT. 11.—*Delivery by Bill of Lading and Other Documents.*

390. The issue or transfer to the buyer of a bill of lading operates as a delivery to the buyer of the goods shipped (*t*).

By bill of lading.

391. Delivery orders (*a*), warrants (*a*), written engagements to deliver goods, and similar documents do not, like bills of lading, transfer possession. They are mere promises by the seller, being the issuer or transferor, to deliver, or authorities to the buyer to receive possession (*b*).

Effect of delivery orders, warrants etc.

Such documents, although they may purport to be, or may commonly be treated as, transferable, are not negotiable instruments (*c*),

(*q*) *Ralli v. Universal Marine Insurance Co.* (1862), 4 De G. F. & J. 1, C. A. (contemporaneous policy).

(*r*) *Landauer v. Asser*, [1905] 2 K. B. 184.

(*s*) *Strass v. Spillers and Bakers, Ltd.*, [1911] 2 K. B. 759 ("increased value policies"); *Harland and Wolff, Ltd. v. Burstall & Co.* (1901), 6 Com. Cas. 113 (seller's honour policy).

(*t*) *Groning v. Mendham* (1816), 5 M. & S. 189 (captain's refusal to deliver goods); *Sanders Brothers v. Maclean* (1883), 11 Q. B. D. 327, C. A., where BOWEN, L.J., at p. 341, compares a bill of lading to the key of a warehouse; *Green v. Sichel* (1860), 7 C. B. (N. S.) 747 (waiver by buyer of custom to deliver by bill of lading); *E. Clemens Horst Co. v. Biddell Brothers*, [1912] A. C. 18. A bill of lading truly represents the goods. As to the time during which it operates, see *Barber v. Meyerstein* (1870), L. R. 4 H. L. 317. Generally, where goods are in the possession of a third person, an attornment to the buyer by the bailee is necessary; see *Sale of Goods Act*, 1893 (56 & 57 Vict. c. 71), s. 29 (3) (see p. 210, *ante*); but that provision saves the operation of documents of title.

(*a*) A delivery order is a document issued by the seller and authorizing the bailee of the goods to deliver; a warrant is a document issued by the bailee himself; see the definitions in the *Stamp Act*, 1891 (54 & 55 Vict. c. 39), ss. 69 (1) (now repealed), 111 (1); *Factors Act*, 1889 (52 & 53 Vict. c. 45), s. 1 (4).

(*b*) *Gillman, Spencer & Co. v. Carbutt & Co.* (1889), 61 L. T. 281, C. A. (where the promise was on the facts negatived); and see the cases in note (*c*), *infra*.

(*c*) *Gilbertson & Co. v. Anderson and Colman, Ltd.* (1901), 18 T. L. R. 224 (delivery order); *Dixon v. Bovill* (1856), 3 Macq. 1, H. L. (undertaking to deliver to bearer); *Farmeloe v. Bain* (1876), 1 C. P. D. 445 (undertaking

SALE OF GOODS.

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Delivery.

unless there be a trade usage to that effect (*d*). Accordingly, subject to the provisions of the Factors Act, 1889 (*e*), the owner cannot claim delivery of the goods except from the seller who is the issuer or immediate transferor of the document (*f*).

Delivery of
bill of lading.

392. Goods deliverable by bill of lading (*g*) are delivered by the transfer to the buyer of a bill of lading duly indorsed and effectual to pass the property in the goods (*h*), representing goods which are in fact in accordance with the contract (*i*), and made out in terms which are not inconsistent with the provisions of the contract of sale (*k*), and are such that the buyer will be enabled to receive possession of the goods at the appointed destination (*l*).

Shipping
documents.

393. Shipping documents, or other documents necessary to enable the buyer to deal with the goods in the usual way of business, which under the contract are deliverable to the buyer, must be such as are specified in the contract, otherwise such as are customary (*m*). They must be made out in proper form, and in terms not inconsistent with the provisions of the contract (*m*). A tender of some only of such documents, or of documents which are insufficient under the contract, or irregular, is an invalid tender (*m*).

to deliver to buyer's order). *A fortiori*, a document not purporting to be transferable is not negotiable (*Gunn v. Bolekow, Vaughan & Co.* (1875), 10 Ch. App. 491 (certificate by wharfinger that goods ready for delivery)). The documents in question are in the same position as bills of lading before the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111) (*Thompson v. Dominy* (1845), 14 M. & W. 403). "There is no decision or authority that it is competent to a party to create by his own act a transferable right of action on a contract, irrespective of custom" (*Crouch v. Credit Foncier of England* (1873), L. R. 8 Q. B. 374, 386). As to transfer of title by documents of title, see, further, p. 193, *ante*.

(*d*) *Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.* (1877), 5 Ch. D. 205 (iron warrants); *Crouch v. Credit Foncier of England, supra*, at p. 386. By the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 11, for the purposes of that Act, the transfer of a document may be by indorsement, or where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery. As to trade usage generally, see title CUSTOM AND USAGES, Vol. X., pp. 274 *et seq.*

(*e*) 52 & 53 Vict. c. 45, ss. 2 (1), 9, 10.

(*f*) See the cases cited in note (*e*), p. 225, *ante*. Strictly speaking, the holder of the instrument claims delivery, not under the instrument itself, but under the contract in pursuance of which it was issued.

(*g*) But the buyer may waive the delivery of the bill of lading, and if the property and possession have passed to him, he is liable for the price (*Green v. Sichel* (1860), 7 C. B. (N.S.) 747 (trade usage to pay against bill of lading)).

(*h*) *Sanders v. Maclean* (1883), 11 Q. B. D. 327, C. A. (bills in a set).

(*i*) *Tameaco v. Lucas* (1859), 1 E. & E. 592 (bill of lading untrue representing contract quantity).

(*k*) *Tameaco v. Lucas, supra*, at p. 581; *Re Keighley, Maxted & Co. and Bryan, Durant & Co.* (No. 2) (1894), 70 L. T. 155, C. A. (bill of lading showing excessive quantity).

(*l*) *Lecky & Co., Ltd. v. Ogilvy, Gillanders & Co.* (1897), 3 Com. Cas. 29, C. A. (bill of lading made out by mistake to wrong port).

(*m*) *Hickox v. Adams* (1876), 34 L. T. 304, C. A. (policy of insurance not tendered); *Imperial Bank v. Cowan* (1874), 31 L. T. 336, Ex. Ch. (bill of lading including goods not contracted for: waiver by buyer); *Re Reinhold & Co. and Hansloh* (1896), 12 T. L. R. 422 (chamber of commerce certificate not identifying goods); *Re Salomon & Co. and Naudus* (1899), 81 L. T. 325 (documents altered before execution to accord with facts); *Re Goodbody*

Whether any shipping or other document is such as to be recognised in commerce as a proper or sufficient document is a question of fact (*n*).

SECT. 2.
Delivery.

394. Under a contract of sale of goods to be shipped on "cost, insurance, and freight" terms (*o*), the seller performs his contract by shipping under a proper contract of affreightment goods answering to the contract, insuring them, and forwarding to the buyer the invoice, bill of lading and other shipping documents, together with the policy of insurance (*p*).

Performance
of "c.i.f."
contract.

395. The seller is bound to use all reasonable diligence to deliver the bill of lading to the buyer as soon as possible after

Time of
delivery of
bill of lading.

& Co. and Balfour, Williamson & Co. (1899), 82 L. T. 484, C. A. ("c.f.i. to any safe port": documents except one port: immaterial alteration); *Burstall & Co. v. Grimsdale & Sons* (1906), 11 Com. Cas. 280 (customary documents: documents authorising deviation of ship); *Yuill & Co. v. Robson*, [1908] 1 K. B. 270, C. A. (c.i.f.; insurance against "all risks": insufficient policy); compare *Vincentelli & Co. v. Rowlett & Co.* (1911), 105 L. T. 411 ("all risks": construction of contract); *Landauer & Co. v. Craven and Speeding Brothers*, [1912] 2 K. B. 94 (bill of lading dated out of time, and it and policy of insurance not covering whole voyage); *Orient Co., Ltd. v. Brekke and Howlid*, [1913] 1 K. B. 531 (no insurance effected). As to shipping generally, see title SHIPPING AND NAVIGATION.

(*n*) *Tamvaco v. Lucas* (1861), 1 B. & S. 185; (1862) 3 B. & S. 89, Ex. Ch.; *Cederberg v. Borries Craig & Co.* (1885), 2 T. L. R. 201 (meaning of "all" shipping documents). In particular it is a question of fact whether a policy of insurance contemplated is one to cover the value of the goods to the buyer, or their value on shipment only (*Tamvaco v. Lucas*, *supra* (sale of cargo afloat)).

(*o*) I.e., "c.i.f." or "c.f.i."; see *Ireland v. Livingston* (1872), L. R. 5 H. L. 395, *per* BLACKBURN, J., at p. 406; *Biddell Brothers v. E. Clemens Horst Co.*, [1911] 1 K. B. 214, *per* HAMILTON, J., at p. 220, where the contract is explained.

(*p*) *Tregelles v. Sewell* (1862), 7 H. & N. 574, Ex. Ch. ("so much per ton, delivered at Harburg, c.f.i."); *Acme Wood Flooring Co., Ltd. v. Sutherland Innes Co., Ltd.* (1904), 9 Com. Cas. 170 ("c.i.f. to buyer's wharf": incidence of extra charges); *Wancke v. Wingren* (1889), 58 L. J. (Q. B.) 519 (breach abroad by non-shipment of goods to be shipped c.i.f.); *Crozier, Stephens & Co. v. Auerbach*, [1908] 2 K. B. 161, C. A. ("c.i.f. Tyne—Thames": shipment of inferior goods), overruling *Barrow v. Myers & Co.* (1888), 4 T. L. R. 441; *E. Clemens Horst Co. v. Biddell Brothers*, [1912] A. C. 18 (hops to be shipped abroad, c.i.f. to London, terms "net cash"); *Orient Co., Ltd. v. Brekke and Howlid*, *supra*. The bill of lading or other contract of affreightment must be for the entire voyage to the port of destination, and the insurance must also cover the whole voyage, at any rate where there is a mercantile usage to that effect (*Landauer & Co. v. Craven and Speeding Brothers*, *supra*). As to the law where there is no usage, see *ibid.*; but compare *Cox, McKuen & Co. v. Malcolm & Co.*, [1912] 2 K. B. 107, n. Under a c.i.f. contract, and whether the terms of payment are "cash" or "cash against documents," the buyer must pay on tender of the documents, and is not entitled to previous inspection of the goods under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 34; see *E. Clemens Horst Co. v. Biddell Brothers*, *supra*. But his right of subsequent rejection, if existing, is not affected (*Polenghi Brothers v. Dried Milk Co., Ltd.* (1904), 10 Com. Cas. 42). The obligation of the seller to take out the insurance etc. does not suspend the delivery of the goods, and the passing of the property, until the arrival of the goods. These facts are to be determined as in other contracts (*Delaurier & Co. v. Wyllie* (1889), 17 R. (Ct. of Sess.) 167; *Dupont v. British South Africa Co.* (1901), 18 T. L. R. 24). As to marine insurance generally, see title INSURANCE, Vol. XVII., pp. 334 *et seq.*

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the shipment of the goods, and without reference, unless it be otherwise agreed (*q*), to the arrival or landing of the goods (*r*). His duty in that behalf is a condition precedent to the liability of the buyer to accept and pay for the goods (*r*); but no condition is ordinarily implied that the bill of lading shall be delivered in time to enable the buyer to forward it to meet the arrival of the vessel, or for it to arrive at the port of discharge before landing charges are incurred; and an express stipulation to that effect is ordinarily not a condition precedent (*s*).

Declaration
by seller of
name of
vessel etc.

396. The making to the buyer by the seller, pursuant to the contract, of a declaration of the particulars of the shipment, or the name of the vessel, or other facts in connection with the goods which the buyer requires to know to enable him to deal with them, is a condition precedent to the liability of the buyer to accept and pay for the goods (*t*).

SECT. 3.—Acceptance.

Buyer's right
of examining
the goods.

397. Where goods are delivered to the buyer which he has not previously examined he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract (*a*).

(*q*) *Lomas & Co. v. Barff, Frangopulo & Co. v. Lomas & Co.* (1901), 17 T. L. R. 487, per KENNEDY, J. (rules of Fruit Association).

(*r*) *Barber v. Taylor* (1839), 5 M. & W. 527; *Sanders v. Maclean* (1883), 11 Q. B. D. 327, C. A., per BRETT, M.R., at p. 337.

(*s*) *Sanders v. Maclean*, *supra*.

(*t*) *Reuter v. Sala* (1879), 4 C. P. D. 239, C. A. (name of vessel and particulars of goods); *Graves v. Legg* (1854), 9 Exch. 709; *Greaves v. Legg* (1856), 11 Exch. 642; *Busk v. Spence* (1815), 4 Camp. 329 (name of vessel); *Gilkes v. Leonino* (1858), 4 C. B. (N. S.) 485 (name of vessel to be declared by particular date: waiver by buyer withdrawn); *Re Carver & Co. and Sassoon & Co.* (1911), 17 Com. Cas. 59 (name of ship then stranded, but afterwards refloated: no new voyage). A declaration by the seller to a broker as the common agent may by usage be a declaration to the buyer, even where the broker fails to communicate it to the buyer (*Greaves v. Legg*, *supra*).

(*a*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 34 (1), which applies only where delivery has been made, whereas *ibid.*, s. 34 (2), applies where the delivery is incomplete. See *Lorymer v. Smith* (1822), 1 B. & C. 1; *Howe v. Palmer* (1820), 3 B. & Ald. 321; *Heilbutt v. Hickson* (1872), L. R. 7 C. P. 438, per BRETT, J., at p. 456; *Perkins v. Bell*, [1893] 1 Q. B. 193, C. A. (comparing bulk with sample); *Mellor v. Japiny* (1889), 5 T. L. R. 574 (same: cloth); *Chalmers v. Paterson* (1897), 34 Sc. L. R. 768 (second examination provided for). The buyer, if he requests an examination, must do so at a convenient time (*Lorymer v. Smith*, *supra*). The right of examination may be waived by express agreement, course of dealing, or usage (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 55). In a contract on "c.i.f." terms, or where otherwise payment is to be made in exchange for shipping documents, an examination of the goods on or previously to the tender of the documents is waived (*Polenghi Brothers v. Dried Milk Co., Ltd.* (1904), 92 L. T. 64 (c.i.f. terms); *E. Clemens Horst Co. v. Biddell Brothers*, [1912] A. C. 18). As to when and where the right of examination arises, see p. 229, *post*. Examination may also be waived by the buyer, as where the goods are to be delivered at a particular place and there is no one there to examine them (*Castle v. Szwed* (1860), 5 H. & N. 281, per BRAMWELL, B., at p. 288; (1861) 6 H. & N. 828, Ex. Ch., per COCKBURN, C.J., at p. 837).

Unless otherwise agreed (*b*), when the seller tenders delivery of the goods to the buyer, he is bound to afford the buyer a reasonable opportunity (*c*) of examining the goods for the purpose of ascertaining whether they are in conformity with the contract (*d*).

SECT. 3.
Acceptance.

398. The time and place of delivery is *prima facie* the time and place for the examination of the goods by the buyer (*e*); but the circumstances of the case may indicate some other place and time (*f*), especially where the goods contain a latent defect not discoverable by ordinary diligence at the place of delivery (*g*). In the latter case an examination of the goods at the place of delivery is not binding upon the buyer, and he may, on a subsequent inspection, reject the goods if they are not in conformity with the contract (*g*).

Time and
place of
examination.

399. A tender by the seller not made according to the terms of the contract is revocable by him unless it has been accepted (*h*), and a valid tender may, within the contract time, or, if no time be specified, within a reasonable time, be substituted (*i*).

Tender by
seller, when
revocable.

As to the buyer's right to damages notwithstanding a waiver of examination, see *Khan v. Duché* (1905), 10 Com. Cas. 87. Where the buyer has examined the goods at the time of the contract under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14 (2) (see p. 159, *ante*), and the examination discloses a defect, the examination under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 34 (1), can only apply to other defects not so disclosed.

(*b*) *Pettitt v. Mitchell* (1842), 4 Man. & G. 819 (goods open to inspection before sale: price payable before delivery); *Polenghi Brothers v. Dried Milk Co., Ltd.* (1904), 92 L. T. 64 (price payable against shipping documents); *F. Clemens Horst Co. v. Biddell Brothers*, [1912] A. C. 18.

(*c*) At the place expressly or by implication appointed for inspection; see the text, *infra*.

(*d*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 34 (2); *Isherwood v. Whitmore* (1843), 11 M. & W. 347 (tender of goods in closed casks); *Startup v. Macdonald* (1843), 6 Man. & G. 593, Ex. Ch., *per* ROSE, B., at p. 610; see also, as to sales by sample, Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 15 (2) (*b*): see p. 161, *ante*.

(*e*) *Perkins v. Bell*, [1893] 1 Q. B. 193, C. A.

(*f*) As where the examination at the place of delivery is waived by the terms of the contract (*F. Clemens Horst Co. v. Biddell Brothers*, *supra* (cash against documents)), or where the original place of examination is changed by agreement (*Heilbutt v. Hickson* (1872), L. R. 7 C. P. 438), or where the goods are delivered at a place where effective examination is impossible (*Grimoldby v. Wells* (1875), L. R. 10 C. P. 391 (goods delivered to buyer's cart half-way to buyer's farm)), or where it would be unreasonable to require an examination (*Molling & Co. v. Dean & Son* (1901), 18 T. L. R. 217 (books sold and packed by seller for export by buyer)); compare *Perkins v. Bell*, *supra* (examination possible at place of delivery).

(*g*) *Heilbutt v. Hickson*, *supra*, *per* BRETT, J., at p. 456; *Grimoldby v. Wells*, *supra*.

(*h*) The Court of Appeal in *Borrowman v. Free* (1878), 4 Q. B. D. 500, C. A., did not decide whether an invalid tender could be withdrawn after it had been accepted; but it is submitted that, being the offer of a new contract, it is irrevocable after acceptance.

(*i*) *Borrowman v. Free*, *supra*; *Telley v. Shand* (1871), 25 L. T. 658; compare *Guth v. Lees* (1865), 3 H. & C. 558 (where the seller made a proper election which was assented to); see also *Imperial Ottoman Bank v. Cowan* (1875), 31 L. T. 336, Ex. Ch. (waiver of invalidity of tender of bill of lading); *Ashmore & Son v. Cox (C. S.) & Co.*, [1899] 1 Q. B. 436, 440.

SECT. 8.

Acceptance.

When acceptance takes place.

400. The buyer is deemed to have accepted (*k*) the goods when he intimates (*l*) to the seller that he has accepted them (*m*), or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller (*n*), or where, after the lapse of a reasonable time (*o*), he retains (*p*) the goods without intimating to the seller that he has rejected them (*q*).

(*k*) The question whether the buyer has accepted the goods only arises where the buyer has a right to reject (*Perkins v. Bell*, [1893] 1 Q. B. 193, C. A.; *Varley v. Whipp*, [1900] 1 Q. B. 513). Thus, if the goods have been appropriated, and are in accordance with the contract, the property passes, and a rejection by the buyer is futile, as the goods are his own. But where the property has not passed, or where, even if it has passed, the buyer is entitled to take advantage of any condition subsequent, the question of acceptance, or of the right of rejection, as the case may be, arises (*Varley v. Whipp*, *supra*).

(*l*) Notice of acceptance under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 35, may be by words, spoken or written. Compare *ibid.*, s. 4 (see p. 129, *ante*); *Abbott & Co. v. Wolsey*, [1895] 2 Q. B. 97, C. A., *per* RIGBY, L.J.

(*m*) *Saunders v. Topp* (1849), 4 Exch. 390; compare *Varley v. Whipp*, *supra* (buyer's grumbling letter, followed later by return of goods: no acceptance).

(*n*) *Parker v. Palmer* (1821), 4 B. & Ald. 387 (resale); *Parker v. Wallis* (1855), 5 E. & B. 21 (spreading out seed); *Chapman v. Morton* (1843), 11 M. & W. 534 (notice of resale and resale by buyer); *Harnor v. Groves* (1855), 15 C. B. 667 (use and resale); *Perkins v. Bell*, *supra* (inspecting goods and sending on to sub-buyer); *Molling & Co. v. Dean & Son* (1901), 18 T. L. R. 217 (buyer sending on goods to final destination, when no acceptance); *Wallis, Son and Wells v. Pratt and Haynes*, [1911] A. C. 394 (seed with latent defect sown by sub-buyer); *Mechan & Sons, Ltd. v. Bow, McLachlan & Co., Ltd.* (1910), 47 Sc. L. R. 650 (tanks bought built into ship without inspection). A resale is only an acceptance where it takes place after an opportunity of rejecting, so as to amount to an election to accept the goods (*Perkins v. Bell*, *supra*; *secus*, where the buyer resells before such an opportunity (*Morton v. Tibbett* (1850), 15 Q. B. 428)), unless it is impossible to return the goods (*Wallis, Son and Wells v. Pratt and Haynes*, *supra*).

(*o*) *Morrison and Mason, Ltd. v. Clarkson Brothers* (1898), 25 R. (Ct. of Sess.) 427 (trial of pump; delay in rejection and payment of price). Reasonable time is a question of fact (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 56). The time may be provided for by the contract (*Sharp v. Great Western Rail. Co.* (1841), 9 M. & W. 7), or may be implied by trade usage (*Sanders v. Jameson* (1848), 2 Car. & Kir. 557 (one day)). After what is *prima facie* an unreasonable delay in rejection, the burden is on the buyer to show that it is reasonable, as, *e.g.*, where he could not discover a breach of a condition before (*Hyslop v. Shirlaw* (1905), 7 F. (Ct. of Sess.) 875, *per* Lord KYLLACHY, at p. 882 (genuineness of picture)).

(*p*) *Bushel v. Wheeler* (1844), 15 Q. B. 442 (silence and delay for five months); *Norman v. Phillips* (1845), 14 M. & W. 277 (refusal and six weeks' silence); *Currie v. Anderson* (1860), 2 E. & E. 592 (retention for a year of bill of lading) (all cases under the Statute of Frauds (29 Car. 2, c. 3), s. 17); *Milner v. Tucker* (1823), 1 C. & P. 15 (chandelier: silence and six months' delay). The time for rejection, after the discovery of a breach of contract, is not extended because the goods were warranted for a period (*Upton Manufacturing Co. v. Huiske* (1886), 69 Iowa Reports, 557).

(*q*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 35, stating what amounts to an acceptance, whereas *ibid.*, s. 34 (1), excludes the implication of an acceptance; see p. 228, *ante*. Where the contract is entire, an acceptance of part of the goods is an acceptance of all (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11 (1) (c)); *Champion v. Short* (1807), 1 Camp. 53; see p. 151, *ante*); *secus*, where the contract is divisible, as where the goods are deliverable by instalments (*Jackson v. Rotax Motor and Cycle Co.*, [1910] 2 K. B. 937, C. A.).

401. In determining what is a reasonable time for the rejection of the goods by the buyer, regard is had to the conduct of the seller, as where he has induced the buyer to prolong the trial of the goods, or has by his silence acquiesced in a further trial (*r*).

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402. Unless otherwise agreed (*s*), where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them (*t*).

Seller's conduct as affecting time for rejection.
Return of rejected goods unnecessary.

403. The buyer must, after a rejection of the goods, act in relation thereto in a reasonable manner. Subject thereto, the goods, after a rejection thereof duly made, are at the risk of the seller (*u*).

Buyer's duty after rejection.

404. The right of rejection may be excluded by the terms of the contract or by usage of trade (*a*), except that no agreement will be construed, or trade usage be valid, to exclude a right of rejection of goods for their not conforming to their description under the contract (*b*).

Exclusion of right of rejection.

(*r*) *Heilbutt v. Hickson* (1872), L. R. 7 C. P. 438, *per* BOVILL, C.J., and BYLES, J., at p. 452, citing *Adam v. Richards* (1795), 2 Hy. Bl. 573; *Lucy v. Mouflet* (1860), 5 H. & N. 229 (silence); *Munro & Co. v. Bennet & Son* (1910), 48 Sc. L. R. 287 (inducing further trial).

(*s*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 55; *Ornstein v. Alexandra Furnishing Co.* (1895), 12 T. L. R. 128; *Mellor v. Street* (1866), 15 L. T. 223 (express power to return damaged goods).

(*t*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 36. The rule before the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), was stated to be that the buyer can reject the goods, either by giving prompt notice of rejection, or by doing any unequivocal act notifying his rejection; and that he is not bound to return the goods, or to place them in neutral custody (*Grimoldby v. Wells* (1875), L. R. 10 C. P. 391, explaining the headnote in *Couston v. Chapman* (1872), L. R. 2 Sc. & Div. 250). The rule in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), is in substance the same; it does not profess to lay down an exhaustive rule.

(*u*) *Okell v. Smith* (1815), 1 Stark. 107, *per* BAYLEY, J., at p. 109. When it is said that the goods are at the risk of the seller, what is no doubt meant is that the buyer is not responsible for accidents not caused by his default. He is still a bailee, although an involuntary one, like a carrier after the refusal of the goods by the consignee (*Heugh v. London and North Western Rail. Co.* (1870), L. R. 5 Exch. 51); see also Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 20; p. 188, *ante*. As to the duties of bailees generally, see title BAILMENT, Vol. I., pp. 523 *et seq.*

(*a*) *Heyworth v. Hutchinson* (1867), L. R. 2 Q. B. 447 (seller's brokers to decide quality); *Leary & Co. v. Briggs & Co.* (1905), 6 F. (Ct. of Sess.) 857 (quality: express agreement excluding rejection); *Re Walkers, Winsor and Hamm and Shaw, Son & Co.*, [1904] 2 K. B. 152 (quality: trade usage); *Sanders v. Jameson* (1848), 2 Car. & Kir. 557 (usage: time for rejection); *Morgan v. Galk* (1865), 3 H. & C. 748 (bulk not to be rejected if only small part unmerchantable). A usage not to reject goods not excessively deficient in quality, or the deficiency in quality of which may be fairly compensated by an allowance, is reasonable and valid (*Re Walkers, Winsor and Hamm and Shaw, Son & Co.*, *supra*, *per* CHANNELL, J., at p. 157).

(*b*) *Shepherd v. Kain* (1821), 5 B. & Ald. 240 (sale of ship "with all faults, and without allowance"); compare *Taylor v. Bullen* (1850), 5 Exch. 779 (ship called, but not sold under description of, "teak built"); *Nichol v. Godts* (1854), 10 Exch. 191 ("rape oil, warranted only equal to samples"); *Azémur v. Casella* (1867), L. R. 2 C. P. 677, Ex. Ch. (cotton: defect in

SECT. 3.

Acceptance.

Buyer's
refusal to
take delivery
after request.

405. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery (c), and the buyer does not within a reasonable time (d) after such request take delivery of the goods, he is liable (e) to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods (f).

The rights of the seller, where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract, remain unaffected by this provision (g).

Rescission of
contract by
insolvent
buyer.

406. When the property in the goods has not passed (h) to an

quality to be allowed for); *Gorton v. Macintosh & Co.*, [1883] W. N. 103, C. A. (no allowance for "imperfections"); *Re Green & Co. and Balfour, Williamson & Co.* (1890), 63 L. T. 325, C. A. (arbitrator to decide quality only); *Wallis, Son and Wells v. Pratt and Haynes*, [1911] A. C. 394 (clause against "warranty" of description of seed); re-establishing *Howcroft v. Laycock* (1898), 14 T. L. R. 460 (a similar case); and, perhaps, not overruling *Howcroft and Watkins v. Perkins* (1900), 16 T. L. R. 217 (a similar case); *Vigers Brothers v. Sanderson Brothers*, [1901] 1 K. B. 608 (wood of certain lengths: clause against rejection). To allow a stipulation against rejection to apply to a case of nonconformity to description would render the contract nugatory (*ibid.*, per BIGHAM, J., at p. 611); and therefore a trade usage to that effect cannot be incorporated in a written contract (*Re North Western Rubber Co., Ltd. and Hüttenbach & Co.*, [1908] 2 K. B. 907, C. A.). A usage that goods, however deficient in quality, shall, if they answer their general description, be accepted, is also probably invalid (*Sinidino, Ralli & Co. v. Kitchen & Co.* (1883), Cab. & El. 217, per HAWKINS, J., at p. 220). The facts of the case may sometimes show that, although a name is given to goods, yet that they are not really sold under that description, as where the goods are sold for what they are (*Carter v. Crick* (1859), 4 H. & N. 412 (seed said to be "seed barley")). CHANNELL, J., having regard to a clause excluding a warranty, seems to have so interpreted the contract in *Howcroft and Watkins v. Perkins*, *supra*.

(c) Defined in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1), as "voluntary transfer of possession"; see p. 119, *ante*.

(d) Reasonableness is a question of fact (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 56); see p. 280, *post*.

(e) The liability is enforceable by action (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 57); see p. 280, *post*.

(f) The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 37, adopting up to this point the ruling of Lord ELLENBOROUGH, C.J., in *Greaves v. Ashlin* (1813), 3 Camp. 426, at p. 427; see also *Somes v. British Empire Shipping Co.* (1860), 8 H. L. Cas. 338, per Lord CRANWORTH, at p. 344; *Hartley v. Hitchcock* (1816), 1 Stark. 408 (coachmaker's claim for standage).

(g) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 37. The reference to the charge for custody seems to show that *ibid.*, s. 37, applies only to cases in which the property has passed, and where the buyer neglects to take possession, i.e., where the goods are kept against the seller's will. The seller cannot charge for keep if he detains the goods against the buyer's will in exercise of a right of lien (*Somes v. British Empire Shipping Co.*, *supra*). The saving of the seller's rights on repudiation by the buyer causes difficulties of construction, as it implies that the buyer's neglect or refusal to take delivery within a reasonable time after request may not always be a repudiation, whereas it should be so, as being default extending to the utmost limits allowed by law (*Howe v. Smith* (1884), 27 Ch. D. 89, C. A., per FRY, L.J., at p. 105; and see *Jones v. Gibbons* (1853), 8 Exch. 920; p. 209, *ante*). There are also difficulties in connection with the interpretation of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 48 (3); see p. 264, *post*.

(h) Even where the property has passed the contract may be rescinded where no question arises under the bankruptcy law, or where no previously

insolvent buyer, it is competent to him, with the consent of the seller, to reject the goods and rescind the contract, without the transaction being deemed to be a fraudulent preference (i) under the law of bankruptcy (k).

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SECT. 4.—Payment.

SUB-SECT. 1.—In General.

407. Unless it is otherwise agreed (l), the price of the goods is not payable unless and until the property therein has passed to the buyer (m), and also, where a delivery thereof is part of the consideration for, or a condition precedent to, payment, they have been delivered (n), unless delivery has been excused (o). But where the property in, and possession of, the goods is to pass to the buyer in contemporaneous exchange for the price thereof, the buyer is

When
ordinarily
due.

vested right of any third person against the buyer is involved (*Richardson v. Goss* (1802), 3 Bos. & P. 119 (wharfinger's general lien); *Smith v. Field* (1793), 5 Term Rep. 402; *Bartram v. Farebrother* (1828), 4 Bing. 579 (buyer's execution creditors); *Heinekey v. Earle* (1857), 8 E. & B. 410, Ex. Ch. (no rescission); *Re Devezze, Ex parte Cote* (1873), 9 Ch. App. 27, *per MELLISH, L.J.*, at p. 34). As to the passing of property, see pp. 166 *et seq.*, *ante*.

(i) Under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 48 (1), saved by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 61 (1); see p. 281, *post*.

(k) *Barnes v. Freeland* (1794), 6 Term Rep. 80; explaining *Salte v. Field* (1793), 5 Term Rep. 211; *Neate v. Ball* (1801), 2 East, 117; *Van Casteel v. Booker* (1848), 2 Exch. 691 (rule stated); *Nicholson v. Bower* (1858), 1 E. & E. 172; *Re Devezze, Ex parte Cote, supra* (reclamation of letter posted abroad); *Booker & Co. v. Milne* (1870), 9 Macph. (Ct. of Sess.) 314; *seaus*, where property has passed (*Barnes v. Freeland, supra*; *Neate v. Ball, supra*; *Re Fletcher, Ex parte Suffolk* (1891), 9 Morr. 8). The intent to prefer can, however, be negatived (*Bills v. Smith* (1865), 6 B. & S. 314; *Lauritzen v. Carr* (1894), 72 L. T. 56 (buyer thinks goods were not his)); see, generally, title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 279 *et seq.*

(l) Thus the price may be made payable irrespective of delivery or the passing of the property (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 49 (2)). So, again, the buyer may take the risk of the loss of the goods although unappropriated to the contract (*Stock v. Inglis* (1884), 12 Q. B. D. 564, C. A.); and see p. 188, *ante*.

(m) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 1, 49 (1); see note (a), p. 121, *ante*, p. 266, *post*; *Laird v. Pim* (1841), 7 M. & W. 474; *Atkinson v. Bell* (1828), 8 B. & C. 277; *Scott v. England* (1844), 2 Dow. & L. 520 (goods bargained and sold); *Kymer v. Suwercropp* (1807), 1 Camp. 109 (goods stopped *in transitu*); *McEntire v. Crossley Brothers*, [1895] A. C. 457, *per Lord HERSCHELL, L.C.*, at p. 464.

(n) Bullen and Leake's Principles of Pleading, 3rd ed., pp. 39, 40; *Forbes v. Smith* (1863), 11 W. R. 574; *Kymer v. Suwercropp, supra*. Where the price is not payable for separate portions of the goods (see *Lockwood v. Tunbridge Wells Local Board* (1884), Cab. & El. 289), the full amount of the goods must first be delivered, even where the goods are deliverable by instalments (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 30 (1); see p. 216, *ante*). As to instalment contracts, see pp. 215 *et seq.*, *ante*. As to the liability for the price where the goods are retaken by the seller, see p. 265, *post*.

(o) As where the buyer refuses to take delivery (*Hankey v. Smith* (1790), Peake, 57 [42], n.); or it is otherwise prevented by his fault (*Studdy v. Sanders* (1826), 5 B. & C. 628); or he takes the risk of the goods being lost (*Alexander v. Gardner* (1835), 1 Bing. (N. C.) 671).

SECT. 4.

Payment.

Payment by
negotiable
instrument.

bound to be ready and willing to pay the price in exchange for the possession of the goods (p).

408. Payment may, by agreement, be made by means of a bill of exchange, promissory note, or other negotiable instrument (q). Such a payment is *prima facie* (r) only conditional on the instrument being honoured at maturity (s), and operates during the currency thereof, and also so long thereafter as the instrument is outstanding in the hands of third persons, even after its dishonour (t).

Notice of
amount of
price.

409. Where the price of the goods is to be ascertained by reference to some fact or thing within the peculiar knowledge of the seller, the buyer is not liable to pay it unless he receives notice of the amount thereof (a).

Payment to
true owner.

410. When goods are sold by a person who has no title thereto, and the owner thereof claims payment from the buyer, the buyer may refuse to pay the price to the seller (b); and, if he

(p) The condition concurrent under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 28 (see p. 204, *ante*), is also a promise (*Sanders v. Maclean* (1883), 11 Q. B. D. 327, C. A.; *Ryan v. Ridley & Co.* (1902), 8 Com. Cas. 105 ("net cash in exchange for bill of lading etc."); *E. Clemens Horst Co. v. Biddell Brothers*, [1912] A. C. 18). The seller must of course be ready and willing to deliver.

(q) Usage may show the time of giving the security (*Whittaker v. Mason* (1835), 2 Bng. (N. C.) 359).

(r) It may, by agreement, be taken as an absolute payment (*Lewis v. Lyster* (1835), 2 Cr. M. & R. 704; *Sard v. Rhodes* (1836), 1 M. & W. 153; *Sibree v. Tripp* (1846), 15 M. & W. 23). The question is one of fact (*Goldsheds v. Cottrell* (1836), 2 M. & W. 20).

(s) *I.e.*, the debt revives on the dishonour of the instrument; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 38 (1) (b); pp. 239, 240, *post*. Accordingly the seller can sue on the original consideration, and without producing the bill, if it is in his or the buyer's possession at the time of action (*Hadwen v. Mendizabel* (1825), 10 Moore (C. P.), 477; *Widders v. Gorton* (1857), 1 C. B. (N. S.) 576; *Re A Debtor, Ex parte The Debtor*, [1908] 1 K. B. 344, C. A., *semble* overruling *Burden v. Halton* (1828), 4 Bing. 454). Where, however, the debt arises under a specialty the taking of a bill or note is not even conditional payment (*Henderson v. Arthur*, [1907] 1 K. B. 10, C. A., *per FARWELL, L.J.*; followed in *Re Defries (J.) & Sons, Ltd.*, *Eichholz v. Defries (J.) & Sons, Ltd.*, [1909] 2 Ch. 423, explaining *Palmer v. Bramley*, [1895] 2 Q. B. 405, C. A.).

(t) *Currie v. Misa* (1875), L. R. 10 Exch. 153, Ex. Ch.; *Burliner v. Royle* (1880), 5 C. P. D. 354 (reviver of larger original debt); *Re Matthew, Ex parte Matthew* (1884), 12 Q. B. D. 506, C. A. (no debt during currency of bill); see *Re A Debtor, Ex parte The Debtor, supra* (bill outstanding), where the law is considered. The debt does not revive unless the instrument is in the seller's hands at the commencement of the action (*Davis v. Reilly*, [1898] 1 Q. B. 1 (bill in hand at trial)). If the instrument is duly paid, the payment dates back to the time of its receipt (*Felix Hadley & Co. v. Hadley*, [1898] 2 Ch. 680); see, further, title CONTRACT, Vol. VII., p. 447.

(a) *Holmes v. Twist* (1614), Hob. 51, Ex. Ch. (price the same as that charged to others), cited by BRAMWELL, B., in *Makin v. Watkinson* (1870), L. R. 6 Exch. 25; *Henning's Case* (1617), Cro. Jac. 432 (a similar case), cited by PARKE and ALDERSON, BB., in *Vyse v. Wakefield* (1840), 6 M. & W. 442. For the general principle regulating notice, see *Vyse v. Wakefield, supra*; *Makin v. Watkinson, supra*; *Olerke v. Child* (1078), Freem. (K. B.) 254; 2 Wms. Saund., ed. 1871, p. 154, note (5); title CONTRACT, Vol. VII., p. 434.

(b) *Dickenson v. Naul* (1830), 4 B. & Ad. 638 (in this case the buyer had expressly promised to pay the auctioneer if he gave up his lien). As

has paid it to the owner, such payment is good as against the seller (c).

**SECT. 4.
Payment.**

SUB-SECT. 2.—Time and Mode of Payment.

411. Where no time or mode of payment is provided for by the contract (d), the course of dealing by the parties, whether under other contracts or under the contract in question (e), or the usage of trade (f), is relevant to show the intention of the parties as to the time or mode of payment.

Course of dealing or trade usage.

412. Where the mode of payment is to be arranged subsequently to the contract, and the buyer wrongfully refuses to enter into an agreement in that behalf within a reasonable time, the seller may recover, as an ordinary debt, the price of the goods, if it be then due (g).

Buyer's refusal to arrange mode of payment.

413. Where the price is payable at a time calculated with reference to the arrival of the goods, or their delivery to the buyer, or other event, and such event becomes impossible by reason of the perishing of the goods, or for some other reason, the buyer, if liable to pay the price (h), must pay it within a reasonable time after such event has become impossible (i).

Time of payment dependent on event which fails.

414. Where the buyer has the option of a shorter or of a longer credit, and does not pay at the expiration of the shorter credit, he is deemed to have elected for the longer credit (k). But if a shorter

Buyer's option of longer or shorter credit.

to the position of an auctioneer with regard to payment of the price, where the principal is an owner, see title AUCTION AND AUCTIONEERS, Vol. I., p. 519; *Manley & Sons, Ltd. v. Berkett*, [1912] 2 K. B. 329. As to waiver by the owner of the tort, see p. 123, *ante*.

(c) *Allen v. Hopkins* (1844), 13 M. & W. 94.

(d) As to a substituted mode of payment, see *Page v. Meek* (1862), 3 B. & S. 259; as to payment "at the convenience" of the buyer, see *Crawshaw v. Hornstedt* (1887), 3 T. L. R. 426, C. A.

(e) *King v. Reedman* (1883), 49 L. T. 473 (time of payment: course of dealing under same contract). In such cases the course of dealing negatives the implication of law under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 28, that payment and delivery are concurrent; see p. 204, *ante*; and see also the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 55. If, however, the contract is in writing, and no time is mentioned for delivery or payment, as by implication of law payment is to be concurrent with delivery, verbal evidence of a contrary course of dealing, or trade usage, is inadmissible (*Graves v. Ashlin* (1813), 3 Camp. 426 (course of dealing); followed in *Ford v. Yates* (1841), 2 Man. & G. 549 (usage of trade)); compare *Lockett v. Nicklin* (1848), 2 Exch. 93; and see titles CONTRACT, Vol. VII., pp. 373, 524; EVIDENCE, Vol. XIII., pp. 566 *et seq.*

(f) *Raitt v. Mitchell* (1815), 4 Camp. 146; *R. v. Jones*, [1898] 1 Q. B. 119, C. C. R. (meal at restaurant); *Clark v. Smallfield* (1861), 4 L. T. 405 (customs duty: usage); see title CUSTOM AND USAGES, Vol. X., pp. 274 *et seq.*

(g) *Hall v. Conder* (1857), 2 C. B. (N. S.) 22, Ex. Ch. The sum is recoverable, either as the price, or as damages equal to the price (*ibid.*).

(h) As having taken the risk of delivery under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 20 (see p. 188, *ante*), or through the property having passed to him (*ibid.*); and see p. 187, *ante*.

(i) *Fragano v. Long* (1825), 4 B. & C. 219, 223. The buyer is not liable to pay the price if, for example, the contract itself is dependent on a contingency, as if the goods were sold "to arrive," and they never arrived.

(k) *Price v. Nixon* (1814), 5 Taunt. 338 ("six or nine months"). The

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and a longer period of credit are specified with the addition of words of estimate, such as "from" or "about," it may be a question of fact whether, at any particular time between the two periods, the credit has not, in a commercial sense, expired (*l*).

Credit where
bill or note
to be given.

415. Where payment is to be made by a bill of exchange or promissory note payable at a future day, and the bill is not given, then, unless credit is made conditional on such a bill or note being given (*m*), the buyer is nevertheless entitled to credit until the time when the bill or note would have matured (*n*). The seller's remedy in the meantime is an action for damages for breach of the agreement to give the bill or note (*o*).

In particular, credit is conditional where the price of the goods is payable in cash with an option to the buyer to substitute a bill or note payable at a future day; it is not conditional where the price is payable by such a bill or note with an option to the buyer to substitute cash (*p*).

Where the buyer has the option of giving a bill or note payable

allowance of the longer credit may, however, be made conditional; see note (*m*), *infra*; compare *Dodd v. Ponsford* (1859), 6 C. B. (N. S.) 324 (payment of interest).

(*l*) *Ashforth v. Redford* (1873), L. R. 9 C. P. 20 (price payable in "from six to eight weeks": GROVE, J., doubting whether the words should not be construed *fortius contra proferentem*, i.e., against the seller). *Price v. Nixon* (1814), 5 Taunt. 338, was not cited, but is distinguishable, as containing no words of estimate. As to expressions of time generally, see title TIME.

(*m*) *Nickson v. Jepson* (1817), 2 Stark. 227 (three months' credit, then bill at three months, if more credit wanted); *Rugg v. Weir* (1864), 16 C. B. (N. S.) 471 (cash under discount at end of credit, or three months bill then); *Lee v. Risdon* (1816), 7 Taunt. 188 (cash: substituted agreement to give bill: none given).

(*n*) *Mussen v. Price* (1803), 4 East, 147 (credit three months, then bill at two); *Dutton v. Solomonson* (1803), 3 Bos. & P. 582 (bill at two months); *Brooke v. White* (1805), 1 Bos. & P. (N. R.) 330 (two months' credit, then bill at twelve); *Day v. Pictou* (1829), 10 R. & C. 120 (part in cash, residue by bills); *Helps v. Winterbottom* (1831), 2 B. & Ad. 431; *Paul v. Dod* (1846), 2 C. B. 800 (six months' credit, then bill at future date); *Rabe v. Otto* (1903), 89 L. T. 562 (bill at future date). The case is still stronger for credit where it is the seller's fault that the bills are not given (*Wayne's Merthyr Steam Coal and Iron Co. v. Morewood & Co.* (1877), 46 L. J. (Q. B.) 746). As to the effect of the buyer's repudiation of the contract, see p. 237, *post*.

(*o*) The buyer is liable in damages for any loss caused to the seller by the bill or note not being given (*Rabe v. Otto*, *supra*, per KENNEDY, J.; *Mussen v. Price*, *supra*, per curiam). These damages are not the price of the goods (*Rabe v. Otto*, *supra*; *Mussen v. Price*, *supra*, per LAWRENCE, J., at p. 151; *Helps v. Winterbottom* (1831), 2 B. & Ad. 431, per Lord TENTERDEN, C.J., at p. 434, and LITLEDALE, J., at p. 435); compare, to the contrary, *Hutchinson v. Reid* (1813), 3 Camp. 329. It has been decided, on a finding of a special jury as to practice, that the seller must tender a draft for acceptance (*Reed v. Mestaer* (1804), *coram* Lord ELLENBOROUGH, C.J., at Nisi Prius, reported in Comyn on Contract (1824), 2nd ed., p. 181); see also *Spaeth v. Hara* (1842), 1 Dowl. (N. S.) 595; compare *Foster v. Eades* (1860), 2 F. & F. 103, *obiter* per BLACKBURN, J. It is not fraudulent for the seller secretly to repurchase the goods from the buyer, if he cannot get a bill (*Harris v. Lunell* (1819), 4 Moore (C. P.), 10).

(*p*) *Anderson v. Carlisle Horse Clothing Co.* (1870), 21 L. T. 760 (cash with option of bill); *Rabe v. Otto*, *supra* (price payable by bill). In the one case the seller does not give credit except on terms; in the other he

at a future day, or of paying cash, and pays part of the price in cash, he cannot, under the option as of right, claim credit for the payment of the residue of the price (*q*).

SECT. 4.
Payment.

416. Where the price of the goods is made payable by instalments at future dates, a provision in the contract that, on the buyer's default in the payment of any instalment, the unpaid balance shall become immediately payable, is not a penalty (*r*).

Default in
paying instal-
ment of price.

417. Notwithstanding that credit has been given, if the buyer repudiates the contract the seller may forthwith elect to treat the contract as rescinded, and, if he does so, may, without waiting for the expiration of the credit, recover the value of such of the goods as the buyer has retained (*s*).

Effect of
repudiation.

SUB-SECT. 3.—Payment of Deposit.

418. Part of the price may be payable as a deposit.

Function of
deposit.

A deposit is paid primarily as security that the buyer will duly accept and pay for the goods, but, subject thereto, forms part of the price (*t*). Accordingly, if the buyer is unable or unwilling to accept and pay for the goods, the seller may repudiate the contract and retain the deposit (*a*). If the seller is unable or unwilling to deliver the goods, or to pass a good title thereto, the buyer may repudiate the contract and recover the deposit (*b*). The buyer may also

gives credit to be secured by bill. The question is a matter of intention whether the contract is a cash or a credit transaction.

(*q*) *Schneider v. Foster* (1857), 2 H. & N. 4. The buyer has elected to pay cash, and such election is irrevocable (*ibid.*; *Rugg v. Weir* (1864), 16 C. B. (N. S.) 471, *per WILLES, J.*).

(*r*) *Wallingford v. Mutual Society* (1880), 5 App. Cas. 685; *Sterne v. Beck* (1863), 1 De G. J. & Sm. 595, C. A. (mortgage); *Protector Loan Co. v. Grice* (1880), 5 Q. B. D. 592, C. A. Such a provision is often found in hire-purchase contracts; see, generally, titles BAILMENT, Vol. I., pp. 554 *et seq.*; BILLS OF SALE, Vol. III., pp. 12, 13.

(*s*) *Mavor v. Payne* (1825), 3 Bing. 285; *Bartholomew v. Markwick* (1864), 15 C. B. (N. S.) 711. The seller can also recover damages for non-acceptance of the residue (*Wayne's Merthyr Steam Coal and Iron Co. v. Morewood & Co.* (1877), 46 L. J. (Q. B.) 746; *Foster v. Eades* (1860), 2 F. & F. 103). Damages for non-acceptance are "a sum payable, not under the contract, but due and payable as soon as the contract is broken" (*Wayne's Merthyr Steam Coal and Iron Co. v. Morewood & Co.*, *supra*, *per LUSH, J.*, at p. 749). As to damages for non-acceptance generally, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 50; pp. 267, 268 *post*. If the seller does not elect to rescind, the provision of credit is binding upon him, even although the buyer has been guilty of fraud (*Ferguson v. Carrington* (1829), 9 B. & C. 59; *Strutt v. Smith* (1834), 1 Cr. M. & R. 312). *A fortiori* he cannot recover the price at once where the buyer has not repudiated (*Wayne's Merthyr Steam Coal and Iron Co. v. Morewood & Co.*, *supra*).

(*t*) *Howe v. Smith* (1884), 27 Ch. D. 89, C. A.; see *ibid.*, at pp. 101 *et seq.*, where the history of earnest, which is identical with a deposit, is traced by FRY, L. J.; *Soper v. Arnold* (1889), 14 App. Cas. 429, 433—435; *Ockenden v. Henly* (1858), E. B. & E. 485; *Hall v. Burnell*, [1911] 2 Ch. 551. The fact that the deposit is in the hands of a stakeholder is immaterial (*Hall v. Burnell*, *supra*).

(*a*) *Howe v. Smith*, *supra*; *Fitt v. Cassanet* (1842), 4 Man. & G. 898 (sale of palm oil scrapings); *Hall v. Burnell*, *supra*.

(*b*) *Walstab v. Spottiswoode* (1846), 15 M. & W. 501 (shares); *Gosbell v. Archer* (1835), 2 Ad. & El. 500; *Warren v. Moore* (1898), 14 T. L. R. 497,

SECT. 4.
Payment.

recover it where, without the default of either party, the contract is rescinded by either party pursuant to an express power in the contract in that behalf (c).

SUB-SECT. 4.—Interest on Price.

Payable by
agreement.

419. Interest on the price of the goods is *prima facie* not payable (d); but it may be payable by agreement (e).

An agreement by the buyer to pay interest on the price may be inferred from the course of dealing between the parties, or from usage of trade (f).

Where bill or
note to be
given.

420. When the goods are to be paid for by a bill of exchange or promissory note, and the bill or note is not given or made, an agreement on the part of the buyer is inferred to pay interest on the price from the time when the bill or note would have matured (g).

C. A. (sale of land); compare *Ashworth v. Mounsey* (1853), 9 Exch. 175 (no default by vendor); *Beavan v. M'Donnell* (1854), 9 Exch. 309 (no default by vendor; lunatic buyer). The buyer is not entitled to interest on the deposit (*Walker v. Constable* (1798), 1 Bos. & P. 306; *Frühling v. Schroeder* (1835), 2 Bing. (N. C.) 77).

(c) *Whitbread & Co., Ltd. v. Watt*, [1902] 1 Ch. 835, C. A. (purchaser's lien on land for deposit).

(d) *Gordon v. Swan* (1810), 2 Camp. 429, n.; 12 East, 419; *Callon v. Bragg* (1812), 15 East, 223 (money lent); *Higgins v. Sargent* (1823), 2 B. & C. 348 (policy of insurance). The rule is the same even where a balance is struck (*Chalie v. York (Duke)* (1806), 6 Esp. 45); and see, generally, title MONEY AND MONEY-LENDING, Vol. XXI., p. 37.

(e) *Harrison v. Allen* (1824), 2 Bing. 4.

(f) *Re Anglesey (Marquis), Willmot v. Gardner*, [1901] 2 Ch. 548, C. A., overruling *Re Lloyd Edwards, Williams v. Trench* (1891), 61 L. J. (CH.) 22; *De Havilland v. Bowerbank* (1807), 1 Camp. 50, per Lord ELLENBOROUGH, C.J.; *Bruce v. Hunter* (1813), 3 Camp. 467 (agent); *Ikin v. Bradley* (1818), 2 Moore (C. P.), 206, Ex. Ch. (bank deposit); *Eaton v. Bell* (1821), 5 B. & Ald. 34 (compound); *Rhodes v. Rhodes* (1860), John. 653. So, too, as the price is a debt, interest may be awarded by way of damages under the conditions prescribed by the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 28, in the case of other debts; see titles DAMAGES, Vol. X., p. 332, note (b); MONEY AND MONEY-LENDING, Vol. XXI., p. 38. In Scotland, interest runs from the date of tender or delivery of the goods, or, as the case may be, from the date when the price was payable; and the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 49 (3), saves the Scottish rule.

(g) *Becher v. Jones* (1810), 2 Camp. 428, n., Ex. Ch.; *Porter v. Palsgrave* (1810), 2 Camp. 472; *Slack v. Lowell* (1810), 3 Taunt. 157; *Marshall v. Poole* (1810), 13 East, 98; *Farr v. Ward* (1837), 3 M. & W. 25; *Davis v. Smyth* (1841), 8 M. & W. 399.

Part V.—Rights of Unpaid Seller against the Goods.

SECT. 1.—*In General.*

SECT. 1. In General.

421. Subject to the provisions of the Act (*h*) and of any statute in that behalf (*i*), notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has, by implication of law (*k*), a lien on the goods for the price while he is in possession (*l*) of them; in case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession (*m*) of them; and, subject to certain statutory limitations (*n*), a right of resale.

Unpaid seller's three rights.

422. The seller (*o*) of goods is deemed to be an "unpaid seller" within the meaning of the Act, when the whole of the price has not been paid or tendered (*p*); or when a bill of exchange, or other negotiable instrument, has been received as conditional payment (*q*), and the condition on which it was received has not

Meaning of "unpaid seller."

(*h*) *I.e.*, Sale of Goods, Act 1893 (56 & 57 Vict. c. 71); see *ibid.*, ss. 41—43 (lien), 44—46 (stoppage *in transitu*), 47 (dispositions by buyer), 48 (resale by seller), 55 (no lien etc. contrary to express agreement etc.).

(*i*) See Factors Act, 1889 (52 & 53 Vict. c. 45), ss. 8 (disposition by seller in possession), 9 (disposition by buyer in possession) (discussed pp. 199 *et seq.*, *ante*); Factors Act, 1889 (52 & 53 Vict. c. 45), s. 10 (disposition by buyer being transferee of document of title). These provisions are substantially identical with the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 25 (1), (2), 47, proviso, respectively.

(*k*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 39 (1).

(*l*) In this case the buyer has no possession, actual or constructive. As to the seller's lien, see pp. 246 *et seq.*, *post*.

(*m*) In this case the seller, by delivering the goods to a carrier, has given the buyer constructive, but not actual, possession. As to stoppage *in transitu*, see pp. 247 *et seq.*, *post*.

(*n*) See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 48; and, as to resale, see pp. 263 *et seq.*, *post*.

(*o*) Including an alien enemy trading with a British subject who has a licence from the Crown (*Fenton v. Pearson* (1812), 15 East, 419 (stoppage *in transitu*)).

(*p*) *Hodgson v. Loy* (1797), 7 Term Rep. 440; *Feise v. Wray* (1802), 3 East, 93 (stoppage); *Milgate v. Kebble* (1841), 3 Man. & G. 100 (lien); *Nicholls v. Hart* (1831), 5 C. & P. 179 (payment by acceptance of composition). The price must of course be due: "There can be no lien without an immediate right of action for the debt" (*Raitt v. Mitchell* (1815), 4 Camp. 146, *per* Lord ELLENBOROUGH, C.J., at p. 150). The existence of a set-off without an agreement to set off is not a payment of the debt (*Pinnock v. Harrison* (1838), 3 M. & W. 532); and an offer by the creditor to set off a debt due from the person having a lien does not amount to a tender so as to discharge the lien (*Clarke v. Fell* (1833), 4 B. & Ad. 404). The "whole of the price" mentioned in the text, *supra*, is the price of all the goods where the contract is entire; in severable contracts it would, as a rule, be only the apportioned price of such part of the goods as is retained; see p. 240, *post*. As to tender, see title CONTRACT, Vol. VII., pp. 417 *et seq.*

(*q*) As to payment by negotiable instrument, see p. 234, *ante*; and see, generally, title CONTRACT, Vol. VII., pp. 447, 449.

SECT. 1. been fulfilled by reason of the dishonour of the instrument (*r*)
In General. or otherwise (*s*).

If the buyer become insolvent, the fact that the seller has negotiated the buyer's acceptance taken as conditional payment, and that the instrument is outstanding, does not prevent the seller being an unpaid seller (*t*).

Seller, position when unpaid on account current.

423. Where there is an unsettled account current between the parties—

(1) If the seller appropriates goods to the buyer specifically on account of a debit balance then existing against him, he cannot exercise any rights of an unpaid seller against those goods by reason that the balance of the account may subsequently be reversed in his favour (*a*);

(2) If the seller draws upon the buyer specifically against particular goods, he does not lose his rights as unpaid seller in respect thereof merely because it is uncertain at the time when he exercises such rights whether the balance of the account is or is not in his favour (*b*): it lies upon the buyer to prove the negative (*c*).

Seller's rights ordinarily indivisible.

424. The unpaid seller's rights extend over every part of the goods for the price of all of them (*d*), except where, by the terms of the contract or otherwise, the price has been apportioned (*e*). If, however, the buyer becomes insolvent, the unpaid seller's rights are, by implication of law and notwithstanding the apportionment

(*r*) *Feise v. Wray* (1802), 3 East, 93; *Griffiths v. Perry* (1859), 1 E. & E. 680; *Gunn v. Bolckow, Vaughan & Co.* (1875), 10 Ch. App. 491, *per* MELLISH, L.J., at p. 501; *Re Nathan, Ex parte Stapleton* (1879), 10 Ch. D. 586, C. A. The words "or otherwise" seem to contemplate the case of the insolvency of the buyer during the period of credit, as in *Valpy v. Oakeley* (1851), 16 Q. B. 941; *Griffiths v. Perry, supra*.

(*s*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 38 (1). Where the bill is running there is no debt, and so the seller is paid. So also where the bill, although it may be overdue, is outstanding in the hands of an indorsee or holder. The case of the buyer's insolvency is an exception; see the cases cited in note (*t*), *infra*.

(*t*) *Miles v. Gorton* (1834), 2 Cr. & M. 504, 512; *Gunn v. Bolckow, Vaughan & Co., supra*, overruling on this point *Bunney v. Poyntz* (1833), 4 B. & Ad. 568; *Re Defries (J.) & Sons, Ltd., Eichholz v. Defries (J.) & Sons, Ltd.*, [1909] 2 Ch. 423.

(*a*) This proposition may, it is submitted, be gathered from *Vertue v. Jewell* (1814), 4 Camp. 31, as explained by Lord ELLENBOROUGH, C.J., in *Patten v. Thompson* (1816), 5 M. & S. 350, at p. 360. *Vertue v. Jewell, supra*, was a case of stoppage *in transitu*, but the same principle should apply generally; see also *Smith v. Bowles* (1797), 2 Esp. 578 (remittance of money in payment of debt).

(*b*) *Wood v. Jones* (1825), 7 Dow. & Ry. (K. B.) 126 (stoppage *in transitu*); see also *The Tigress* (1863), Brown. & Lush. 38.

(*c*) *Wood v. Jones, supra, per* ABBOTT, C.J., at p. 129.

(*d*) *Wentworth v. Oulthwaite* (1842), 10 M. & W. 436, 452; *Payne v. Shadbolt* (1808), 1 Camp. 427 (lien); *Marks v. Laheé* (1837), 3 Bing. (N. C.) 408 (engraver's lien); *Coombs v. Noad* (1842), 10 M. & W. 127 (fuller). It is conceived that, in the case of entire contracts, "the whole of the price" in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 38 (1) (*a*), means the price of all the goods; see note (*p*), p. 239, *ante*.

(*e*) As in the case of instalment contracts, where the instalments are to be separately paid for. In such cases the seller's rights are apportioned

of the price, exercisable over every portion of the goods not paid for in respect of any part of the price of the goods due under the contract (f).

SECT. 1.
In General.

425. With regard to the rights of the unpaid seller against the goods (g), the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed (h), or a consignor or agent (i) who has himself paid, or is directly responsible for, the price (k).

Meaning of
"seller."

The same rights are possessed (l) by a principal consigning goods to his factor on a joint account, where the factor is a debtor to the principal for a proportion of the goods (m), by a person who has agreed to buy goods and who resells the goods, not having at the time of the resale the property in them (n), and by a surety for the buyer who has paid the price to the seller (o).

(*Re Edwards, Ex parte Chalmers* (1873), 8 Ch. App. 289, 293; *Morgan v. Bain* (1874), L. R. 10 C. P. 15, per BRETT, J., at p. 25).

(f) *Re Edwards, Ex parte Chalmers, supra.* If any portion of the goods is paid for, the seller's rights over that portion of them are of course gone (*Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.* (1877), 5 Ch. D. 205).

(g) The words of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), are "In this part of the Act," i.e., in *ibid.*, ss. 38—48.

(h) *Morison v. Gray* (1824), 2 Bing. 260 (stoppage *in transitu*). Although BEST, C.J. (*ibid.*, at p. 261), says that the transfer of the bill of lading conferred on the agent a sufficient right of property to enable him to bring trover, the real point decided was that the agent had conferred upon him a right to the possession of the goods (*Burgos v. Nascimento* (1908), 100 L. T. 71). It was not intended to overrule *Waring v. Cox* (1808), 1 Camp. 369, or *Cole v. Harden* (1803), 4 East, 211, where it was held that the agent could not bring trover or *assumpsit*.

(i) *Feise v. Wray* (1803), 3 East, 93; *Van Casteel v. Booker* (1848), 2 Exch. 691 (agent abroad); *Tucker v. Humphrey* (1828), 4 Bing. 516; *Mercantile Bank v. Gladstone* (1868), L. R. 3 Exch. 233 (agent abroad) (all cases of stoppage *in transitu*); *Hawkes v. Dunn* (1831), 1 Tyr. 413 (lien); *Falk v. Fletcher* (1865), 18 C. B. (N. S.) 403 (right of property in agent).

(k) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 38 (2). A partnership selling goods to a member of the firm is a real seller (*Re McLaren, Ex parte Cooper* (1879), 11 Ch. D. 68, C. A.).

(l) It may be that these persons fall within the words of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 38 (2), as being persons "in the position of a seller."

(m) *Newsom v. Thornton* (1805), 6 East, 17. *Kinloch v. Craig* (1790), 3 Term Rep. 783, H. L., was not a case of stoppage *in transitu* or of lien as against a buyer, but one in which a principal prevented the goods coming into his agent's possession so as to establish a lien of a factor.

(n) *Jenkyne v. Usborne* (1844), 7 Man. & G. 678. "Seller" in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), includes a person who agrees to sell (*ibid.*, s. 62 (1); see p. 121, *ante*). *Quære*, however, whether this particular case does not rather fall under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 39 (2); see p. 258, *post*).

(o) A surety had no right of stoppage *in transitu* at common law (*Siffken v. Wray* (1806), 6 East, 371), but it was decided in *Imperial Bank v. London and St. Katharine Docks Co.* (1877), 5 Ch. D. 195, that, having paid the price, an agent of the buyer, who was in the position of a surety for his principal, could exercise against him the seller's right of lien by virtue of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5, as the seller's lien was a "security"; compare *Re Russell, Russell v. Shoolbred* (1885), 29 Ch. D. 254, C. A.; and see *Re M'Myn, Lightbown v. M'Myn* (1886), 33 Ch. D. 575; title GUARANTEE, Vol. XV., pp. 521, 523.

SECT. 2.
Seller's
Lien.

SECT. 2.—*Seller's Lien.*

SUB-SECT. 1.—*When the Lien Exists.*

Cases in
which lien
exercised.

426. Subject to the provisions of the Act (*p*), the unpaid seller (*q*) of goods who is in possession (*r*) of them is entitled to retain possession of them until payment or tender (*s*) of the price (*t*)—

- (1) where the goods have been sold without any stipulation as to credit (*a*);
- (2) where the goods have been sold on credit, but the term of credit has expired (*b*); or
- (3) where the buyer becomes insolvent (*c*).

(*p*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 42 (part delivery intended as full delivery), 43 (1) (termination of lien), 47 (loss of lien as against buyer's disponent), 55 (effect of express agreement etc.).

(*q*) For the definition of "unpaid seller," see *ibid.*, s. 38 (1); p. 239, *ante*.

(*r*) Including the possession of the seller's servant or bailee (*Owenson v. Morse* (1796), 7 Term Rep. 64). The Act does not define "possession." The fact that the buyer is able under the contract to exercise some degree of possession or control is not inconsistent with the seller's possession under a lien. The test of the loss of lien is whether the buyer has uncontrolled possession, or not (*Lord's Trustee v. Great Eastern Railway*, [1908] 2 K. B. 54, C. A., *per* FLETCHER MOULTON, L.J., at p. 69, where the principles are considered); see *Milgate v. Kebble* (1841), 3 Man. & G. 100 (seller gives inner, but retains outer, key); *Re Westlake, Ex parte Willoughby* (1881), 16 Ch. D. 604 (barge: some control by debtor); *Hilton v. Tucker* (1888), 39 Ch. D. 669 (pledge: delivery of key); *Great Eastern Railway v. Lord's Trustee*, [1909] A. C. 109 (carrier's lien: goods on creditor's land leased to debtor); see also title LIEN, Vol. XIX., pp. 4 *et seq.*

(*s*) Tender of the price duly made divests the seller's lien (*Martindale v. Smith* (1841), 1 Q. B. 389); see title LIEN, Vol. XIX., p. 28.

(*t*) Including sums, such as customs duties, treated by the contract as part of the price (*Winks v. Hassall* (1829), 9 B. & C. 372), but not including the expenses of custody in the exercise of the seller's lien (*British Empire Shipping Co. v. Somerset* (1859), E. B. & E. 353, 367, Ex. Ch.; affirmed (1860), 8 H. L. Cas. 338). But a lien may, it seems, exist even in the case of an illegal contract (*Scarfe v. Morgan* (1838), 4 M. & W. 270 (Sunday contract)), or where the debt is barred by the Statute of Limitations (*Spears v. Hartly* (1800), 3 Esp. 81; *Re Broomhead* (1847), 5 Dow. & L. 52), the maxim being *melior est conditio possidentis* (*Taylor v. Chester* (1869), L. R. 4 Q. B. 309); see title LIMITATION OF ACTIONS, Vol. XIX., p. 42; and, as to lien generally, see title LIEN, Vol. XIX., pp. 1 *et seq.*

(*a*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 41 (1) (*a*). Here the price is payable on delivery; for, where nothing is said, payment and delivery are concurrent (*ibid.*, s. 28); see p. 204, *ante*.

(*b*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 41 (1) (*b*). In this case the price has become payable on delivery (*New v. Swain* (1828), Dan. & Ll. 193).

(*c*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 41 (1) (*c*). The rule is the same whether credit has been given or not, and whether or not insolvency occurs during the period of credit (*Bloxam v. Sanders* (1825), 4 B. & C. 941; *Griffiths v. Perry* (1859), 1 E. & E. 680; *Gunn v. Bolckow, Vaughan & Co.* (1875), 10 Ch. App. 491; *Grice v. Richardson* (1877), 3 App. Cas. 319, P. C.; *Re Westlake, Ex parte Willoughby, supra*). The insolvent buyer is entitled to delivery if he pays or tenders the price of the goods in cash, whether cash was payable or not (*Re Nathan, Ex parte Stapleton* (1879), 10 Ch. D. 586, C. A.), for, in the case of insolvency, the law allows the seller to alter the terms of the contract (*Re Phoenix Bessemer Steel Co., Ex parte Carnforth, Hamatite Iron Co.* (1876), 4 Ch. D. 108, C. A., *per* JESSEL, M.R., at p. 113; see note (*r*), p. 240, *ante*). The price of previous deliveries unpaid for must be included (*Re Edwards, Ex parte*

427. The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee of the buyer (*d*).

SECT. 2.
Seller's
Lien.

SUB-SECT. 2.—*Part Delivery.*

428. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made in such circumstances as to show an agreement to waive the lien (*e*).

Where seller
the buyer's
bailee.
Not ordinarily
equal to
full delivery.

In particular, such an agreement may be inferred where the delivery is of an essential part of the goods sold, as, for example, an essential part of a machine (*f*); or where the character of the person taking delivery, or the object for which it is taken, is such as to show a common intention to treat the part delivery as a delivery of all the goods (*g*); or where the part delivery takes place in circumstances showing that the seller's agent in possession of the goods has acknowledged to the buyer that he holds the goods on his behalf (*h*).

Chalmers (1873), 8 Ch. App. 289). Default in that behalf by the buyer, or his trustee in bankruptcy, entitles the seller, after the lapse of a reasonable time, to repudiate the contract altogether (*Re Nathan, Ex parte Stapleton* (1879), 10 Ch. D. 586, C. A.).

(*d*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 41 (2); *Townley v. Crump* (1835), 4 Ad. & El. 58; *Miles v. Gorton* (1834), 2 Cr. & M. 504; *Grice v. Richardson* (1877), 3 App. Cas. 319, P. C. (all cases of insolvency); compare titles AGENCY, Vol. I., pp. 197 *et seq.*; BAILMENT, Vol. I., pp. 547 *et seq.*; LIEN, Vol. XIX., p. 8. At common law the lien was not exercisable after an attornment by the seller to the buyer if the buyer was merely in default, being solvent (*Cusack v. Robinson* (1861), 1 B. & S. 299, 308); see, further, the cases on attornment under actual receipt, cited in note (*n*), p. 132, *ante*. On the buyer's insolvency, however, the lien revived (*Grice v. Richardson, supra*). The rule has now been made a general one. The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 41 (2), is of course not applicable where the goods are sold on credit, there being during the credit no "right of lien," and it must also be read subject to *ibid.*, s. 43 (1) (see p. 244, *post*), so that, if the lien is lost, and the goods are afterwards redelivered to the seller as bailee, the seller's right does not revive. As to loss of lien, see title LIEN, Vol. XIX., pp. 28, 29. The right may also be excluded under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 55; see p. 279, *post*.

(*e*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 42; *Bunney v. Poyntz* (1833), 4 B. & Ad. 568 (seller's own possession); *Tanner v. Scovell* (1845), 14 M. & W. 28; *Dixon v. Yates* (1833), 5 B. & Ad. 313 (part delivery to satisfy sub-contract); *Re McLaren, Ex parte Cooper* (1879), 11 Ch. D. 68, C. A. (carrier retains lien for freight). The fact that the goods are in the seller's own possession is important to show that a part delivery is not intended as a complete delivery (*Miles v. Gorton* (1834), 2 Cr. & M. 504, *per* BAYLEY, B., at p. 510). The "right of lien" must exist in the first instance. Thus, if the goods are deliverable by instalments, which are not to be separately paid for, as the price is not payable until after complete delivery, no lien exists, and the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 42, has no application. If the instalments are to be separately paid for the lien is ordinarily severable; see pp. 240, 241, *ante*.

(*f*) *Re McLaren, Ex parte Cooper, supra*, *per* COTTON, L.J., at p. 75.

(*g*) *Jones v. Jones* (1841), 8 M. & W. 431 (stoppage *in transitu*: part delivery to assignee of buyer under deed for benefit of creditors), explained in *Re McLaren, Ex parte Cooper, supra*.

(*h*) *Hammond v. Anderson* (1803), 1 Bos. & P. (N. R.) 69, as explained by

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Lien.

General rule.

Particular
cases of loss.SUB-SECT. 3.—*Loss of Lien.*

429. The unpaid seller of goods loses his lien thereon when he delivers his goods to a carrier or other bailee (i) for the purpose of transmission to the buyer, without reserving the right of disposal (k) of the goods (l); when the buyer or his agent lawfully obtains possession of the goods (m); or by waiver thereof (n).

Where at the time of the contract the goods are in the possession of the seller's agent (o), the lien is lost where the agent, with the consent of the seller, acknowledges to the buyer that he holds the goods on his behalf (p).

BRAMWELL, L.J., in *Re Kiell, Ex parte Falk* (1880), 14 Ch. D. 446, C. A., at p. 456, and by BRETT, L.J., in *Re McLaren, Ex parte Cooper* (1879), 11 Ch. D. 68, C. A., at p. 74. But *Hammond v. Anderson* (1803), 1 Bos. & P. (N. R.) 69, has also been explained as a case where the buyer had, by weighing all the goods sold for an entire price, taken actual possession of all of them and then separated part (*ibid.*, per CHAMBERE, J., at p. 72; *Bunney v. Poyntz* (1833), 4 B. & Ad. 568, per PARKE, J., at p. 571; *Re McLaren, Ex parte Cooper, supra*, per COTTON, L.J., at p. 77); see also *Wood v. Tassell* (1844), 6 Q. B. 234. *Quære*, however, whether the proposition in the text is not affected by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 41 (2); see p. 243, *ante*.

(i) Such as a forwarding agent of the buyer.

(k) Under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19 (1) (see p. 181, *ante*), i.e., without constituting the carrier the seller's own agent, instead, as is generally the case, the agent of the buyer, as under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 32 (1) (see p. 222, *ante*); see *Craven v. Ryder* (1816), 6 Taunt. 433; *Ruck v. Hatfield* (1822), 5 B. & Ald. 632; *Thompson v. Trail* (1826), 6 B. & C. 36 (all cases in which the seller retained the mate's receipt for the goods). Thus, a shipment, where the bill of lading is taken to the order of the seller or his agent, is a delivery to the master as the agent of the seller (*Wait v. Baker* (1848), 2 Exch. 1, per PARKE, B.; *Gabarron v. Kreeft, Kreeft v. Thompson* (1875), L. R. 10 Exch. 274, per CLEASBY, B.). Cases in which the seller agrees to deliver the goods at their destination are similar.

(l) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 43 (1) (a).

(m) *Ibid.*, s. 43 (1) (b); *Re McLaren, Ex parte Cooper, supra*, per BRETT, L.J., at p. 71. The lien exists only while the seller is in possession (*ibid.*, s. 39 (1) (a); see p. 239, *ante*); as to marking or setting aside the goods, see *Holderness v. Shackels* (1828), 8 B. & C. 612; *Dixon v. Yates* (1833), 5 B. & Ad. 313; *Townley v. Crump* (1835), 4 Ad. & El. 58. A special interest may, by agreement etc., be reserved to the seller notwithstanding delivery (*Dodsley v. Varley* (1840), 12 Ad. & El. 632), or the seller may, by agreement, be authorised to retake the goods (*Richards v. Symons* (1845), 8 Q. B. 90); see p. 265, *post*. To divest the lien possession must be taken in the capacity of buyer or buyer's agent, not as the seller's special bailee; see pp. 245, note (o), 247, *post*. It must also be noticed that under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 43 (1) (b), the buyer must take lawful possession, whereas in *ibid.*, s. 45 (1), (2), the word "lawful" is omitted; see pp. 248, 251, *post*.

(n) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 43 (1) (c); see p. 246, *post*.

(o) Attornment by a seller himself in possession does not divest the lien (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 41 (2)); see p. 243, *ante*.

(p) See the cases cited in regard to the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 29 (3), in note (c), p. 210, *ante*; see also *Oastle v. Swords* (1861), 6 H. & N. 828, Ex. Ch., per CROMPTON, J., at p. 838 (warehouseman); *Pooley v. Great Eastern Rail. Co.* (1876), 34 L. T. 537 (delivery order unstamped); *Grigg v. National Guardian Assurance Co.*, [1891] 3 Ch. 206 (delivery order attorned to); *Poulton & Son v. Anglo-American Oil Co.* (1910), 27 T. L. R. 38 (mere notice to seller's agent of sale); compare *Slubey v. Heyward*

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Where at the time of the contract the goods are in the possession of a third person, not being the seller's agent, the lien is lost where the seller puts the goods at the disposal of the buyer, who is able, without interference (*q*) by such third person, to take actual or constructive possession of the goods (*r*).

Where at the time of the contract the goods are in the possession of the buyer himself as the seller's bailee, the lien is lost where the contract of sale is complete (*s*).

430. An unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment for the price of the goods (*t*). Effect of judgment.

431. Notwithstanding that the goods are in the possession of the buyer, there may, by express agreement, course of dealing, or usage of trade (*a*), be reserved to the seller, as between him and the buyer (*b*), a special property or interest in the goods until the price is paid, analogous to a lien (*c*). Such property or interest is not a Quasi-lien.

(1795), 2 Hy. Bl. 504; *Hammond v. Anderson* (1803), 1 Bos. & P. (N. R.) 69, as explained in *Re McLaren, Ex parte Cooper* (1879), 11 Ch. D. 68, C. A., per BRETT, L.J., at p. 74. If the sale is made through the seller's warehouseman or other bailee the completion of the contract is *ipso facto* an attornment (*Simmonds v. Humble* (1862), 13 C. B. (N. S.) 258).

(*q*) *Smith v. Chance* (1819), 2 B. & Ald. 753.

(*r*) *Tansley v. Turner* (1835), 2 Bing. (N. C.) 151; *Cooper v. Bill* (1865), 3 H. & C. 722; *Marshall v. Green* (1875), 1 C. P. D. 35 (all cases of timber sold). Marking the goods by the buyer, when coupled with other circumstances, is evidence in such cases of a constructive delivery; see *Tansley v. Turner, supra*; *Cooper v. Bill, supra*. Such a marking by a sub-buyer is evidence of the seller's assent to the sub-sale under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 47 (*Stoveld v. Hughes* (1811), 14 East, 308); see p. 259, *post*.

(*s*) Pollock and Wright on Possession in the Common Law, p. 74; Benjamin, Sale of Personal Property, 2nd ed., p. 662; 5th ed., p. 839. The completion of the contract gives the buyer the right to possess the goods as owner, and, as he is already in actual possession, his previous possession as a bailee is turned into possession as owner (*Cain v. Moon*, [1896] 2 Q. B. 283; *Kilpin v. Railey*, [1892] 1 Q. B. 582 (gift after delivery); and see title PERSONAL PROPERTY, Vol. XXII., p. 405).

(*t*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 43 (2); *Scrivener v. Great Northern Rail. Co.* (1871), 19 W. R. 388; *Houlditch v. Desanges* (1818), 2 Stark. 337; see, generally, title JUDGMENTS AND ORDERS, Vol. XVIII., p. 209; compare title LIEN, Vol. XIX., pp. 28, 29. But the seller loses his lien if he causes the goods to be taken in execution at his own suit, for the sheriff acquires possession (*Jacobs v. Latour* (1828), 5 Bing. 130); see title LIEN, Vol. XIX., p. 6, note (*x*); compare title EXECUTION, Vol. XIV., pp. 54, 55.

(*a*) Under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 55.

(*b*) As between the seller and a sub-buyer etc., the special right of the seller may be divested by a disposition by the buyer, the buyer being in possession with the consent of the seller under the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 9; see pp. 201, *ante*, 261, *post*.

(*c*) *Dodsley v. Varley* (1840), 12 Ad. & El. 632 (course of dealing: goods not to be removed from buyer's warehouse until payment); *Howes v. Ball* (1827), 7 B. & C. 481 (agreement to give seller a right of hypothec), explained by Lord BLACKBURN in *Sewell v. Burdick* (1884), 10 App. Cas. 74, at p. 96. As to rights over the goods independent of the possession, see *Richards v. Symons* (1845), 8 Q. B. 90 (right by agreement of person having lien to retake goods); *Re Hamilton, Young & Co., Ex parte Carter*, [1905] 2 K. B. 772, C. A. (letter of lien or charge); *North Western Bank*

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Lien.

Waiver of
lien.

right in security over the goods, unless the seller obtains possession thereof, but is a merely personal right enforceable by action (*d*).

432. A right of lien may be waived (*e*), expressly or by implication. It is waived by implication where the seller takes security for the price, the terms of which are inconsistent with the existence of the lien implied by law (*f*); or where by his words or conduct he dispenses with payment or tender of the price, as where he repudiates the contract by refusing (*g*) or rendering himself unable (*h*) to deliver the goods, or by otherwise conducting himself in relation to them in a manner inconsistent with the buyer's right to receive them on payment or tender (*i*); or where, without relying on his right of lien, he claims to retain the goods on some other ground (*k*); or where his conduct is such that he is deemed by law to have waived his lien as against a sub-buyer or other disponee of the buyer (*l*).

Redelivery of
goods to
seller.

433. The seller's right of lien is revested by a redelivery to him of the goods by or on behalf of the buyer (*m*) if the delivery is

v. Poynter, Son and Macdonalds, [1895] A. C. 56 (delivery of bill of lading to pledgor for special purpose); *Reeves v. Capper* (1838), 5 Bing. (N. C.) 136 (delivery to pledgor of chattel pledged); *Nyberg v. Handelaar*, [1892] 2 Q. B. 202, C. A. (delivery for special purpose by co-owner of chattel to other co-owner).

(*d*) *Sewell v. Burdick* (1884), 10 App. Cas. 47, *per* Lord BLACKBURN, at p. 96; see Blackburn, *Contract of Sale*, 1st ed., p. 41.

(*e*) As the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 43, speaks of the "loss" of the lien, *ibid.*, s. 43 (1) (*c*) (see p. 244, *ante*), seems to apply only where a lien originally exists, not, *e.g.*, where the giving of credit is one of the terms of the contract; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 41 (1) (*a*); p. 242, *ante*. As to waiver, see, further, title LIEN, Vol. XIX., pp. 28, 29.

(*f*) *Re Leith's Estate, Chambers v. Davidson* (1866), L. R. 1 P. C. 296; *Angus v. McLachlan* (1883), 23 Ch. D. 330; *Bank of Africa v. Salisbury Gold Mining Co.*, [1892] A. C. 281, P. C.

(*g*) As where he refuses to deliver except on payment of sums, the payment of which is not a condition precedent to delivery (*Jones v. Tarteletton* (1842), 9 M. & W. 675; *Kerford v. Mondel* (1859), 28 L. J. (EX.) 303; *The "Norway" (Owners) v. Ashburner* (1865), 3 Moo. P. C. C. (N. S.) 245 (carrier's lien); for the imposition of such a condition is an absolute refusal (*Davies v. Vernon* (1844), 6 Q. B. 443): *secus*, a merely excessive claim (*Scarfe v. Morgan* (1838), 4 M. & W. 270; *Allen v. Smith* (1862), 12 C. B. (N. S.) 638 (innkeeper's lien)).

(*h*) *Jacobs v. Latour* (1828), 5 Bing. 130 (goods taken in execution at suit of creditor); *Jones v. Cliff* (1833), 1 Cr. & M. 540 (goods bailed parted with); *Gurr v. Cuthbert* (1843), 12 L. J. (EX.) 309 (seller consumes goods); *Mulliner v. Florence* (1878), 3 Q. B. D. 484, C. A. (sale by party having lien).

(*i*) *Gurr v. Cuthbert*, *supra*, *per* PARKE, B.

(*k*) *Boardman v. Sill* (1808), 1 Camp. 410, n.; recognised in *Yungmann v. Briesemann* (1893), 67 L. T. 642, C. A.; *White v. Gainer* (1824), 2 Bing. 23 (no mention of lien but no inconsistent claim set up); *Cannee v. Spanton* (1844), 8 Scott (N. B.), 714; *Weeks v. Goode* (1859), 6 C. B. (N. S.) 367; *Morley v. Hay* (1828), 3 Man. & Ry. (K. B.) 396 (carrier, entitled to general lien, claims only particular lien). The case is really an instance of refusal to deliver; see note (*g*), *supra*.

(*l*) *I.e.*, under the Factors Act, 1889 (52 & 53 Vict. c. 45), ss. 9, 10; see pp. 119, *ante*, 258, 260, 261, *post*.

(*m*) A redelivery of the goods to the seller without the privity of the

made with the intention of revesting the right of lien (*n*). But the seller cannot revest in himself a right of lien once lost by the mere fact of his subsequently acquiring the possession of the goods (*o*).

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SECT. 3.—*Stoppage in Transitu.*

SUB-SECT. 1.—*When the Right Exists.*

434. Subject to the provisions of the Act (*p*), when the buyer of goods becomes insolvent (*q*), the unpaid seller (*r*) who has parted with the possession (*s*) of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods as long as they are in course of transit (*t*), and may retain them (*a*) until payment or tender of the price (*b*).

Seller may
stop goods
on buyer's
insolvency.

buyer does not revest the lien (*Sweet v. Pym* (1800), 1 East, 4 (fuller's lien)); compare title LIEN, Vol. XIX., p. 29.

(*n*) *Valpy v. Gibson* (1847), 4 C. B. 837 (redelivery of goods for packing); *Jones v. Pearle* (1723), 1 Stra. 556; *Jones v. Thurloe* (1723), 8 Mod. Rep. 172 (innkeeper's lien); *Hartley v. Hitchcock* (1816), 1 Stark. 408 (coach-maker's lien); and see *Re O'Sullivan, Ex parte Baller (Ferd.) & Co.* (1892), 61 L. J. (Q. B.) 228, where the redelivery, intended to revest the seller's lien, was a fraudulent preference, and void; see also title LIEN, Vol. XIX., p. 29.

(*o*) *Jacobs v. Latour* (1828), 5 Bing. 130 (goods sold by sheriff to creditor after execution at his suit against debtor); *Sweet v. Pym, supra.* *Allen v. Smith* (1862), 11 W. R. 440, Ex. Ch., by analogy shows that the lien would not be lost by the delivery of the goods by the seller to the buyer for a mere temporary purpose. Further, the seller may revest his lien by peaceably retaking goods fraudulently removed by the buyer (*Wallace v. Woodgate* (1824), Ry. & M. 193). Probably, however, in such a case the lien is not lost, the buyer not having obtained "lawful" possession; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 43 (1) (*b*); p. 244, *ante*; and see title LIEN, Vol. XIX., p. 29.

(*p*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 45 (duration of transit), 46 (mode of stoppage), 47 (effect of disposition of goods made by buyer), 48 (1), (2) (effect of stoppage), 55 (contrary agreement etc.).

(*q*) For the definition of "insolvency," see p. 120, *ante*.

(*r*) For the definition of "unpaid seller," see p. 239, *ante*.

(*s*) By delivering them to a carrier or other bailee for transmission, whereby the lien is lost (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 43 (1) (*a*)); see p. 244, *ante*.

(*t*) Defined in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 45 (1); see p. 248, *post*.

(*a*) So as to revest the lien, such being the effect of a stoppage *in transitu*, and not rescission of the contract (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 48 (1)); see p. 262, *post*. These words also show that stoppage *in transitu* in the strict meaning only exists where the goods have become the property of the buyer. The common law was the same at the date of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71) (*Kemp v. Falk* (1882), 7 App. Cas. 573, *per* Lord BLACKBURN, at p. 581; *Phelps, Stokes & Co. v. Comber* (1885), 29 Ch. D. 813, C. A., *per* COTTON, L.J., at p. 821).

(*b*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 44; *Lickbarrow v. Mason* (1793), 6 East, 21, n., H. L.; 1 Smith, L. C., 11th ed., p. 693, and notes; see also title CARRIERS, Vol. IV., pp. 96 *et seq.* Stoppage *in transitu* in the proper sense applies only where both property and right to possession has passed to the buyer, but not actual possession (*Gibson v. Carruthers* (1841), 8 M. & W. 321, *per* PARKE, B., at p. 335; *Lickbarrow v. Mason, supra, per* BULLER, J., at p. 27 (*n*); *Kendall v. Marshall Stevens & Co.* (1883), 11 Q. B. D. 356, C. A., *per* BRETT, L.J., at p. 364). Again, it is necessary that the goods should be in the possession of a carrier as the buyer's agent. Accordingly it is not, properly speaking,

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Stoppage in Transitu.

The right of stoppage *in transitu* is one available only against the goods themselves (c). It is therefore, for instance, not available against the proceeds of an insurance policy effected by the buyer against damage to the goods during the transit (d).

Stoppage in anticipation of buyer's insolvency.

435. Goods may be stopped *in transitu* notwithstanding that the buyer has not been found to be, or is not, insolvent at the time of the stoppage, if he be so by the time of the termination of the transit (e).

Solvent buyer's right of indemnity.

436. If, after stoppage *in transitu*, the buyer proves not to be insolvent, he is entitled to the delivery of the goods, and to receive an indemnity from the seller for any loss caused by the stoppage (f).

SUB-SECT. 2.—Duration of Transit.

"Course of transit."

437. Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission (g) to the buyer, until the buyer, or his agent in that behalf (h), takes delivery (i) of them from such carrier or other bailee (k).

stoppage *in transitu* where the seller withholds or reclaims delivery of goods the property in which has not passed to the buyer (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 39 (2) (see p. 258, *post*); *Turner v. Liverpool Docks (Trustees)* (1851), 6 Exch. 543, Ex. Ch.; *Craven v. Ryder* (1816), 6 Taunt. 433; *Moakes v. Nicolson* (1865), 19 C. B. (N. S.) 290 (seller reclaims from carrier); *Loeschman v. Williams* (1815), 4 Camp. 181 (seller reclaims from packer)); where the seller countermands an order on his own agent to deliver the goods, so as to prevent his lien being lost (*M'Ewan v. Smith* (1849), 2 H. L. Cas. 309); nor where a principal, having consigned goods to his factor, countermands the delivery by the carrier to the factor, so as to prevent the factor acquiring a lien (*Kinloch v. Craig* (1790), 3 Term Rep. 783, H. L.).

(c) *Berndtson v. Strang* (1866), 3 Ch. App. 588, *per* Lord CAIRNS, L.C., at p. 591; *Kemp v. Falk* (1882), 7 App. Cas. 573, *per* Lord SELBORNE, L.C., at p. 578; but compare the same case *sub nom. Re Kiell, Ex parte Falk* (1880), 14 Ch. D. 446, C. A., and see *Re Knight, Ex parte Golding Davis & Co., Ltd.* (1880), 13 Ch. D. 628, C. A.

(d) *Berndtson v. Strang*, *supra*.

(e) *The Constantia* (1807), 6 Ch. Rob. 321, *per* Sir W. SCOTT, at p. 326; *The Tigress* (1863), Brown. & Lush. 38, *per* Dr. LUSHINGTON, at p. 44.

(f) *The Constantia*, *supra*. The same principles no doubt apply where the stoppage is for any other reason invalid.

(g) Being the agent of the buyer, such as a forwarding agent. If the carrier or other bailee is the seller's agent the lien is not lost, and no question of stoppage *in transitu* arises.

(h) *I.e.*, an agent to keep the goods for the buyer, not an agent for transmission of them to him (*Dodson v. Wentworth* (1842), 4 Man. & G. 1080 (delivery at warehouse used by buyer); *Jobson v. Eppenheim & Co.* (1905), 21 T. L. R. 468). "A mere delivery at the place of destination is not necessarily a termination of the transit; the transit remains until the goods have come into the possession of the consignee" (*Heinekey v. Earle* (1857), 8 E. & B. 410, *per* Lord CAMPBELL, C.J., at p. 423).

(i) *I.e.*, a voluntary transfer of possession (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62(1)); see p. 119, *ante*. Although the word "lawfully" which appears in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 43 (1) (b) (see p. 244, *ante*), is here omitted, it is submitted that the buyer cannot wrongfully take possession of the goods, having

(k) For note (k), see p. 249, *post*.

Goods are thus deemed to be in course of transit so long as they remain in the possession of the carrier, or other bailee for transmission (*l*), in his capacity as such (*m*), whether the goods are actually in motion on their journey, or are lodged in any place in the course of transmission (*n*). The mere fact that the buyer travels by the same conveyance as the goods does not prevent the goods being stopped in transit (*o*).

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—

regard to the definition of delivery above cited. The point was previously doubtful; see *Whitehead v. Anderson* (1842), 9 M. & W. 518, *per* PARKE, B., at p. 534; but compare *Blackburn, Contract of Sale*, 1st ed., p. 259; 2nd ed., p. 375. It should also be noticed that under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 45 (6) (see p. 252, *post*), a wrongful refusal by the carrier to deliver terminates the transit. The inference is that a rightful refusal does not.

(*k*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 45 (1); see, in addition to the cases cited in notes (*h*), (*i*), p. 248, *ante*, and notes (*l*)—(*o*), *infra*, and cases cited on pp. 250—255, *post*, *Northey and Lewis v. Field* (1794), 2 Esp. 613 (goods on arrival warehoused in King's stores: claim by seller before sale for duties); *Fowler v. Kymer or M'Taggart* (1797), cited 3 East, 396 (delivery on buyer's ship chartered by demise); *Wright v. Lawes* (1801), 4 Esp. 82 (buyer warehouses and samples goods on arrival); *Inglis v. Usherwood* (1801), 1 East, 515 (shipment abroad on buyer's chartered ship: retaking by seller under foreign law); *Nix v. Olive* (1805), cited in *Abbott on Shipping*, 14th ed., p. 851 (similar to *Northey and Lewis v. Field*, *supra*); *Noble v. Adams* (1816), 7 Taunt. 59 (transit ended on shipment by buyer); *Tucker v. Humphrey* (1828), 4 Bing. 516 (arrival at wharf: no possession taken by buyer); *Dodson v. Wentworth* (1842), 4 Man. & G. 1080 (goods delivered by carrier at warehouse used by buyer); compare *Re Worsdell, Ex parte Barrow* (1877), 6 Ch. D. 783 (goods delivered by carrier at warehouse of carrier's agent); *Orr v. Murdock* (1851), 2 I. C. L. R. 9 (goods consigned to excise collector: lodgment with him by buyer of delivery order); *Fraser v. Witt* (1868), L. R. 7 Eq. 64 (charterparty: arrival of goods at intermediate port); *Re Whitworth, Ex parte Gibbes* (1875), 1 Ch. D. 101 (transfer by seller's agent of bill of lading on arrival of goods: possession taken); *M'Leod & Co. v. Harrison* (1880), 8 R. (Ct. of Sess.) 227 (goods to be shipped "to buyer's orders": bill of lading taken by buyer for delivery at A. for transit to B.); *Bethell v. Clark* (1888) 20 Q. B. D. 615, C. A. (goods delivered by buyer's orders to carrier for further transit); *Re Gurney, Ex parte Hughes* (1892), 67 L. T. 598 (receipt in buyer's name by dock superintendent at place of shipment); *Reid v. Snowball Co., Ltd.* (1904), 7 F. (Ct. of Sess.) 35 (goods to be shipped at M. "c.i.f. to G.": transit extends to G.); see also title CARRIERS, Vol. IV., p. 96.

(*l*) The existence of a carrier or other bailee for transmission is essential to the right of stoppage *in transitu* in a proper sense (*Gibson v. Carruthers* (1841), 8 M. & W. 321, *per* ROLFE, B., at p. 328; approved by JAMES, L.J., in *Re Cook, Ex parte Rosevear China Clay Co.* (1879), 11 Ch. D. 560, C. A., at p. 569).

(*m*) *Re McLaren, Ex parte Cooper* (1879), 11 Ch. D. 68, C. A., *per* BRETT, L.J., at pp. 73, 75, *per* JAMES, L.J., at p. 78; *Kendal v. Marshall Stevens & Co.* (1883), 11 Q. B. D. 356, *per* BRETT, L.J., at pp. 361, 364.

(*n*) *Mills v. Ball* (1801), 2 Bos. & P. 457; *James v. Griffin* (1837), 2 M. & W. 623; *Kendal v. Marshall Stevens & Co.*, *supra*, *per* BRETT, L.J., at pp. 364, 365; *Edwards v. Brewer* (1837), 2 M. & W. 375; see also title CARRIERS, Vol. IV., p. 97. "Goods can be stopped only while they are passing through channels of communication for the purpose of reaching the hands of the vendee" (*Kendal v. Marshall Stevens & Co.*, *supra*, *per* BOWEN, L.J., at p. 363). In *Scott v. Pettit* (1803), 3 Bos. & P. 469, and *Leeds v. Wright* (1803), 3 Bos. & P. 320, the goods had got into the hands of the buyer's agent.

(*o*) *Lyons v. Hoffnung* (1890), 15 App. Cas. 391.

SECT. 3.

Stoppage
in Transitu.

The course of transit of the goods may be fixed, either by the contract of sale (*p*), or by the subsequent directions of the buyer to the seller (*q*).

How fixed.

Effect of
seller's ignor-
ance or
knowledge of
destination.

438. The seller's ignorance of the destination of the goods contemplated by the buyer does not prevent the goods being in transit until arrival, if the goods were, under the contract, delivered by the seller to a carrier for transmission to such destination (*r*); but, where the goods, previously to their arrival, are delivered to the buyer or his agent to hold the goods for the buyer, the seller's knowledge of the destination does not prolong the transit until the goods arrive there (*s*).

Bill of lading
transferred
to buyer etc.

439. The mere fact that a bill of lading is transferred by the seller to the buyer (*t*), or that, by the terms of a bill of lading, the buyer (*a*) or a sub-buyer (*b*) is the shipper or consignee of the goods, does not prevent the goods being *in transitu* on and after shipment.

(*p*) *Re Love, Ex parte Watson* (1877), 5 Ch. D. 35, C. A.; *Bethell v. Clark* (1888), 20 Q. B. D. 615, C. A., *per* Lord ESHER, M.R., at p. 617.

(*q*) *Bethell v. Clark, supra, per* Lord ESHER, M.R., at p. 617; *Nicholls v. Le Feuvre* (1835), 2 Bing. (N. C.) 81.

(*r*) *Re Cock, Ex parte Rosevear China Clay Co.* (1879), 11 Ch. D. 560, C. A.

(*s*) *Valpy v. Gibson* (1847), 4 C. B. 837; *Re Isaacs, Ex parte Miles* (1885), 15 Q. B. D. 39, C. A. (goods deliverable to forwarding agent to await buyer's orders), explaining *Re Love, Ex parte Watson, supra* (bargain that goods should go to a particular destination); *Re Bruno, Silva & Son, Ex parte Francis & Co., Ltd.* (1887), 56 L. T. 577 (mate's receipt handed by seller to buyer: bill of lading in buyer's name); *Jobson v. Eppenheim & Co.* (1905), 21 T. L. R. 468; compare *Kemp v. Ismay, Imrie & Co.* (1909), 100 L. T. 996 (goods to be despatched to forwarding agent for shipment: no further orders of buyer necessary).

(*t*) *The Tigress* (1863), Brown. & Lush. 38; *Fraser v. Witt* (1868), L. R. 7 Eq. 64. Similarly, the delivery by the seller to the buyer's agent of a delivery order on the seller's agent, which the buyer transfers to the carrier as his authority to receive the goods, does not of itself amount to a taking of actual possession by the buyer's agent previously to shipment (*Jackson v. Nichol* (1839), 5 Bing. (N. C.) 508). There would seem to be no case in which the seller himself transfers a bill of lading to a sub-buyer; it may be that such a transfer would be an "assent" to a sub-sale, so as to divest a right of stoppage under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 47; see p. 258, *post*.

(*a*) *Thompson v. Trail* (1826), 6 B. & C. 36; *Lyons v. Hoffnung* (1890), 15 App. Cas. 391, 395, P. C. (buyer stated to be shipper); *Brindley & Co. v. Oilgwyn Slate Co.* (1885), 55 L. J. (Q. B.) 67; *Re McLaren, Ex parte Cooper* (1879), 11 Ch. D. 68, C. A.; *Kemp v. Ismay, Imrie & Co., supra* (buyer consignee). But goods are not in transit if the buyer, previously to shipment, obtains possession, and by taking the bill of lading in his own name sends the goods on a fresh transit (*Bethell v. Clark* (1887), 19 Q. B. D. 553, *per* CAVE, J., at p. 562; *Re Bruno, Silva & Son, Ex parte Francis & Co., Ltd., supra*; see also *Re Gurney, Ex parte Hughes* (1892), 67 L. T. 598 (dock company's receipt given to buyer).

(*b*) *Re Knight, Ex parte Golding, Davis & Co., Ltd.* (1880), 13 Ch. D. 628, C. A. The privity of the seller to this transaction would not seem to be an "assent" to the sub-sale under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 47; see p. 259, *post*.

440. If the buyer or his agent in that behalf obtains (c) delivery (d) of the goods before their arrival at the appointed destination, the transit is at an end (e).

SECT. 3.
Stoppage
in Transitu

441. If, after the arrival of the goods at the appointed destination (f), the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf, and continues in possession of them as bailee for the buyer or his agent, the transit is at an end, and it is immaterial that a further destination (g) for the goods may have been indicated by the buyer (h).

Possession obtained before arrival at destination.
Attornment by carrier to buyer after arrival.
Capacity in which buyer's agent takes delivery.

442. Where the goods are delivered by the seller or a carrier to an agent on behalf of the buyer, the question whether the goods, while in the possession of such agent, are in transit, or whether the transit has ended by the delivery of the goods to him, depends upon whether the agent is a bailee for the transmission (i) of the goods

(c) As to the effect of a demand of delivery before the arrival of the goods at the destination, see *Sale of Goods Act, 1893* (56 & 57 Vict. c. 71), s. 45 (6); p. 252, *post*.

(d) I.e., a voluntary transfer of possession (*Sale of Goods Act, 1893* (56 & 57 Vict. c. 71), s. 62 (1)); see p. 119, *ante*.

(e) *Sale of Goods Act, 1893* (56 & 57 Vict. c. 71), s. 45 (2); *Mills v. Ball* (1801), 2 Bos. & P. 457, *per* Lord ALVANLEY, C.J., at p. 461; *Whitehead v. Anderson* (1842), 9 M. & W. 518, 534; *Kendal v. Marshall Stevens & Co.* (1883), 11 Q. B. D. 356, C. A., *per* COTTON, L.J., at p. 366, *per* BOWEN, L.J., at p. 369. The rule in the text covers the case where the buyer obtains possession of the goods constructively by the attornment of the carrier to him (*Foster v. Frampton* (1826), 6 B. & C. 107; compare *Coventry v. Gladstone* (1868), L. R. 6 Eq. 44, where evidence of attornment was wanting); see also title CARRIERS, Vol. IV., pp. 96, 97.

(f) The mere arrival of the goods at the appointed destination is insufficient to end the transit; there must be a delivery to the buyer or his agent (*Sale of Goods Act, 1893* (56 & 57 Vict. c. 71), s. 44; see p. 248, *ante*), or the carrier must agree to hold the goods for the buyer or his agent (*Bethell v. Clark* (1887), 19 Q. B. D. 553, *per* CAVE, J., at p. 561). As to attornment by the carrier before the arrival of the goods, see note (e), *supra*.

(g) *Kendal v. Marshall Stevens & Co.*, *supra*.

(h) *Sale of Goods Act, 1893* (56 & 57 Vict. c. 71), s. 45 (3); *Re McLaren, Ex parte Cooper* (1879), 11 Ch. D. 68, C. A.; see title CARRIERS, Vol. IV., p. 97. The assent of both carrier and buyer to the attornment is necessary (*Foster v. Frampton* (1826), 6 B. & C. 107 (acts of ownership by buyer with consent of carrier); *Wentworth v. Outhwaite* (1842), 10 M. & W. 436 (notice by carrier that goods remained at rent); *Re Millo, Ex parte Gouda* (1872), 20 W. R. 981; *Kendal v. Marshall Stevens & Co.*, *supra* (carrier's advice note to buyer); *James v. Griffin* (1837), 2 M. & W. 623; *Re Worsdell, Ex parte Barrow* (1877), 6 Ch. D. 783 (no assent by buyer); *Bolton v. Lancashire and Yorkshire Rail. Co.* (1866), L. R. 1 C. P. 431 (no assent by either); *Taylor v. Great Eastern Rail. Co.* (1901), 17 T. L. R. 394 (buyer's assent presumed from delay); *Whitehead v. Anderson* (1842), 9 M. & W. 518; followed in *Coventry v. Gladstone* (1868), L. R. 6 Eq. 44; *Jackson v. Nichol* (1839), 5 Bing. (N. C.) 508 (no assent by carrier)); but see note (g), p. 252, *post*. It is doubtful whether the simple act of allowing the goods to be marked or samples to be taken from them is sufficient to show an attornment, unless such acts are accompanied by other circumstances (*Whitehead v. Anderson, supra*, at p. 535; compare *Foster v. Frampton, supra*, where such circumstances existed). The fact that the carrier retains his lien for the freight is relevant, but not conclusive, to disprove an attornment (*Re McLaren, Ex parte Cooper, supra*; *Kemp v. Falk* (1882), 7 App. Cas. 573, *per* Lord BLACKBURN, at p. 584; *Allan v. Gripper* (1832), 2 Cr. & J. 218).

(i) *Smith v. Goss* (1808), 1 Camp. 282 (buyer's authority to seller to

SECT. 3.
**Stoppage
 in Transitu.**

on the transit, or an agent to hold the goods at the disposal of the buyer (*k*). The fact that the seller has the buyer's authority to instruct the agent as to the further transmission of the goods, or that, on the contrary, at the time of the contract of sale the agent has received or will receive orders from the buyer with regard to such transmission, is relevant to prove or disprove, respectively, that the goods, while in the possession of the agent, are in transit (*l*).

Effect of
 rejection of
 goods by
 buyer.

443.—If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them (*m*), the transit is not deemed to be at an end, even if the seller has refused to receive them back (*n*).

Such a rejection by the buyer is not a fraudulent preference of the seller within the meaning of the law of bankruptcy (*o*).

Wrongful
 refusal by
 carrier to
 deliver.

444. Where the carrier or other bailee (*p*) wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end (*q*).

instruct agent as to transmission); *Coates v. Railton* (1827), 6 B. & C. 422; *Nicholls v. Le Feuvre* (1835), 2 Bing. (N. C.) 81; *Kemp v. Ismay, Imrie & Co.* (1909), 14 Com. Cas. 202 (delivery to forwarding agent for transmission abroad); *Bethell v. Clark* (1888), 20 Q. B. D. 615, C. A. (goods ordered to be shipped on the D. for abroad); compare *Rowe v. Pickford* (1817), 8 Taunt. 83 (no ulterior destination named to seller: delivery to buyer's warehouseman); *M'Leod & Co. v. Harrison* (1880), 8 R. (Ct. of Sess.) 227 (goods by bill of lading deliverable to A. at R. "to be forwarded in transit to M.").

(*k*) *Dixon v. Baldwin* (1804), 5 East, 175 (forwarding agents to await buyer's orders); *Leeds v. Wright* (1803), 3 Bos. & P. 320; *Scott v. Pettit* (1803), 3 Bos. & P. 469 (delivery to buyer's packer); *Valpy v. Gibson* (1847), 4 C. B. 837; *Kendal v. Marshall Stevens & Co.* (1883), 11 Q. B. D. 356, C. A.; *Re Isaacs, Ex parte Miles* (1885), 15 Q. B. D. 39, C. A.; *Jobson v. Eppenheim & Co.* (1905), 21 T. L. R. 468 (forwarding agents).

(*l*) *Kendal v. Marshall Stevens & Co.*, *supra* (buyer's orders); *Bethell v. Clark*, *supra* (buyer's orders not necessary: three forwarding agents); followed in *Kemp v. Ismay, Imrie & Co.*, *supra*; *Valpy v. Gibson*, *supra*, at p. 865; *Smith v. Goss*, *supra* (seller's orders).

(*m*) *I.e.*, in his capacity of carrier or bailee for transmission. It is otherwise if the buyer reject the goods after his agent has taken possession of them. This does not prolong the transit (*Jobson v. Eppenheim & Co.*, *supra*).

(*n*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 45 (4); *Bollon v. Lancashire and Yorkshire Rail. Co.* (1866), L. R. 1 C. P. 431; *James v. Griffin* (1837), 2 M. & W. 623 (buyer taking temporary possession coupled with rejection); see *Booker & Co. v. Milne* (1870), 9 Macph. (Ct. of Sess.) 314; and see also title CARRIERS, Vol. IV., p. 98. If the buyer intends not to take the goods (although his intention is not communicated to the carrier), the goods remain in the possession of the carrier as such (*James v. Griffin*, *supra*).

(*o*) *Re McLaren, Ex parte Cooper* (1879), 11 Ch. D. 68, C. A., *per* BRETT, L.J., at p. 73. Even a transfer by an insolvent buyer to the seller, with his consent, of the bill of lading, although it may be a fraudulent preference, has probably not the effect of divesting the seller's right of stoppage (*Re O'Sullivan, Ex parte Baller (Ferd.) & Co.* (1892), 61 L. J. (Q. B.) 228, *per* COLLINS, J., at p. 233 (VAUGHAN WILLIAMS, J., dissenting); approved by BIGHAM, J., in *Re Johnson, Ex parte Wright* (1908), 99 L. T. 305, but reversed on another point (1892), 67 L. T. 464, C. A. See, generally, title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 280 *et seq.*

(*p*) *I.e.*, for the purpose of transmission of the goods to the buyer (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 45 (1); see p. 248, *ante*).

(*q*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 45 (6); *Bird v.*

445. Where part of the goods is sent by one route and part by another, and the part sent by one route is stopped *in transitu*, the stoppage is not effective to entitle the seller to the possession of the goods sent by the other route, the transit whereof has terminated, although both parcels of goods may have been bought under an entire contract (r), but it entitles the seller to exercise his lien on the goods stopped for the price of the goods sent by the other route (s).

SECT. 3.
Stoppage
in *Transitu*.
—
Goods sent
by separate
routes.

446. A delivery of the goods on board the buyer's own vessel (t), whether it be a general ship or one sent specially for the goods, is not a delivery to the master as agent to take delivery for the buyer, if the master receives the goods in the capacity of a carrier only (a). If the goods are so received, the fact that the master has no authority to receive the goods except as an agent to take delivery for the buyer is immaterial (b).

Delivery on
buyer's vessel.

In particular, a reservation by the seller, on the shipment of the

Brown (1850), 4 Exch. 786 (demand on arrival of goods by buyer's assignees, and tender of freight); see title CARRIERS, Vol. IV., p. 98. A refusal is wrongful where the buyer is entitled to demand delivery; and Lord BLACKBURN suggests that "the actual refusal must be so tortious as to render the middleman liable in trover"; see Blackburn, *Contract of Sale*, 1st ed., p. 260; 2nd ed., p. 375. The language of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 45 (6), is wide enough to cover the case of a refusal to deliver the goods on a demand made before the arrival of the goods at their destination, a demand which a consignee is competent to make (*London and North Western Rail. Co. v. Barlett* (1861), 7 H. & N. 400; *Scothorn v. South Staffordshire Rail. Co.* (1853), 8 Exch. 341; *Cork Distilleries Co. v. Great Southern and Western Rail. Co. (Ireland)* (1874), L. R. 7 H. L. 269). But the carrier will be entitled to demand his full freight (*Metcalf v. Britannia Ironworks Co.* (1876), 1 Q. B. D. 613, per MELLOR and QUAIN, J.J., at p. 632). In *Jackson v. Nichol* (1839), 5 Bing. (N. C.) 508, 519 (carrier's wrongful refusal to deliver on tender of freight), however, a demand of the goods before the end of the journey was held to be insufficient to terminate the transit, there being no actual delivery and no attornment by the carrier (see title CARRIERS, Vol. IV., p. 97), but it is doubtful whether this case is good law; see also *Coventry v. Gladstone* (1868), L. R. 6 Eq. 44 (freight paid: carrier's promise to deliver when goods could be got at); title CARRIERS, Vol. IV., p. 98.

(r) *Wentworth v. Outhwaite* (1842), 10 M. & W. 436.

(s) *Ibid.* The lien of a seller is ordinarily indivisible; see p. 240, *ante*.

(t) Similar principles apply to the buyer's cart, waggon, or other vehicle. It does not follow, as a proposition of law, that goods delivered to the buyer's own vehicle are not *in transitu* (*Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.* (1877), 5 Ch. D. 205, per JESSEL, M.R., at p. 219); but there is of course no transit after delivery if the vehicle is the destination of the goods (*Berndtson v. Strang* (1867), L. R. 4 Eq. 481, per WOOD, V.-C., at p. 489).

(a) *Turner v. Liverpool Docks (Trustees)* (1851), 6 Exch. 543, Ex. Ch.; *Schotsmans v. Lancashire and Yorkshire Rail. Co.* (1867), 2 Ch. App. 332. "Although there is an actual delivery to the vendee's agent, the vendor may annex terms to such delivery, and so prevent it from being absolute and irrevocable" (*ibid.*, per Lord CHELMSFORD, L.C., at p. 335); see also *Berndtson v. Strang*, *supra*, per WOOD, V.-C., at p. 491). If the seller, intending to deliver the goods to a carrier, by mistake delivers on board the buyer's own vessel, such delivery is perhaps not a delivery to the buyer (*Schotsmans v. Lancashire and Yorkshire Rail. Co.*, *supra*, per Lord CHELMSFORD, L.C., at p. 335).

(b) *Turner v. Liverpool Docks (Trustees)*, *supra*, at p. 565.

SECT. 3.

Stoppage
in Transitu.Delivery on
chartered
vessel.

goods on board the buyer's vessel, of the right of disposal of the goods (c) shows that the goods are delivered to the master of the vessel in the capacity of a carrier, notwithstanding that the seller may afterwards transfer the bill of lading to the buyer (d).

447. When goods are delivered to a vessel (e) chartered by the seller the goods are, nevertheless, in transit (f), unless by the terms of the charter there is a demise of the ship, so that the seller is the temporary owner thereof; if this is so, the seller preserves his lien, and no question of stoppage *in transitu* arises (g).

When goods are delivered to a vessel (e) chartered by the buyer, it depends on the circumstances of the particular case whether the goods are in the possession of the master as a carrier, or as agent to the buyer (h). If under the terms of the charter the buyer is the temporary owner of the ship under a demise thereof, a delivery of the goods on board the ship is a delivery to the master as agent for the buyer, unless (i) the seller has reserved the right of disposal (k); if the buyer is not the temporary owner of the ship, the goods are *prima facie* in transit (l).

(c) As where he takes the bill of lading to his own order, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19 (2); see p. 181, *ante*.

(d) *Schotsmans v. Lancashire and Yorkshire Rail. Co.* (1867), 2 Ch. App. 332, *per* Lord CHELMSFORD, L.C., at p. 336; *Berndtson v. Strang* (1867), L. R. 4 Eq. 481. Such a transfer may pass the property; *Re Tappenbeck, Ex parte Banner* (1876), 2 Ch. D. 278, 288, C. A. But the right of stopping the goods *in transitu* remains, as being a right exercisable as against the possession (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 44; see p. 247, *ante*).

(e) Similar principles apply to the seller's or buyer's hired vehicles. See *Trinity House (Master, etc.) v. Olark* (1815), 4 M. & S. 288, where Lord ELLENBOROUGH, at p. 299, comparing a ship and a cart, shows that possession of the goods may pass to the hirer, notwithstanding that the cart is in charge of the latter's waggoner.

(f) *Gurney v. Behrend* (1854), 3 E. & B. 622; *Re McLaren, Ex parte Cooper* (1879), 11 Ch. D. 68, C. A.; *Fraser v. Witt* (1868), L. R. 7 Eq. 64; and the seller's lien is lost where the charter is not by demise (*Gurney v. Behrend, supra*, at p. 633).

(g) The master being the seller's agent to deliver, so that the seller still retains possession through his agent, the buyer has not even constructive possession. As to the chartering of ships generally, see title SHIPPING AND NAVIGATION.

(h) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 45 (5); *Meletopolu v. Ranking* (1842), 6 Jur. 1095 (statement in bill of lading of shipment by buyer).

(i) Under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19; see p. 181, *ante*.

(k) *Fowler v. Kymer or M'Taggart* (1797), cited in 1 East, 522, and 3 East, 396; and by WOOD, V.-C., in *Berndtson v. Strang, supra*, at p. 491. In charters by demise "the owner divests himself of all control and possession of the vessel for the time being in favour of another, who has all the use and benefit of it" (*Fraser v. Marsh* (1811), 13 East, 238, *per* Lord ELLENBOROUGH, C.J.); as to charters conferring a temporary ownership, see, generally, *Fraser v. Marsh, supra* (demise for several voyages); *Trinity House (Master, etc.) v. Olark* (1815), 4 M. & S. 288; *Saville v. Champion* (1819), 2 B. & Ald. 503 (no demise); *Meiklereid v. West* (1876), 1 Q. B. D. 428; *Baumwoll Manufactur von Carl Scheibler v. Furness, [1893] A. C. 8*.

(l) *Bohllingk v. Inglis* (1803), 3 East, 381 (bill of lading made out to buyer); *Berndtson v. Strang, supra* (bill of lading to seller's order transferred

448. Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made in such circumstances as to show an agreement^(m) to give up possession of the whole of the goods⁽ⁿ⁾. The fact that the carrier retains his lien for the freight of the goods is relevant to show that a part delivery is not intended to be a constructive delivery of all the goods^(o).

SECT. 3.
Stoppage
in Transitu.
Effect of part
delivery.

SUB-SECT. 3.—Exercise of Right.

449. The unpaid seller may^(p) exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are^(q). Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and in such

Modes of
stoppage.

to buyer): *Re Cock, Ex parte Rosevear China Clay Co.* (1879), 11 Ch. D. 560, C. A. (verbal charter: no bill of lading).

(m) As the goods are *ex hypothesi* in the possession of a carrier, the agreement "to give up possession" would seem to be one between the person taking delivery and the carrier, and not between such person and the seller; and the rule has been so expressly stated (*Re McLaren, Ex parte Cooper* (1879), 11 Ch. D. 68, 78, C. A.).

(n) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 45 (7); *Tanner v. Scovell* (1845), 14 M. & W. 28 (part delivery by wharfinger: no evidence of his attornment to buyer); *Re Piggott, Ex parte Cross* (1851), Fonbl. 215; *Re McLaren, Ex parte Cooper, supra*, at pp. 74, 77, explaining *Stubey v. Heyward* (1795), 2 Hy. Bl. 504 (attornment by carrier); *Hammond v. Anderson* (1803), 1 Bos. & P. (N. R.) 69 (a similar case: weighing by buyer of all the goods); *Mechan & Sons, Ltd. v. North Eastern Rail. Co.* (1911), 48 Sc. L. R. 987; and see title CARRIERS. Vol. IV., p. 98. The rule before the Act has been thus stated: "Delivery of part operates as a constructive delivery of the whole only where the delivery of part takes place in the course of the delivery of the whole, and the taking possession by the buyer of that part is the acceptance of constructive possession of the whole" (*Bolton v. Lancashire and Yorkshire Rail. Co.* (1866), L. R. 1 C. P. 431, *per WILLES, J.*, at p. 440). As to the effect on a lien of part delivery, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 42; p. 243, *ante*.

(o) *Re McLaren, Ex parte Cooper, supra*; *Kemp v. Falk* (1882), 7 App. Cas. 573, *per Lord BLACKBURN*, at p. 584; *Edwards v. Brewer* (1837), 2 M. & W. 375 (goods landed by carrier at neutral wharf "subject to freight and charges"). The fact that a carrier's lien exists is not, however, conclusive; the carrier's warehouse may be the destination of the goods (*Allan v. Gripper* (1832), 2 Cr. & J. 218), or the carrier may attorn to the buyer subject to the lien (*Kemp v. Falk, supra, per Lord BLACKBURN*, at p. 584). In *Crawshaw v. Eades* (1823), 1 B. & C. 181, the goods had not been weighed to ascertain the freight.

(p) The methods of stoppage here mentioned are probably not exhaustive. In *Snee v. Prescott* (1744), 1 Atk. 245, Lord HARDWICKE, L.C., at p. 250, said that the seller might recover the goods by any means not criminal. Thus, a demand of the bill of lading is a good stoppage (*Re Love, Ex parte Watson* (1877), 5 Ch. D. 35, C. A.); and in *Hutchings v. Nunes* (1863), 1 Moo. P. C. C. (N. S.) 243, taking possession of a small part of the goods in the name of the whole was treated as effectual. It has not been decided whether a notice to stop may be given to the consignee of the goods (*Phelps, Stokes & Co. v. Comber* (1885), 29 Ch. D. 813, C. A.).

(q) *Northey and Lewis v. Field* (1794), 2 Esp. 613 (notice of claim to customs officials: goods warehoused for unpaid duties).

SECT. 3.
**Stoppage
 in Transitu.**

circumstances that the principal by the exercise of reasonable diligence may communicate it to his servant or agent in time to prevent a delivery to the buyer (r).

It is not necessary for the seller to prove to the carrier that events have happened which justify a stoppage *in transitu* (s).

Duty of
 carrier on
 receipt of
 notice.

450. Where notice of stoppage *in transitu* is given by the seller to the carrier or other bailee in possession of the goods, he must (t) redeliver the goods to, or according to the directions of, the seller (a). The expenses of such redelivery must be borne by the seller (b).

If the carrier, after a valid notice of stoppage *in transitu*, delivers the goods to the buyer, he is guilty of a conversion thereof (c).

(r) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 46 (1); *Whitehead v. Anderson* (1842), 9 M. & W. 518; *Bethell v. Clark* (1888), 20 Q. B. D. 615, C. A. It is the duty of the shipowner to forward the notice (*Kemp v. Falk* (1882), 7 App. Cas. 573, *per* Lord BLACKBURN, at p. 585, disapproving of the contrary opinion of BRAMWELL, L.J., in *Re Kiell, Ex parte Falk* (1880), 14 Ch. D. 446, C. A., at p. 455). It may be that this is a duty "declared by the Act," so as to be enforceable by action under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 57.

(s) In other words the seller need not prove his right to stop: he stops at his peril (*The Tigress* (1863), Brown. & Lush. 38).

(t) A duty being here cast upon the carrier, it is enforceable by action (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 57). The action would seem to be one founded in tort, for, as the law gives the seller the right to put an end to the contract of carriage by demanding possession of the goods, a dealing by the carrier with them inconsistently with such right is wrongful (*Pontifex v. Midland Rail. Co.* (1877), 3 Q. B. D. 23, 26). The duty of the carrier is stated by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), in unqualified terms, but it would seem that he is not bound to redeliver the goods unless his freight is tendered or a tender be waived. As to waiver, see *Jones v. Tarleton* (1842), 9 M. & W. 675; *Scarfe v. Morgan* (1838), 4 M. & W. 270 (tender not waived); *Kerford v. Mondel* (1859), 28 L. J. (EX.) 303; *Thompson v. Trail* (1826), 6 B. & C. 36. The seller's right of stoppage is subordinate to the carrier's particular lien; see p. 257. *post*. As to the duty of a carrier in relation to stoppage *in transitu* of goods in his possession, generally, see title CARRIERS, Vol. IV., pp. 96 *et seq.*

(u) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 46 (2); *The Tigress, supra*, *per* Dr. LUSHINGTON, at p. 45; *Jackson v. Nichol* (1830), 5 Bing. (N. C.) 508 (trover against carrier's agent); *Mechan & Sons, Ltd. v. North Eastern Rail. Co.* (1911), 48 Sc. L. R. 987; see title CARRIERS, Vol. IV., p. 98. In case of doubt the carrier should interplead (*The Tigress, supra*); see title CARRIERS, Vol. IV., p. 99; and see, generally, title INTERPLEADER, Vol. XVII., pp. 577 *et seq.*

(b) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 46 (2); and see title CARRIERS, Vol. IV., pp. 98, 99. This provision as to expenses is new, and regulates the rights of the carrier and of the seller *inter se*, in the absence of a contract to the contrary. But, if goods are delivered freight free on the buyer's own ship, and the master has authority so to receive them, the seller, having stopped the goods, is entitled to have them redelivered without a tender of freight, as against persons to whom, without the knowledge of the seller, the buyer had sold the ship (*Mercantile Bank v. Gladstone* (1868), L. R. 3 Exch. 233).

(c) *Pontifex v. Midland Rail. Co.* (1877), 3 Q. B. D. 23; *The Tigress, supra*; *Ormonde Cycle Co. v. Bailey and Leatham* (1895), 11 T. L. R. 219; see also *Syeds v. Hay* (1791), 4 Term Rep. 260; *Mills v. Ball* (1801), 2 Bos. & P. 457 (where the wharfinger agreed expressly to hold the goods for the seller); and compare *Allan v. Gripper* (1832), 2

Where the delivery by the carrier of the goods to the buyer after a valid notice of stoppage *in transitu* has been brought about under a *bonâ fide* mistake, the mistake does not cause the delivery to terminate the transit, and the buyer is bound to return the goods to the seller on demand (*d*). If he omits to do so he is guilty of a conversion of the goods (*e*).

SECT. 3.
Stoppage
in *Transitu*.

Delivery
to buyer by
mistake.

451. Any act relied upon as a stoppage *in transitu* must have been done with that intent, and by virtue of a right in respect of the goods adverse to that of the buyer (*f*). If the act is so done, it is immaterial that it is done with the buyer's consent (*g*).

Stoppage
must be
intended as
such.

452. The seller's right of stoppage *in transitu* is subject to the particular lien of the carrier for the conveyance of the goods (*h*), but is paramount to any general lien of the carrier as against the consignee (*i*), and also to the rights of any execution creditor of the latter (*k*).

Carrier's lien
on goods
stopped.

453. A stoppage *in transitu* made on account of the seller by a person unauthorised in that behalf is effectual if it is ratified before the transit has terminated, but it cannot be ratified afterwards (*l*). The dispatch during the transit by the seller to the person making the stoppage *in transitu* of a letter of authority is,

Stoppage by
unauthorised
person.

Cr. & J. 218, where the seller's notice was too late; and see title CARRIERS, Vol. IV., p. 99. As to conversion generally, see title TROVER AND DETINUE.

(*d*) *Litt v. Cowley* (1816), 7 Taunt. 169; *Re Devezze, Ex parte Cote* (1873), 9 Ch. App. 27. The view of the court in *Litt v. Cowley, supra*, that a stoppage *in transitu* re-vested the property in the goods in the seller is of course not law (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 48 (1); see p. 262, *post*).

(*e*) *Litt v. Cowley, supra*. As to the general principles that trover lies at the suit of a person entitled to the possession of a chattel, see *Roberts v. Wyatt* (1810), 2 Taunt. 268; and see title TROVER AND DETINUE.

(*f*) *Phelps, Stokes & Co. v. Comber* (1885), 29 Ch. D. 813, C. A.; *Siffken v. Wray* (1805), 6 East, 371.

(*g*) *Mills v. Ball* (1801), 2 Bos. & P. 457; *Smith v. Goss* (1808), 1 Camp. 282; *Nicholls v. Le Feuvre* (1835), 2 Bing. (N. C.) 81 (buyer's request to his agent not to ship). These cases should be compared with *Siffken v. Wray, supra*, where the act done was not adverse, being done under a special agreement with the buyer.

(*h*) *Oppenheim v. Russell* (1802), 3 Bos. & P. 42, *per* CHAMBER, J., at p. 53; *Morley v. Hay* (1828), 3 Man. & Ry. (K. B.) 396 (wharfinger's particular lien); and see title CARRIERS, Vol. IV., p. 99. In *Mercantile Bank v. Gladstone* (1868), L. R. 3 Exch. 233, the goods were freight free by express agreement.

(*i*) *Oppenheim v. Russell, supra*; see also *Richardson v. Goss* (1802), 3 Bos. & P. 119; *Morley v. Hay, supra* (wharfinger); *Nicholls v. Le Feuvre, supra* (buyer's shipping agent acquires no lien by relanding goods on seller's account).

(*k*) *Smith v. Goss, supra*.

(*l*) *Bird v. Brown* (1850), 4 Exch. 786; see also *Siffken v. Wray, supra*. The rule is an illustration of the ordinary principle of the law of agency that a ratification is not effectual unless it be made at a time when the principal could himself do the act ratified; see title AGENCY, Vol. I., p. 177. Where the rights of third persons intervene, another principle also comes into play, that a ratification cannot prejudice a third person's vested right; see *ibid.*, p. 181.

SECT. 3. however, sufficient as a ratification, notwithstanding that the letter may not be received by the unauthorised agent until after the termination of the transit (*n*).
Stoppage in Transitu.

SECT. 4.—*Right of Withholding Delivery.*

Quasi-lien and right of stoppage.

454. Where the property in the goods has not passed to the buyer (*n*), the unpaid seller (*o*) has, in addition to his other remedies (*p*), a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer (*q*).

SECT. 5.—*Effect of Dispositions by Buyer on Seller's Rights of Lien and Stoppage in Transitu.*

SUB-SECT. 1.—*In General.*

Seller's assent to buyer's disposition.

455. Subject to the provisions of the Act (*r*), the unpaid seller's (*s*) right of lien or stoppage *in transitu* is not affected by

(*m*) *Hutchings v. Nunes* (1863), 1 Moo. P. C. C. (N. S.) 243. In *Bird v. Brown* (1850), 4 Exch. 786, the stoppage was not made by the agent until after the buyer had demanded the goods, whereas in *Hutchings v. Nunes*, *supra*, the stoppage was made by the agent in due time. *Bird v. Brown*, *supra*, in fact decided two points—(1) that the agent did not act in time on the authority dispatched in time; (2) that the principal could not, after the end of the transit, ratify another stoppage made in time, but unauthorised when made.

(*n*) "Buyer," by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1), includes one who agrees to buy; see p. 118, *ante*. The case in which the property in the goods has not passed to the seller himself at the time when he exercises his rights perhaps falls under this clause rather than under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 38 (2); see p. 241, *ante*.

(*o*) For the definition of "unpaid seller," see p. 239, *ante*.

(*p*) I.e., a right of action for the price by agreement, although the property has not passed (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 49 (2); see p. 267, *post*), or an action for non-acceptance (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 50; see p. 267, *post*); and the general right of withholding delivery where any condition precedent or concurrent to delivery has not been fulfilled (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 28; see p. 204, *ante*).

(*q*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 39 (2); *Re Edwards. Ex parte Chalmers* (1873), 8 Ch. App. 289, following *Griffiths v. Perry* (1859), 1 E. & E. 680; *Bellamy v. Davey*, [1891] 3 Ch. 540 (*quasi-lien*); *Craven v. Ryder* (1816), 6 Taunt. 433; *Reid v. Snobball (J. B.) Co., Ltd.* (1905), 7 F. (Ct. of Sess.) 35; *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q.B. 643, C.A. (right of disposal reserved: *quasi-right of stoppage*). As the right here given is "similar to and co-extensive with" the rights of lien and stoppage *in transitu*, the right of withholding delivery arises under this clause if the price is due and unpaid, or if the buyer become insolvent; see pp. 242, 247, *ante*.

(*r*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 25 (2), re-enacting the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 9 (see p. 261, *post*); the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 47, proviso, re-enacting the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 10 (see note (*o*), p. 260, *post*); and the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 55 (express agreement etc. to contrary) (see p. 279, *post*).

(*s*) For the definition of "unpaid seller," see p. 239, *ante*.

any sale or other disposition of the goods which the buyer may have made (t), unless the seller has assented thereto (a).

An assent to a disposition by the buyer is not a mere acknowledgment of the fact of the disposition (b). The seller is said to assent where, by his words or conduct, he expressly or by implication represents to the buyer's disponent that the goods will be deliverable to him free from the seller's rights as unpaid seller (b).

Such an assent may be given by the seller prospectively, as, for example, where, previously to the buyer's disposition, the seller issues to the buyer a document, intended to pass from hand to hand, and to be acted on, which, by its terms, or by usage of trade, or otherwise, contains a representation such as is above mentioned (c).

An assent given to the buyer's disponent at a time when the buyer is entitled to the possession of the goods is not revocable as against the disponent by reason of the buyer's subsequent default in payment or insolvency (d).

SUB-SECT. 2.—*Under the Factors Act.*

456. Where a document of title (e) to goods (f) has been lawfully

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Disposi-
tions by
Buyer on
Seller's
Rights of
Lien and
Stoppage
in Transitu.

Transfer by
buyer or
owner of
documents of
title.

(t) *Craven v. Ryder* (1816), 6 Taunt. 433; *Dixon v. Yates* (1833), 5 B. & Ad. 313; *M'Ewan v. Smith* (1849), 2 H. L. Cas. 309.

(a) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 47.

(b) *Mordaunt Brothers v. British Oil and Cake Mills, Ltd.*, [1910] 2 K. B. 502; *Poultton & Son v. Anglo-American Oil Co.* (1910), 27 T. L. R. 38; affirmed (1911), 27 T. L. R. 216, C. A. (mere acknowledgment of subsale); *Stoveld v. Hughes* (1811), 14 East, 308 (express assent: also marking goods by sub-buyer); *Green v. Haythorne* (1816), 1 Stark. 447 (seller's unreasonable delay in dissenting from sub-buyer's request for delivery); *Dixon v. Yates*, *supra* (gauging and coopering casks); *Dixon v. Bovill* (1856), 3 Macq. 1, H. L. (express promise to deliver to sub-buyer); *Pearson v. Dawson* (1858), E. B. & E. 448 (entry of sub-buyer's name in seller's books); *Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.* (1877), 5 Ch. D. 205 (issue by seller of transferable warrant); *Re Knight, Ex parte Golding, Davis & Co., Ltd.* (1880), 13 Ch. D. 628, C. A.; *Bellamy v. Davey*, [1891] 3 Ch. 540 (mere acknowledgment of sub-sale). An assent is immaterial, save in so far as it affects some matter with regard to which there is power to dissent. A seller can dissent to the waiver of his rights, but not to the mere fact of the buyer's disposition. Where the goods are specific, the presentation by the sub-buyer to the original seller of a delivery order, and the seller's entry in his books of the sub-buyer's name, may justify the inference that the seller has attorned to the sub-buyer; *secus*, where the goods are unascertained (*Mordaunt Brothers v. British Oil and Cake Mills, Ltd.*, *supra*).

(c) *Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.*, *supra* ("iron deliverable to G. S. & Co. or their assigns by indorsement"), a case decided before the Factors Act, 1877 (40 & 41 Vict. c. 39), which by *ibid.*, s. 5, included under documents of title such documents as those mentioned in the case; compare *Gunn v. Bolckow, Vaughan & Co.* (1875), 10 Ch. App. 491; *Farmeloe v. Bain* (1876), 1 C. P. D. 445; and *Dixon v. Bovill*, *supra*, in all of which cases there were mere engagements to deliver, and no representation of any fact by the unpaid seller.

(d) *Pearson v. Dawson*, *supra*.

(e) This expression has the same meaning as in the Factors Act, 1869 (52 & 53 Vict. c. 45) (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1)); see p. 119, *ante*. It must be remembered that, in cases of lien, the proviso to the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 47, has no application where a bill of lading (which divests lien) is transferred to the buyer or owner.

(f) See the definition in *ibid.*, s. 62 (1); p. 112, *ante*. By the Factors

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Disposi-
tions by
Buyer on
Seller's
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Lien and
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transferred (*g*) to any person (*h*) as buyer or owner (*i*) of the goods, and that person transfers the document to a person who takes the document in good faith (*k*) and for valuable consideration (*l*), then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or stoppage *in transitu* is defeated, and, if such last-mentioned transfer was by way of pledge (*m*) or other disposition (*n*) for value, the unpaid seller's right of lien or stoppage *in transitu* can only be exercised subject to the rights of the transferee (*o*).

Act, 1889 (52 & 53 Vict. c. 45), s. 1 (3), the word "goods" also includes "wares and merchandise."

(*g*) Note that, to give the buyer or owner power to deal with the document of title, it must be "lawfully" transferred to him; see p. 261, *post*. In *Nix v. Olive* (1805), cited in Abbott on Shipping, 14th ed., p. 851, a bill of lading was sent, but not transferred, to the buyer, and it was held that the sub-buyer acquired no title.

(*h*) By the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 1 (6), the word "person" includes any body of persons corporate or unincorporate.

(*i*) The word "buyer" includes one who agrees to buy (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (1); *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q. B. 643, C. A.). Where, however, the property has not passed to the buyer, the seller exercises, not a lien or right of stoppage in the strict sense, but a right of withholding delivery under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 39 (2); see p. 258, *ante*. The word "owner" may be intended to cover a case where an agent being a person "in the position of a seller" under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 38 (2) (see p. 241, *ante*), transfers a document of title to his principal.

(*k*) See p. 120, *ante*. The rule stated in the text protects an ultimate indorsee in good faith after several intermediate transfers (*Gurney v. Behrend* (1854), 3 E. & B. 622).

(*l*) At common law these words included an antecedent debt (*Leask v. Scott* (1877), 2 Q. B. D. 376, C. A., dissenting from *Rodger v. Comptoir d'Escompte de Paris* (1869), L. R. 2 P. C. 393; *The Emilien Marie* (1875), 2 Asp. M. L. C. 514; 44 L. J. (ADM.) 9), as an understanding at least generally exists that time shall be given (*Glegg v. Bromley*, [1912] 3 K. B. 474, C. A. (where the law as to assignments for antecedent debts is considered)); but no valuable consideration is given if the facts negative such an understanding (*Wigan v. English and Scottish Law Life Assurance Association*, [1909] 1 Ch. 291 (where the transferee was not aware of the transfer)); see also the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 5, which defines the consideration for a disposition "in pursuance of the Act," and includes "any valuable consideration"; see title AGENCY, Vol. I., p. 206.

(*m*) *Re Westzinthus* (1833), 5 B. & Ad. 817; *Spalding v. Ruding* (1843), 6 Beav. 376; affirmed on appeal (1846), 15 L. J. (CH.) 374; *Coventry v. Gladstone* (1868), L. R. 6 Eq. 44; *Kemp v. Falk* (1882), 7 App. Cas. 573. See the definition of "pledge" in the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 1 (5); and see note (*b*), p. 201, *ante*. In the case of a pledge in exchange for other goods, documents of title, or negotiable securities, the right of the pledgee is limited to the value of the goods given in exchange (Factors Act, 1889 (52 & 53 Vict. c. 45), s. 5); see title AGENCY, Vol. I., p. 206.

(*n*) As to the meaning of "disposition," see note (*b*), p. 201, *ante*. By the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 5, the consideration for a sale, pledge, or other disposition "in pursuance of the Act," may be an exchange. A transfer by the buyer to his factor merely to enable him to receive a cargo was held in *Patten v. Thompson* (1816), 5 M. & S. 350, not to be a disposition for value.

(*o*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 47 (proviso), substantially identical with the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 10, which is again substantially identical with the Factors Act, 1877 (40 & 41

A document of title is lawfully transferred when it is transferred according to its tenor, and with the consent in fact of a transferor entitled to transfer it (*p*).

457. The unpaid seller's right of lien or stoppage *in transitu* may be wholly, or, as the case may be, partially, defeated by a disposition by the buyer of a document of title to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods (*q*).

The mere fact that a disponent of the goods knows that the goods have not been paid for is not inconsistent with good faith on

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Transfer by buyer of document of title to transferee in good faith and without notice.

Vict. c. 39), s. 5 (now repealed). With regard to stoppage *in transitu*, it adopts the rule of the common law declared in *Lickbarrow v. Mason* (1793), 6 East, 21, n., H. L.; 1 Smith, L. C., 11th ed., p. 693 (see also *Pease v. Gloahec*, *The "Marie Joseph"* (1866), L. R. 1 P. C. 219; *The Argentina* (1867), L. R. 1 A. & E. 370), and extends it so as to make it applicable to the transfer by the buyer of documents of title other than bills of lading. With regard to lien, it applies the same extended rule, a lien not being lost at common law, as against a buyer or sub-buyer, or other transferee, by the issue or transfer of any document but a bill of lading, that being the only document which *per se* transferred possession. Some difficulty arises in the interpretation of the words "subject to the rights of the transferee" in the case of a pledge by the buyer or owner of a document of title for an antecedent debt. There are no words in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 47, assimilating the position of the buyer or owner to that of a mercantile agent under the Factors Act, 1889 (52 & 53 Vict. c. 45), and it might therefore be argued that the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 4, is not to be read into the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 47. The Factors Act, 1889 (52 & 53 Vict. c. 45), s. 4, limits the right of the pledgee for an antecedent debt to "the right to the goods which could have been enforced by the pledgor at the time of the pledge," and so seems to render that right subject to the seller's right of lien or stoppage *in transitu*, if then existing. On the other hand, the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 47, makes these rights of the seller subject to the rights of the pledgee. The two enactments should probably be reconciled by reading "subject to the rights of the transferee" as meaning his rights under the contract of pledge as modified by the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 4. In other words, *ibid.*, s. 4, should be considered as a second proviso to the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 47.

(*p*) *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q. B. 643, C. A.; *The Argentina* (1867), L. R. 1 A. & E. 370. As to the mode of transfer "for the purposes of the Act," see Factors Act, 1889 (52 & 53 Vict. c. 45), s. 11; p. 200, *ante*; and as to consent, see p. 202, *ante*.

(*q*) Under and subject to the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 9 (*Cahn v. Pockett's Bristol Channel Steam Packet Co.*, *supra* (stoppage *in transitu* wholly defeated)); see note (*i*), p. 202, *ante*. The Factors Act, 1889 (52 & 53 Vict. c. 45), s. 9, is, from the nature of the case, not applicable where the buyer obtains possession of the goods themselves, except where some special right by agreement, and analogous to lien, is conferred on the seller, as in *Dodsley v. Varley* (1840), 12 Ad. & El. 632. There is no decided authority for the proposition that the seller's right of stoppage *in transitu* may be partially defeated under the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 9; but stoppage *in transitu* falls within the words "other right of the original seller" (*ibid.*), and pledge is one of the dispositions authorised, which the seller must be taken to have consented to *pro tanto* only. Where the pledge of the document of title by the buyer is for an antecedent debt, the effect of the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 4, which, it is conceived, should be read with *ibid.*, s. 9, is to make the rights of the pledgee subject to the seller's right of lien or of stoppage; see note (*o*), p. 260, *ante*.

SECT. 5.
Effect of
Disposi-
tions by
Buyer on
Seller's
Rights of
Lien and
Stoppage
in Transitu.

Rights of
pledgee and
unpaid seller.
Sub-buyer's
unpaid
purchase-
money.

his part (r); nor does it of itself show that the disponent had notice of a right of lien or stoppage *in transitu* of the original seller (s).

Upon a transfer of a document of title by way of pledge, the pledgee is entitled, as against the unpaid seller, to be paid only the sum for which the instrument was specifically pledged, and not also the amount of a general balance of account against the pledgor (t). The unpaid seller is entitled to require the pledgee to satisfy his claim against the buyer first out of any goods or securities in the hands of the pledgee and available against the buyer (a).

When the unpaid seller's right of stoppage *in transitu* as regards the goods has been defeated by a transfer by the buyer of a document of title to a sub-buyer, it is doubtful whether the seller, if he gives such a notice of stoppage *in transitu* as would, but for the sub-sale, be effectual, is equitably entitled to so much of the sub-buyer's unpaid purchase-money as will satisfy the seller's claim against the buyer (b).

SECT. 6.—Effect of Exercise by Seller of his Rights of Lien and Stoppage in Transitu.

Exercise of
seller's rights,
no rescission.

458. Subject to certain statutory provisions (c), a contract of sale is not rescinded (d) by the mere exercise (e) by an unpaid seller (f) of his right of lien or stoppage *in transitu* (g).

(r) *Cuming v. Brown* (1808), 9 East, 506; *Pease v. Gloaghe*, *The "Marie Joseph"* (1866), L. R. 1 P. C. 219; compare *Salomons v. Nissen* (1788), 2 Term Rep. 674 (where the assignee agreed with the buyer to pay for the goods, and did not do so); see also definition of "good faith," p. 120, *ante*.

(s) Under the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 9: for notice that the goods have not been paid for is not necessarily notice that the price is due, or that the buyer is insolvent.

(t) *Spalding v. Ruding* (1843), 6 Beav. 376; affirmed on appeal (1846), 15 L. J. (Ch.) 374. The unpaid seller is entitled in equity "to stop *in transitu* everything which is not covered by the pledge" (*Kemp v. Falk* (1882), 7 App. Cas. 573, *per* Lord BLACKBURN, at p. 582).

(a) *Re Westzinthus* (1833), 5 B. & Ad. 817. The unpaid seller is in effect, by means of his goods, a surety to the disponent for the buyer (*ibid.*); see also *Re Holland, Ex parte Alston* (1868), 4 Ch. App. 168 (consignment to factor); *Re Stratton, Ex parte Salting* (1883), 25 Ch. D. 148, C. A.

(b) Decided in the affirmative in *Re Kiell, Ex parte Falk* (1880), 14 Ch. D. 446, C. A., following *Re Knight, Ex parte Golding, Davis & Co., Ltd.* (1880), 13 Ch. D. 628, C. A.; but see, *contra*, *Kemp v. Falk* (1882), 7 App. Cas. 573, *per* Lord SELBORNE at p. 577; and see *Bernidson v. Strang* (1868), 3 Ch. App. 588, *per* Lord CAIRNS, L.C. It is submitted that, according to Lord SELBORNE'S opinion, the right of stoppage is one against the goods only; and that, as a sub-buyer, being the transferee of a document of title, takes the goods free from the right of stoppage, which is "defeated," there should be no right to intercept his unpaid purchase-money. On the other hand, where the right has not been defeated, it may well be given effect to by the sub-buyer's purchase-money being paid to the seller to the extent of his claim.

(c) *I.e.*, the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 48 (3), (4), relating to resale; see pp. 264, 265, *post*.

(d) *I.e.*, cannot be treated by the seller as rescinded; for the buyer could not so treat it, and so take advantage of his own wrong (*Roberts v. Wyatt* (1810), 2 Taunt. 268; *Malins v. Freeman* (1838), 4 Bing. (N. C.) 395).

(e) *I.e.*, by the mere fact, as regards lien, that the buyer is in default

(f), (g) For notes (f), (g), see p. 263, *post*.

459. When an unpaid seller, who has exercised his right of lien or stoppage *in transitu*, resells the goods, the buyer acquires a good title thereto as against the original buyer (*h*).

SECT. 6.
Effect of
Exercise by
Seller of
his Rights of
Lien and
Stoppage
in Transitu.

General
nature
of right
to resell.

SECT. 7.—*Resale by Seller.*

460. The seller, even where the property has passed, is entitled to treat the contract of sale as rescinded, and to resell the goods as an owner thereof, but without prejudice to his right to damages in respect of any loss caused to him by the buyer's default, when the buyer, by his words or conduct, repudiates the contract (*i*). In particular, the seller may resell the goods when the buyer becomes insolvent, and expressly or by implication intimates his insolvency to the seller in circumstances showing that he is unwilling or unable to pay the price of the goods (*k*).

or insolvent (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 41 (1); see p. 242, *ante*); or, in case of stoppage *in transitu*, that he is insolvent, and the goods have been stopped (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 44; see p. 247, *ante*). "It is only after the breach of the obligation to pay that the lien attaches" (*The Eider*, [1893] P. 119, C. A., *per* Lord ESHER, M.R., at p. 132). See also *Boorman v. Nash* (1829), 9 B. & C. 145 (insolvency); *Martindale v. Smith* (1841), 1 Q. B. 389; *Gibson v. Carruthers* (1841), 8 M. & W. 321 (bankruptcy); *Re Edwards, Ex parte Chalmers* (1873), 8 Ch. App. 289, 293, 294; *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434, *per* Lord BLACKBURN, at p. 444; *Kemp v. Falk* (1882), 7 App. Cas. 573, *per* Lord BLACKBURN, at p. 581 (stoppage *in transitu*); *Re Nathan, Ex parte Stapleton* (1879), 10 Ch. D. 586, C. A. (buyer's insolvency).

(f) For the definition of "unpaid seller," see p. 239, *ante*.

(g) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 48 (1).

(h) *Ibid.*, s. 48 (2); *Milgate v. Kebble* (1841), 3 Man. & G. 100; *Lord v. Price* (1874), L. R. 9 Exch. 54. The reason is that the buyer, being in default, is not entitled to the possession, and so cannot bring trover. See also *Adelphi Bank v. Halifax Sugar Refining Co.* (1887), 4 T. L. R. 21, C. A. (pledge of bill of lading by unpaid seller). It is noticeable that the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 48 (2), does not in terms require good faith and absence of notice on the part of the second buyer, both of which are necessary if the seller resells under the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 8; see p. 199, *ante*. On the other hand, the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 8, does not require the first buyer to be in default.

(i) On general principles (*Mersey Steel and Iron Co. v. Naylor, Benzon & Co.*, *supra*; *Bloomer v. Bernstein* (1874), L. R. 9 C. P. 588). This is not a rescission in the sense of a rescission by agreement, but one *sub modo*, at the option of the seller only, who has "the option to treat the repudiation of the contract as a definitive breach of it and thereupon to treat the contract as rescinded except for the purpose of his bringing an action for breach of it" (*Michael v. Hart & Co.*, [1902] 1 K. B. 482, C. A., *per* COLLINS, M.R., at p. 490; *Johnstone v. Milling* (1886), 16 Q. B. D. 460, C. A., *per* Lord ESHER, M.R., at p. 467); see, generally, title CONTRACT, Vol. VII., pp. 438 *et seq.*

(k) As where the price is not tendered in cash within a reasonable time by the buyer, or his trustee, or *semble*, a sub-buyer (*Re Nathan, Ex parte Stapleton, supra*; *Re Phoenix Bessemer Steel Co., Ex parte Carnforth Hematite Iron Co.* (1876), 4 Ch. D. 108, C. A. (no repudiation); *Morgan v. Bain* (1874), L. R. 10 C. P. 15 (no tender by insolvent); *Lawrence v. Knowles* (1839), 5 Bing. (N. C.) 399 (no tender by assignees of buyer); *Mess v. Duffus & Co.* (1901), 6 Com. Cas. 165 (intimation of insolvency by itself insufficient)). The necessity that cash should be tendered even where the contract allows credit, is a provision superadded

SECT. 7.

Resale by Seller.

Statutory
right of
resale.

461. Where the goods are of a perishable nature (*l*), or where the unpaid seller (*m*) gives notice to the buyer of his intention to resell (*n*), and the buyer does not within a reasonable time (*o*) pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract (*p*).

Whether the unpaid seller under the foregoing provision resells the goods in the capacity of an owner, so as to be entitled to any profit which may be realised by the resale, or whether he resells the goods in a capacity analogous to that of a pledgee, or in any other limited capacity, is doubtful (*q*).

by the law in spite of the agreement of the parties (*Re Phoenix Bessemer Steel Co., Ex parte Carnforth Hamatite Iron Co.* (1876), 4 Ch. D. 108, C. A., *per* JESSEL, M. R., at pp. 112, 113). But if the seller elects to abide by the contract he must perform it according to its terms, including the allowance of credit (*Morgan v. Bain* (1874), L. R. 10 C. P. 15, *per* BRETT, J., at p. 27).

(*l*) Not only physically, but commercially perishable, as by deteriorating in market value by delay (*Maclean v. Dunn* (1828), 4 Bing. 722, 728); or by deteriorating in quality so as to become unmerchantable; see *Asfar & Co. v. Blundell*, [1896] 1 Q. B. 123, C. A.; *Duthie v. Hilton* (1868), L. R. 4 C. P. 138 (freight not earned); *Sharp v. Christmas* (1892), 8 T. L. R. 687, C. A. (potatoes).

(*m*) For the definition of "unpaid seller," see p. 239, *ante*.

(*n*) A request by the seller to the buyer, after a delivery and rejection of the goods, to resell them for the seller is evidence of a mutual rescission of the contract (*Gomery v. Bond* (1815), 3 M. & S. 378).

(*o*) What is "a reasonable time" is a question of fact (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 56).

(*p*) *Ibid.*, s. 48 (3); *Maclean v. Dunn*, *supra*; *Page v. Cowasjee Eduljee* (1866), L. R. 1 P. C. 127, 145; *Lord v. Price* (1874), L. R. 9 Exch. 54, *per* BRAMWELL, B., at p. 55. As the right of resale is exercisable on default by the buyer in payment, it is conceived that, where the price has been apportioned to separate portions of the goods, and is separately payable, the seller can sell only that portion of the goods in respect of which there has been default in payment; see p. 220, *ante*. The amount of the seller's loss is *prima facie* the difference in the price realised, added to the expenses of the resale (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 50; see p. 268, *post*; *Maclean v. Dunn*, *supra*; *Re Nathan, Ex parte Stapleton* (1879), 10 Ch. D. 586, C. A.; *Noble v. Edwards, Edwards v. Noble* (1877), 5 Ch. D. 378, C. A.).

(*q*) The inference from a comparison of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 48 (3), with *ibid.*, s. 48 (4), is that a resale under s. 48 (3) does not rescind the contract. But the buyer's default under *ibid.*, s. 48 (3), is a default "down to the last moment which the law gives" (*Howe v. Smith* (1884), 27 Ch. D. 89, C. A., *per* FRY, L. J., at p. 105), and so hardly to be distinguished from a repudiation by the buyer. Moreover, the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 48 (3), does not say that the seller may, after resale, recover any balance of the price unsatisfied, but damages only, a right which generally presupposes that the property is in the seller, *i.e.*, has been re-vested (*McEntire v. Crossley Brothers*, [1895] A. C. 467, *per* Lord HERSCHELL, L. C., at p. 465). Again, the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 37 (see p. 232, *ante*), justifies a resale by the seller as owner where the buyer's default in taking delivery after notice is a repudiation, a hardly distinguishable case. It is therefore submitted that the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 48 (3), re-enacts the common law. Further, it is believed that the common law cases show that an unpaid seller had no right of resale except on the buyer's repudiation. See and consider *Hore v. Milner* (1797), Peake, 58 [42], n.; *Chinery v. Viall* (1860), 5 H. & N. 288; *Maclean v. Dunn*, *supra*, at p. 728 (seller cannot sue for price after resale); *Howe v.*

462. Where the seller expressly (*r*) reserves a right of resale in case the buyer should make default (*s*) and, on the buyer making default (*s*), resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim which the seller may have for damages (*t*). Accordingly, the seller is entitled to any profits resulting from the resale (*a*).

SECT. 7.
Resale by Seller.

Express power of resale, or of repurchase.

In calculating the loss by the buyer's default the seller must take into account any deposit on the price which may have been paid by the buyer (*b*).

Conversely, where, pursuant to an express power in that behalf exercisable on the seller's default in delivery, the buyer buys similar goods from a third person, the contract is rescinded, and the buyer is entitled to any profits on the repurchase (*c*).

463. A retaking of the goods by the seller after delivery operates as a rescission of the contract, so that, unless it has been otherwise agreed, the price, although it may then be due, is thereafter not recoverable by the seller, and must, if paid, be returned by him, where the goods are retaken under an express power exercisable on the buyer's default (*d*), or, it is submitted, where they are retaken

Retaking of the goods by the seller.

Smith (1884), 27 Ch. D. 89, C. A., *per FRY, L.J.*, at p. 105 (seller after buyer's default may sell as full owner); *Fitt v. Cassanet* (1841), 4 Man. & G. 898; *Page v. Cowasjee Eduljee* (1866), L. R. 1 P. C. 127 (buyer in default cannot recover price); *Maclean v. Dunn* (1828), 4 Bing. 722 (resale no rescission as against buyer); and for the general principle governing rescission at the option of one party only, see *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888), 39 Ch. D. 339, C. A., *per BOWEN, L.J.*, at p. 365; and see title CONTRACT, Vol. VII., pp. 422, 423. As to sale by a pledgee, see title PAWNS AND PLEDGES, Vol. XXII., p. 243; as to the statutory power of sale of a pawnbroker, see *ibid.*, p. 252.

(*r*) The same result as in the rule stated in the text occurs where a power of resale is given by usage of trade (*Re Tate, Ex parte Moffatt* (1841), 2 Mont. D. & De G. 170), and the damages, being ascertainable, constitute a provable debt in bankruptcy (*ibid.*).

(*s*) I.e., such default as is contemplated by the terms of the power, not necessarily such default as would justify a resale in the absence of express power.

(*t*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 48 (4), adopting the law laid down in *Lamond v. Davall* (1847), 9 Q. B. 1030. The result of the resale is that the buyer is no longer liable for the price as such, the resale being made by the seller as an owner, and not as the buyer's agent (*ibid.*). The rescission spoken of in the text is a rescission *sub modo*, i.e., at the option of the party not in fault, and subject only to his right to damages. The damages are the same as under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 48 (3); see note (*p*), p. 264, *ante*.

(*a*) *Ex parte Hunter* (1801), 6 Ves. 95, 97; and see the reasoning of KENNEDY, J., in *Simmonds v. Millar & Co.* (1898), 15 T. L. R. 100.

(*b*) *Ockenlen v. Henly* (1858), E. B. & E. 485; *Shuttleworth v. Clews*, [1909] W. N. 254 (both cases of sales of land).

(*c*) *Simmonds v. Millar & Co.*, *supra*; see also *Kynoch, Ltd. v. R.* (1909), *Times*, 30th March, C. A. The buyer can also, like the seller, recover any loss as damages.

(*d*) *Hewison v. Ricketts* (1804), 63 L. J. (Q. B.) 711, as explained in *Brooks v. Beirnsstein*, [1909] 1 K. B. 98. In *Hewison v. Ricketts*, *supra*, the property had not passed: but it is conceived that the same rule applies where the property has passed, on the analogy of *Lamond v. Davall* (1847), 9 Q. B. 1030, and the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 48 (4); see the text, *supra*. Where the contract is of hire with an

SECT. 7.
Resale by
Seller.

wrongfully, and the property in the goods has not passed to the buyer (e).

Part VI.—Breach of the Contract.

SECT. 1.—Remedies of the Seller

SUB-SECT. 1.—Action for the Price.

Where pro-
perty has

464. Where, under a contract of sale (f), the property (g) in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action (h) against him for the price of the goods (i).

option only of purchase, the rule is different; the contract is rescinded for the future only, and arrears of rent are recoverable (*Brooks v. Beirnsstein*, [1909] 1 K. B. 98), existing rights being respected; see *Stubbs v. Holywell Rail. Co.* (1867), L. R. 2 Exch. 311. The buyer's licence to the seller to enter his premises to retake the goods is irrevocable (*Neath v. Randall* (1849), 58 Massachusetts Reports, 195). A mere notice by the seller of his intention to resume possession is not a rescission of the contract, at any rate as against the right of distress of the buyer's lessor (*Hackney Furnishing Co. v. Watts*, [1912] 3 K. B. 225, overruling *London Furnishing Co. v. Solomon* (1912), 28 T. L. R. 265).

(e) See the reasoning of the court in *Stephens v. Wilkinson* (1831), 2 B. & Ad. 320, and *Brooks v. Beirnsstein*, *supra*. Where the property in the goods has passed, the buyer has received the consideration for the sale, and the seller's conduct is accordingly only an independent tort, and cannot be treated by the buyer as a rescission (*Stephens v. Wilkinson*, *supra*; *Gillard v. Brittan* (1841), 8 M. & W. 575; *Re Humberston* (1846), De G. 262; *Page v. Cowasjee Eduljee* (1866), L. R. 1 P. C. 127). But the buyer can of course counterclaim for the tort in the seller's action for the price; see title SET-OFF AND COUNTERCLAIM, p. 507, *post*.

(f) See pp. 113, 117, *ante*.

(g) See p. 120, *ante*.

(h) See p. 118, *ante*.

(i) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 49 (1); *Scott v. England* (1844), 2 Dow. & L. 520; *Kymer v. Suwercropp* (1807), 1 Camp. 109 (goods stopped *in transitu*); *Alexander v. Gardner* (1835), 1 Bing. (N. C.) 671 (goods lost at sea), *Broomfield v. Smith* (1836), 1 M. & W. 542 (no action during period of credit); *Mackay v. Dick* (1881), 6 App. Cas. 251 (price payable on condition: condition waived by buyer); *Gomery v. Bond* (1815), 3 M. & S. 378 (price not payable after seller's consent to rescind); *Garry v. Pyke* (1839), 10 Ad. & El. 512 (price payable out of fund in seller's hand); *Smith v. Winter* (1852), 12 C. B. 487 (pre-payment); and see title DAMAGES, Vol. X., p. 335. As to interest on the price, see p. 238, *ante*. The statement in title DAMAGES, Vol. X., p. 303, that interest is allowable as damages on non-payment of money must be taken to refer to cases where interest is agreed to be paid, or is otherwise payable by law; see title MONEY AND MONEY-LENDING, Vol. XXI., pp. 37 *et seq.* The neglect or refusal to pay must be wrongful. *Prima facie* payment of the price and delivery of the goods are concurrent conditions (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 28; see p. 204, *ante*), but the parties may make any bargain they please as to priority of delivery or payment (*Calcutta and Burmah Steam Navigation Co. v. De Mattos* (1863), 32 L. J. (Q. B.) 322, *per* BLACKBURN, J., at p. 328); so that, if delivery is not a condition precedent to payment of the price, the price is recoverable, if it is otherwise due, without delivery. On the other hand, the buyer may, by the terms of the contract, be entitled to credit. Credit allowed, but not as a term of the contract, is of course

465. Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract (*k*).

SECT. 1.
Remedies of the Seller.

Where property has not passed.

SUB-SECT. 2.—Damages for Non-acceptance.

466. Where the buyer (*l*) wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action (*l*) against him for damages for non-acceptance (*m*).

General rule as to damages.

The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract (*n*).

Measure of damages.

revocable (*De Symons v. Minchwich* (1795), 1 Esp. 430). When the property has passed and the price is payable, it becomes payable as an ordinary debt (*Martindale v. Smith* (1841), 1 Q. B. 389). If the property has not passed, in the absence of express stipulation as to prepayment of the price, the seller's only remedy is an action for damages under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 50; see the text, *infra*. This was the common law rule (*Atkinson v. Bell* (1828), 8 B. & C. 277; *Boswell v. Kilborn* (1862), 15 Moo. P. C. C. 309). As to the seller's right to recover for the care and custody of the goods, and for loss caused by the buyer's delay in taking delivery, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 37, which, *semble*, applies only where the property has passed; see p. 232, *ante*.

(*k*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 49 (2); *Dunlop v. Grole* (1845), 2 Car. & Kir. 153 (contract to pay on a particular day if delivery not required before). The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 49 (2), applies to instalments of the price (*Workman, Clark & Co., Ltd. v. Lloyd Brazileño*, [1908] 1 K. B. 968, C. A.).

(*l*) See p. 118, *ante*.

(*m*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 50 (1). The neglect or refusal must be wrongful (*ibid.*). There may be conditions precedent (see title CONTRACT, Vol. VII., pp. 434 *et seq.*) to be performed by the seller, and the action does not lie if he has failed to perform them (see, e.g., *Graves v. Legg* (1854), 9 Exch. 709 (names of ships to be declared on shipment of goods)), unless they have been waived by the buyer, as in *Braithwaite v. Foreign Hardwood Co.*, [1905] 2 K. B. 543, C. A. As to damages for default in taking delivery, where the property has passed, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 37; p. 232, *ante*. Subject to the provisions of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 49 (2) (see the text, *supra*), if the property in the goods has not passed, the seller's only remedy is by action under *ibid.*, s. 50 (*Boswell v. Kilborn*, *supra*). If the property has passed, the seller, it seems, may sue, either for the price or under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 50, in which latter case his conduct amounts to an election to treat the buyer's conduct as a repudiation of the contract.

(*n*) *Ibid.*, s. 50 (2); *Cort v. Ambergate, Nottingham and Boston and Eastern Junction Rail. Co.* (1851), 17 Q. B. 127; *Re Vic Mill Co., Ltd.*, [1913] 1 Ch. 183, affirmed [1913] W. N. 96, C. A. (goods unproduced: no market: loss of profits); *Ellis, Lever & Co. v. Dunkirk Colliery Co.* (1880), 43 L. T. 706, H. L. (no market: loss on resale price); and see title DAMAGES, Vol. X., p. 335. The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 50 (2), adopts the first part of the rule laid down for breaches of contract generally in *Hadley v. Baxendale* (1854), 9 Exch. 341, 354, and defines only what are called ordinary or general damages. The most common application of it is given by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 50 (3); see p. 268, *post*. As to special damages, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 54; p. 277, *post*. As to damages generally, see title DAMAGES, Vol. X., pp. 301 *et seq.*

SECT. 1.

Remedies of the Seller.

Primâ facie
rule as to
damages—
market price.

467. Where there is an available market for the goods in question (o), the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price at the time or times (p) when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept (q).

SECT. 2.—*Remedies of the Buyer.*SUB-SECT. 1.—*Action for Non-delivery.*

When action
lies.

468. Where the seller wrongfully neglects or refuses to

(o) As to what is an available market, see *Dunkirk Colliery Co. v. Lever* (1878), 9 Ch. D. 20, 25, C. A.; note (w), p. 270, *post*.

(p) The words "or times" point to instalment contracts; see *Brown v. Muller* (1872), L. R. 7 Exch. 319; *Roper v. Johnson* (1873), L. R. 8 C. P. 167, as to non-delivery in instalment contracts, where the same rule applies. As to postponement of delivery and subsequent refusal to accept, see title DAMAGES, Vol. X., p. 335.

(q) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 50 (3); *Maclean v. Dunn* (1828), 4 Bing. 722 (auction sale); *Boorman v. Nash* (1829), 9 B. & C. 145 (tender of instalments at fixed date: bankruptcy of buyer); *Phillipotts v. Evans* (1839), 5 M. & W. 475 (tender at fixed date: buyer's previous repudiation); *Boswell v. Kilborn* (1862), 15 Moo. P. C. C. 309; *Re Nathan, Ex parte Stapleton* (1879), 10 Ch. D. 586, C. A.; *Ginner v. King* (1890), 7 T. L. R. 140, C. A. (damages at date of buyer's refusal); *Tredegar Iron and Coal Co. v. Hawthorn Brothers & Co.* (1902), 18 T. L. R. 716, C. A. (buyer's previous repudiation); *Braithwaite v. Foreign Hardwood Co.*, [1905] 2 K. B. 543, C. A.; and see title DAMAGES, Vol. X., p. 335. These damages do not constitute a debt (*Green v. Dicknell* (1838), 8 Ad. & El. 701). If there is no difference between the contract and market price, the damages are nominal (*Prehn v. Royal Bank of Liverpool* (1870), L. R. 5 Exch. 92, *per* MARTIN, B., at p. 99). But there are many cases where the rule as to the market price at the date of delivery is not applicable. For example, there may be no market or current price for the goods in question, or the contract may have been repudiated by the buyer before the time fixed for acceptance, and even before the goods were manufactured, or produced, or procured. In those cases resort must be had to the general rule laid down by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 50 (2); see, e.g., *Cori v. Ambergate, Nottingham and Boston and Eastern Junction Rail. Co.* (1851), 17 Q. B. 127 (contract repudiated before the whole of the goods manufactured); *Hinckley v. Pittsburgh Bessemer Steel Co.* (1886), 121 United States Reports, 264 (same: cost of production and delivery); *Silkstone and Dodsworth Coal and Iron Co. v. Joint Stock Coal Co.* (1877), 35 L. T. 668 (perishable coal, part not raised when acceptance refused: cost of production); compare *Tredegar Coal and Iron Co. v. Gielgud* (1883), Cab. & El. 27, where there was some evidence of a market. Ordinarily this general rule is satisfied by ascertaining the difference between the value of the goods and the contract price at the time of breach, and, if there has been a resale by the seller, the resale price is taken as evidence of the value (*Ellis, Lever & Co. v. Dunkirk Colliery Co.* (1880), 43 L. T. 706, H. L.; *Stroud v. Austin & Co.* (1883), Cab. & El. 119). The buyer who gives notice of his intention not to accept the goods, before the time for acceptance has arrived, cannot diminish the damages on the ground that the seller is bound to accept the repudiation as a breach (*Frost v. Knight* (1872), L. R. 7 Exch. 111, 113, Ex. Ch., explaining *Phillipotts v. Evans*, *supra*, and *Ripley v. M'Clure* (1849), 4 Exch. 345); see also *Roper v. Johnson* (1873), L. R. 8 C. P. 167; and see title DAMAGES, Vol. X., p. 335. The seller may hold him to his contract and wait for the appointed time of performance (*Michael v. Hart & Co.*, [1902] 1 K. B. 482, C. A.; *Tredegar Iron and Coal Co. v. Hawthorn Brothers & Co.* (1902), 18 T. L. R. 716, C. A.). On the

deliver(*r*) the goods to the buyer (*s*), the buyer may maintain an action against the seller for damages for non-delivery (*t*).

SECT. 2.

Remedies of the Buyer.

469. The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract(*u*).

General rule as to damages.

other hand, the seller may accept the repudiation as an immediate breach (see title CONTRACT, Vol. VII., p. 438), and the damages are then measured as on the date of the seller's acceptance of the repudiation (*Shaw's Brow Iron Co. v. Birchgrove Steel Co.* (1889), 6 T. L. R. 50, C. A., affirmed (1891), 7 T. L. R. 246, H. L.; *Tredegair Iron and Coal Co. v. Hawthorn Brothers & Co.* (1902), 18 T. L. R. 716, C. A.). It is submitted that the tendency of modern cases is to modify the hard-and-fast rule of *Frost v. Knight* (1872), L. R. 7 Exch. 111, that damages must be measured with reference to the original date of performance; see note (*h*), p. 271, *post*; *Roth & Co. v. Taysen, Townsend & Co.* (1896), 1 Com. Cas. 306, C. A.; compare *British Westinghouse Electric and Manufacturing Co., Ltd. v. Underground Electric Railways Co. of London, Ltd.*, [1912] A. C. 673.

(*r*) See p. 119, *ante*.

(*s*) See p. 118, *ante*.

(*t*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 51 (1); *Jones v. Gibbons* (1853), 8 Exch. 920 (goods to be delivered as required); *Lewis v. Clifton* (1854), 14 C. B. 245 (growing timber to be removed by buyer: independent trespass by buyer no defence). The neglect or refusal must be wrongful, i.e., in breach of the contract (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 51 (1)). The buyer has three remedies in case of wrongful non-delivery, namely, (1) in all cases an action for damages; (2) if the goods are specific or ascertained, a right to specific performance under *ibid.*, s. 52 (see p. 272, *post*); and (3) if the property has passed, the ordinary remedies of an owner, such as detinue and trover (see p. 273, *post*).

(*u*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 51 (2); and, as to damages generally, see title DAMAGES, Vol. X., p. 301 *et seq.* The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 51 (2), merely applies to the case of non-delivery the first part of the general rule of damages for breach of contract laid down in *Hadley v. Baxendale* (1854), 9 Exch. 341, 354; see title DAMAGES, Vol. X., p. 313. As the contract, if duly performed by the seller, would give to the buyer goods which at the time and place of delivery would be of a certain value, it is obvious that, if the goods are not delivered, the buyer loses this value. On the other hand, the buyer agrees to pay a price in return. The loss, therefore, which directly and naturally results to the buyer in the ordinary course of events is the value of the goods at the time and place of delivery diminished by the price which the buyer binds himself to pay (*Rodocanachi v. Milburn* (1886), 18 Q. B. D. 67, C. A.); in other words, the difference between the contract price and the value of the goods exclusive of circumstances "accidental" to the buyer (*ibid.*, at p. 77). This value, if there is a market, is presumed to be the market price (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 51 (3)), that is to say, the price which the buyer can get for the goods in the market, or which, if he buys similar goods to supply the place of the goods undelivered, he has to pay for the substituted goods; see title DAMAGES, Vol. X., p. 333. Such being the rule, the price at which the buyer, in anticipation of delivery, has resold the goods is an immaterial factor in the case (*Williams v. Reynolds* (1865), 6 B. & S. 495; *Wertheim v. Chicoutimi Pulp Co.*, [1911] A. C. 301, 307, P. C.; *Re Williams Brothers and Agius (E. T.), Ltd.* (1913), 135 L. T. Jo. 34, C. A.), except where, there being no market, the resale price is evidence of the value of the goods contracted for, or where profits may be claimed as special damages (*ibid.*). Principles similar to those above stated apply where delivery is merely delayed. See the rationale of the rule of damages explained in *Wertheim v. Chicoutimi Pulp Co.*, *supra*; and, in illustration, *Stroud v. Austin & Co.* (1893), Cab. & El. 119 (no market: resale price evidence of value); *Portman v. Middleton* (1858), 4 C. B. (N. S.) 322; *Hinde v. Liddell* (1875), L. R. 10 Q. B. 265 (excess of price paid by buyer for

SECT. 2.

Remedies of the Buyer.

Primâ facie
rule as to
damages—
market price.

Delay in
delivery.

470. Where there is an available market (v) for the goods in question the measure of damages is *primâ facie* to be ascertained by the difference (w) between the contract price and the market or current price of the goods at the time or times (a) when they ought to have been delivered, or, if no time was fixed, at the time of refusal to deliver (b).

471. Where the seller delivers the goods at a time later than the contract time, and the buyer accepts the goods, the measure of damages is *primâ facie* the difference between the value which the goods would have had at the place of delivery if they had been substituted goods; *Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A. C. 105, 117, P. C. (value of substituted goods).

(v) As to what constitutes an "available market," see *Dunkirk Colliery Co. v. Lever* (1878), 9 Ch. D. 20, C. A. "It is immaterial whether the rise in price is occasioned by scarcity, or increased demand, or any other cause" (*Josling v. Irvine* (1861), 6 H. & N. 512, per WILDE, B., at p. 517). In this case the seller sold an article which proved of much greater value than the parties were aware of at the time of the sale. As to damages where there is no market, see title DAMAGES, Vol. X., pp. 333, 334. Where there is no market at the place of delivery, the value at the nearest available place, less the cost of transport thither, may sometimes be taken as the market value (*Wertheim v. Chicoutimi Pulp Co.*, [1911] A. C. 301, P. C.; *Grand Tower Co. v. Phillips* (1874), 90 United States Reports, 471); as may also the value in controlling markets (*Cohen v. Platt* (1877), 69 New York State Reports, 348, 352). If there is no market price at the place of delivery at the time when the goods should have been delivered, the price for a brief period before or after that time may be shown (*ibid.*).

(w) If there is no difference the damages are nominal (*Valpy v. Oakeley* (1851), 16 Q. B. 941; *Griffiths v. Perry* (1859), 1 E. & E. 680).

(a) Where the time of delivery is indefinite, and within the control of the seller, it would seem that the buyer, being induced by the seller to believe that a breach has not occurred, may treat the date of his discovery of the breach as the date of the breach (*Wilson v. London and Globe Finance Corporation, Ltd.* (1897), 14 T. L. R. 15, C. A.). In the case of instalment contracts the damages must *primâ facie* be calculated with reference to the market price at the time for the delivery of each instalment (*Brown v. Muller* (1872), L. R. 7 Exch. 319; *Roper v. Johnson* (1873), L. R. 8 C. P. 167). As to indeterminate instalments, see *Barningham v. Smith* (1874), 31 L. T. 540; *Bergheim v. Blaenavon Iron Co.* (1875), L. R. 10 Q. B. 319. The buyer cannot accumulate successive breaches, and treat them as a single breach at the end of the contract period (*Barningham v. Smith, supra*). As to postponement of delivery, see title DAMAGES, Vol. X., p. 334; *Re Voss, Ex parte Llansamlet Tinplate Co.* (1873), L. R. 16 Eq. 155.

(b) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 51 (3); *Leigh v. Paterson* (1818), 8 Taunt. 540 (previous repudiation not accepted by buyer); followed in *Gainsford v. Carroll* (1824), 2 B. & C. 624; *Barrow v. Arnaud* (1846), 8 Q. B. 595, 609, Ex. Ch.; *Peterson v. Ayre* (1853), 13 C. B. 353 (special damages excluded by existence of market); *Shaw v. Holland* (1846), 15 M. & W. 136, 146 (shares); *Josling v. Irvine, supra* (market price unusually high); *Williams v. Reynolds* (1865), 6 B. & S. 495; *Ashmore & Son v. Cox (C. S.) & Co.*, [1899] 1 Q. B. 436, 443 (date of repudiation accepted is date of breach); *Kidston & Co. v. Monceau St. Fiore Ironworks Co.* (1902), 18 T. L. R. 320 (date of refusal to deliver: date of breach); *Wertheim v. Chicoutimi Pulp Co., supra* (delay in delivery); see title DAMAGES, Vol. X., p. 333. If the goods are to be removed at the buyer's expense, in calculating the difference the expenses of removal must be added to the contract price (*M'Neill v. Richards*, [1899] 1 I. R. 79). As to parol evidence to enhance the measure of damages under a written contract, see *Brady v. Oastler* (1864), 3 H. & C. 112. In Scotland the rule was formerly not so strictly applied, and more latitude in considering actual loss was allowed (*Dunlop v. Higgins* (1848),

delivered in due time and the value which they had at that place when they were delivered (c).

472. The above-mentioned rule for the calculation of damages by the market price at the date of delivery (d) is inapplicable, and damages for non-delivery are measured under other provisions (c), where—

- (1) The contract itself has fixed the damages (f);
- (2) The price has been prepaid (g);
- (3) The seller has repudiated the contract before the time fixed for delivery, and the buyer has accepted the repudiation as an immediate breach (h);

SECT. 2.
**Remedies of
the Buyer.**

When rule as
to market
price inap-
plicable.

1 H. L. Cas. 381, 403, approving *Watt v. Mitchell* (1839), 1 Dunl. (Ct. of Sess.) 1157).

(c) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 51 (2); *Borries v. Hutchinson* (1865), 18 C. B. (N. S.) 445 (increased freight and insurance); *Fletcher v. Tayleur* (1855), 17 C. B. 21 (ship: diminished profits of voyage); *Wilson v. Lancashire and Yorkshire Rail. Co.* (1861), 9 C. B. (N. S.) 632 (carrier: loss of market); *Cory v. Thames Ironworks Co.* (1868), L. R. 3 Q. B. 181 (profits of ordinary use of chattel); *Steam Herring Fleet, Ltd. v. Richards (S.) & Co., Ltd.* (1901), 17 T. L. R. 731 (fishing boats: wages paid to seamen and loss of profits); *Wertheim v. Chicoutimi Pulp Co.*, [1911] A. C. 301, P. C. (resale at price above market price); and see title DAMAGES, Vol. X., p. 334. In the case of delay in delivery the contract price, as representing goods which the buyer has received, is not the determining factor in the ascertainment of the damages.

(d) *I.e.*, under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 51 (3); see p. 270, *ante*.

(e) *E.g.*, under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 51 (2) (see p. 269, *ante*), 55 (express agreement etc.), or 61 (2) (saving of the rules of the common law).

(f) *Ibid.*, s. 55 (express agreement modifying rights); *Diestal v. Stevenson*, [1906] 2 K. B. 345; *Clyde Bank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Castaneda*, [1905] A. C. 6 (delay). As to the time when a penalty has been held to be due in an instalment contract, see *Bergheim v. Blaenarvon Iron Co.* (1875), L. R. 10 Q. B. 319 ("exceeding time of delivery"). As to the distinction between liquidated damages and a penalty, see title DAMAGES, Vol. X., pp. 328 *et seq.*

(g) In which case it has been held at Nisi Prius that the value of the goods should be taken at the time of the trial (*Elliot v. Hughes* (1863), 3 F. & F. 387; see also *Startup v. Cortazzi* (1835), 2 Cr. M. & R. 165 (market price plus interest on money)). But the measure must vary according to the facts. In some of the American States the value of the goods must be taken at the highest price between the date fixed for delivery and the trial (*Clark v. Pinney* (1827), 7 Cowen's Reports, 681 (where the cases are considered); *West v. Pritchard* (1848), 19 Connecticut State Reports, 212).

(h) *Leigh v. Paterson* (1818), 8 Taunt. 540 (repudiation not accepted); *Frost v. Knight* (1872), L. R. 7 Exch. 111, Ex. Ch.; *Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A. C. 105, 117, P. C. The buyer may elect to hold to the contract until the time for performance comes, or may accept the repudiation as an immediate breach, in which case damages are measured at the date of the acceptance of the repudiation (*Tredegar Iron and Coal Co. v. Hawthorn Brothers & Co.* (1902), 18 T. L. R. 716, C. A.; see note (g), p. 268, *ante*). If the buyer accepts the repudiation he must act reasonably, and not lie by to enhance the damages (*Nickoll and Knight v. Ashton, Edridge & Co.*, [1900] 2 Q. B. 298; *Wilson v. Hicks* (1857), 26 L. J. (ex.) 242 (charterparty); and see title DAMAGES, Vol. X., p. 335); and opinions have been expressed that, if it is apparent that it will be impossible for the seller to deliver, the buyer must accept the repudiation and do his best to mitigate the damages (*Nickoll and Knight v. Ashton, Edridge & Co.*, *supra*, per MATHEW, J., at p. 305; S. C., [1901] 2 K. B.

SECT. 2.
Remedies of
the Buyer.

(4) There is no market for the goods in question at the time and place of delivery (*i*);

(5) The seller has delivered the goods, but later than the contract time (*j*); or

(6) The time for delivery has been voluntarily extended by the buyer at the seller's request (*k*).

SUB-SECT. 2.—*Specific Performance.*

Discretion
of the court—
scope of
judgment.

473. In any action (*l*) for breach of contract to deliver (*m*) specific (*n*) or ascertained goods the court may, if it thinks fit, on the application of the plaintiff (*o*), by its judgment direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff (*o*) may be made at any time before judgment (*p*).

126, C. A., *per* VAUGHAN WILLIAMS, L.J.; but compare *Tredegar Iron and Coal Co. v. Hawthorn Brothers & Co.* (1902), 18 T. L. R. 716, C. A.; and see note (*q*), p. 268, *ante*.

(*i*) In this case the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 51 (2), applies, and the damages are the difference between the contract price and the value of the goods at the time and place for delivery (*Elbinger Actien-Gesellschaft v. Armstrong* (1874), L. R. 9 Q. B. 473, 476; *France v. Gaudet* (1871), L. R. 6 Q. B. 199 (trover: resale price as value); *Hinde v. Liddell* (1875), L. R. 10 Q. B. 265; *M'Neill v. Richards*, [1899] 1 I. R. 79 (probable resale price); *Josling v. Irvine* (1861), 6 H. & N. 512); see p. 269, *ante*. If goods of the description contracted for are not obtainable, the value may be measured by the cost of the best substitute procurable (*Hinde v. Liddell*, *supra* (superior shirrings); *Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A. C. 105, P. C.). The principle applies to all contracts (*Le Blanche v. London and North Western Rail. Co.* (1876), 1 C. P. D. 286, C. A. (carrier)). The selling value to the buyer of the goods procured is immaterial (*Erie County Natural Gas and Fuel Co. v. Carroll*, *supra*; *Hinde v. Liddell*, *supra*). If the buyer has procured the substituted goods without loss, his damages are nominal (*ibid.*).

(*j*) See p. 270, *ante*.

(*k*) Damages in such case for the breach of the contract at the contract time are to be measured at the expiration of the extended time, or, if no specific time was mentioned, at the expiration of a reasonable time after the last request of the seller for postponement, so as to give the buyer the benefit of a rising market (*Ogle v. Vane (Earl)* (1868), L. R. 3 Q. B. 272, Ex. Ch.; distinguished in *Re Voss, Ex parte Llansamlet Tin Plate Co.* (1873), L. R. 16 Eq. 155 (no request by seller for postponement: ordinary rule); *Hickman v. Haynes* (1875), L. R. 10 C. P. 598; *Wilson v. London and Globe Finance Corporation, Ltd.* (1897), 14 T. L. R. 15, C. A. (shares)). Where the extension of time is not voluntary, but under a new contract, the *prima facie* rule in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 51 (3), in terms applies. All the cases above mentioned were cases in which the market price had risen at the extended time. It is submitted that the seller may take advantage of the fact that the market has fallen.

(*l*) See p. 118, *ante*.

(*m*) The Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 2 (now repealed), contained the words "for a price in money," but no change is intended.

(*n*) See p. 121, *ante*.

(*o*) See p. 120, *ante*.

(*p*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 52. This provision applies whether or not the property has passed by the contract (*James*

SUB-SECT. 3.—*Action in Tort.*

474. Where the property in goods has passed to the buyer, and he is entitled to delivery, he may, instead of suing for damages for non-delivery, maintain an action against the seller for the detention or conversion of the goods (*q*); but he cannot, by bringing his action in tort, obtain higher damages against the seller than he would have recovered by suing in contract (*r*).

SUB-SECT. 4.—*Breach of Warranty.*

475. Where there is a breach of warranty (*s*) by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty (*t*), the buyer is not by reason only (*u*) of such breach of warranty entitled to reject the goods (*v*); but he may set up against the seller the

SECT. 2.

Remedies of the Buyer.

Buyer's right to bring detinue or trover.

Buyer's remedies on breach.

Jones & Sons, Ltd. v. Tankerville (Earl), [1909] 2 Ch. 440, *per* PARKER, J., at p. 445). As to writs of delivery, see R. S. C., Ord. 48; and County Court Rules, Ord. 25, rr. 69, 70; and, as to writs of assistance, see *Wyman v. Knight* (1888), 39 Ch. D. 165. As to specific performance generally, see title SPECIFIC PERFORMANCE. The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 52, saves the law of Scotland, under which specific implement is an ordinary and not an extraordinary remedy (*Stewart v. Kennedy* (1890), 15 App. Cas. 75, 102, 105).

(*q*) *Kieran v. Sandars* (1837), 6 Ad. & El. 515; *Milgate v. Kebble* (1841), 3 Man. & G. 100 (buyer not entitled to possession); compare *Martindale v. Smith* (1841), 1 Q. B. 389; *Gurr v. Outhbert* (1843), 12 L. J. (EX.) 309 (consumption of goods by seller); *Langton v. Higgins* (1859), 4 H. & N. 402 (trover against second buyer from seller); *Johnson v. Lancashire and Yorkshire Rail. Co.* (1878), 3 C. P. D. 499; and see title DAMAGES, Vol. X., pp. 344, 345. As to actions in tort generally, see title TORT; as to detinue and conversion, see title TROVER AND DETINUE.

(*r*) *Chinery v. Viall* (1860), 5 H. & N. 288; *Johnson v. Stear* (1863), 15 C. B. (N. S.) 330 (conversion by prepaid pledge); *Hiorl v. London and North Western Rail. Co.* (1879), 4 Ex. D. 188, C. A. (nominal damages: facts equivalent to return of goods to owner); and see title DAMAGES, Vol. X., p. 344, note (*s*). In actions against strangers the buyer can recover the full value of the goods without deduction of the unpaid price (*Johnson v. Lancashire and Yorkshire Rail. Co.*, *supra*; *France v. Gaudet* (1871), L. R. 6 Q. B. 199), even where he is not the owner, but only the bailee under a contract of sale; but in this case he is a trustee for the seller for the unpaid purchase-money (*Turner v. Hardcastle* (1862), 11 C. B. (N. S.) 683).

(*s*) See p. 122, *ante*.

(*t*) See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11 (1) (*c*); p. 151, *ante*.

(*u*) *Payne v. Whale* (1806), 7 East, 274. The contract, however, may be subject to a condition subsequent (*Gompertz v. Denton* (1832), 1 Cr. & M. 207, 209; *Head v. Tattersall* (1871), L. R. 7 Exch. 7; *Foster v. Smith* (1856), 18 C. B. 156), or a stipulation which might have been treated as a warranty may have been made fraudulently, and so be a ground for rescinding the contract and returning the goods (*Gompertz v. Denton. supra*; *Clarke v. Dickson* (1858), E. B. & E. 148; *Holdsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317, 323, 338). Again, the contract itself may in its inception be founded on the fulfilment of a condition assumed as the basis of the contract (*Bannerman v. White* (1861), 10 C. B. (N. S.) 844). As to conditions and warranties generally, see pp. 149 *et seq.*, *ante*.

(*v*) The same rule applies to goods taken in exchange (*Emanuel v. Dane* (1812), 3 Camp. 299).

SECT. 2.
Remedies of
the Buyer.

breach of warranty in diminution or extinction of the price (*w*) or maintain an action (*a*) against the seller for damages for breach of warranty (*b*).

The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage (*c*).

Measure of
damages.

476. The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty (*d*).

(*w*) *Street v. Blay* (1831), 2 B. & Ad. 456; *Allen v. Cameron* (1833), 1 Cr. & M. 832; *Cousins v. Paddon* (1835), 2 Cr. M. & R. 547 (reduction); *Poulton v. Lattimore* (1829), 9 B. & C. 259 (extinction); *King v. Boston* (1789), 7 East, 481, n. (extinction); *Grounsell v. Lamb* (1836), 1 M. & W. 352 (express agreement: extinction); *Dicken v. Neale* (1836), 1 M. & W. 556 (reduced value paid). The rule here adopted was first definitely formulated in *Basten v. Butter* (1806), 7 East, 479. If, however, the buyer wrongfully rejects the goods and repudiates the contract, and so waives the performance of conditions precedent, he cannot set up in reduction of the damages a breach of warranty of quality or description when sued for non-acceptance (*Braithwaite v. Foreign Hardwood Co.*, [1905] 2 K. B. 543, 552, C. A.); and the buyer cannot show a mere breach of warranty as a defence *pro tanto* to a negotiable instrument given for the price (*Tye v. Gwynne* (1809), 2 Camp. 346; *Trickey v. Lerne* (1840), 6 M. & W. 278; *Warwick v. Nairn* (1855), 10 Exch. 762); but he may show a total failure of consideration (*Wells v. Hopkins* (1839), 5 M. & W. 7). But since the Judicature Acts (see title COURTS, Vol. IX., p. 51, note (*g*)) a breach of warranty may be set up by way of counterclaim to an action on the instrument; and see title SET-OFF AND COUNTERCLAIM, pp. 504 *et seq.*, *post*.

(*a*) See p. 118, *ante*.

(*b*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 53 (1). For the statutory definition of "warranty," see p. 122, *ante*. The action formerly could be framed not only in contract, but in tort, and without averring a *scienter*, or proving it, if averred (*Williamson v. Allison* (1802), 2 East, 446; *Wood v. Smilh* (1829), 5 Man. & Ry. (K. B.) 124; *Brown v. Edgington* (1841), 2 Man. & G. 279); but see *Ecwe Brothers, Ltd. v. Crossley Brothers* (No. 1) (1912), 57 Sol. Jo. 144, C. A. (express warranty: action lies in contract, not in tort, for negligence). The right of action is not excluded by a provision in the contract that the buyer shall pay in cash after inspection of the goods on arrival (*Khan v. Duché* (1905), 10 Com. Cas. 87).

(*c*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 53 (4); *Mondel v. Steel* (1841), 8 M. & W. 858; *Rigge v. Burbidge* (1846), 15 M. & W. 598. Before the Judicature Acts (see title COURTS, Vol. IX., p. 51, note (*g*)) it was held that, when a breach of warranty was pleaded as a defence to an action for the price, a diminution or extinction of the price was limited to the difference between the actual value of the goods and their value as warranted, and that a cross-action only would lie in respect of special or consequential damages not satisfied by the diminution or extinction of the price (*Mondel v. Steel*, *supra*; *Rigge v. Burbidge*, *supra*). But now that defence and counterclaim can be pleaded together, this point becomes of little importance; see title SET-OFF AND COUNTERCLAIM, p. 508, *post*. The buyer, if sued by the seller, is not bound to set up the breach of warranty as a defence in the buyer's action, but may bring a cross-action (*Davis v. Hedges* (1871), L. R. 6 Q. B. 687, disapproving *Fisher v. Samuda* (1808), 1 Camp. 190). In the result the buyer may divide his cause of action, or may keep it entire and sue for his whole damage (*Davis v. Hedges*, *supra*, at p. 692).

(*d*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 53 (2). As to damages generally, see title DAMAGES, Vol. X., pp. 301 *et seq.* This provision applies to breach of warranty the rule of ordinary damages for

SECT. 2.
Remedies of
the Buyer.

breach of contract, being the first branch of the rule laid down in *Hadley v. Baxendale* (1854), 9 Exch. 341; see title DAMAGES, Vol. X., p. 310. "The rule so laid down excludes the element of the defendant's knowledge; his liability is to depend, not upon the state of his mind, but upon the facts of the case" (*Bostock & Co., Ltd. v. Nicholson & Sons, Ltd.*, [1904] 1 K. B. 725, per BRUCE, J., at p. 736). The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 53 (2), therefore, does not contemplate special circumstances in the purview of the parties, *i.e.*, special damages under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 54. See *Lewis v. Peake* (1816), 7 Taunt. 153 (costs recovered by sub-buyer), as explained in *Walker v. Hatton* (1842), 10 M. & W. 249; *Borradaile v. Brunton* (1818), 8 Taunt. 535 (cable warranted: loss of anchor); *Randall v. Raper* (1858), E. B. & E. 84 (seed barley: difference in crop); *Wagstaff v. Short-Horn Dairy Co.* (1884), Cab. & El. 324 (potatoes: same); *Smith v. Green* (1875), 1 C. P. D. 92 (cow with infectious disease infecting other cows); *Randall v. Newson* (1877), 2 Q. B. D. 102, C. A. (defective carriage pole specially made for carriage: injury to buyer's horses); *Wilson v. Dunville* (1879), 6 L. R. Ir. 210 (brewer's grains which poisoned cattle); *Smith v. Johnson* (1899), 15 T. L. R. 179 (defective mortar: cost of pulling down and rebuilding house condemned); *Davis v. Miller* (1894), 10 T. L. R. 286 (beer bottle containing oxalic acid: injury to health); *Bostock & Co., Ltd. v. Nicholson & Sons, Ltd.*, [1904] 1 K. B. 725 (sulphuric acid, warranted commercially free from arsenic, and ordinarily used in manufacture of beer: price paid recoverable and value of goods destroyed); *Holden v. Bostock & Co.* (1902), 50 W. R. 323, C. A. (sugar for making beer containing arsenic: market value of beer destroyed *etc.*); *Milburn v. Belloni* (1868), 39 New York State Reports, 53 (coal dust for making bricks: bricks worthless); *Crage v. Fry* (1903), 67 J. P. 240 (fish bought condemned and destroyed by public authority: value of fish and costs of proceedings); *Cointat v. Myham & Son* (1913), 29 T. L. R. 387 (conviction for having bad meat on premises: amount of fine and costs and loss of trade due to conviction); *Frost v. Aylesbury Dairy Co.*, [1905] 1 K. B. 608, C. A. (milk with typhoid germs: death from typhoid); *Jackson v. Watson & Sons*, [1909] 2 K. B. 193, C. A. (tinned salmon: death of buyer's wife through eating it); *British Westinghouse Electric and Manufacturing Co., Ltd. v. Underground Electric Railways Co. of London, Ltd.*, [1912] A. C. 673, H. L., reversing S. C., [1912] 3 K. B. 128, C. A. (engine unduly expensive to work: increased cost of working). Where the ordinary use of the goods sold is the creation by the buyer of a new product, as, *e.g.*, where seed is sold, the difference between the value of the product, if the goods had answered to the warranty, and the value of the actual product, are damages naturally resulting from the breach of warranty (*Randall v. Raper*, *supra*), unless the inferiority of the goods might have been detected before they were dealt with, in which case the damages do not directly or naturally result (*Wagstaff v. Short-Horn Dairy Co.*, *supra*); and if the product is worthless the value of other goods used in the production and spoilt may also be recovered (*Bostock & Co., Ltd. v. Nicholson & Sons, Ltd.*, *supra*). Where goods are bought for the buyer's use, and the warranted quality is to continue during a period, the measure of damages is *prima facie* the buyer's estimated loss during the period by the use of the goods, as, *e.g.*, where a machine is sold having a certain commercial life (*British Westinghouse Electric and Manufacturing Co., Ltd. v. Underground Electric Railways Co. of London, Ltd.*, *supra*). But the buyer must minimise his loss if he can; and, if he buys elsewhere a substituted article, *prima facie* he can recover from the seller the expenses incident to the purchase, if they do not exceed the damages otherwise recoverable (*ibid.*; *quære*, whether he is not bound to buy in such a case as *Speak v. Taylor* (1894), 10 T. L. R. 224 (buyer's retention of admittedly useless article)). But, if the substituted article be so superior to the one replaced, *e.g.*, so as to show that the commercial life of the article replaced has ended, the damages may be reduced in proportion to the buyer's gain by the possession of the superior article (*British Westinghouse Electric and Manufacturing Co., Ltd. v. Underground Electric Railways Co. of London, Ltd.*, *supra*). As to damages for the buyer's loss of custom, which are ordinarily not recoverable under the Sale

SECT. 2.

Remedies of the Buyer.

Breach of warranty of quality.

Return of goods or notice of breach unnecessary.

Expense of keeping the goods.

Substituted remedy by agreement.

In the case of breach of warranty of quality, such loss is *prima facie* the difference between the value of the goods at the time of delivery (e) to the buyer and the value they would have had if they had answered to the warranty (f).

477. Unless otherwise agreed, it is not a condition precedent to the buyer's right of action for breach of warranty (g), or to his defence, if sued for the price, in that behalf, that he should return the goods to the seller, or notify him of the breach (h).

478. On a breach of warranty the buyer, if he has previously tendered the goods to the seller, may recover the expenses of the keep and preservation thereof until a reasonable opportunity occurs for a resale (i).

479. By express agreement (k) of the parties an action for breach of warranty may be excluded and another remedy compulsorily substituted (l), or the buyer may be given the option of pursuing a

of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 53 (2), see *Fitzgerald v. Leonard* (1893), 32 L. R. Ir. 675; *Bostock & Co., Ltd. v. Nicholson & Sons, Ltd.*, [1904] 1 K. B. 725; and, on the subject generally, see, further, title DAMAGES, Vol. X., pp. 336, 337; and, in particular, as to the recovery of legal costs incurred in litigation with third persons, *ibid.*, pp. 326—328. Where there is a warranty of fitness for a particular purpose, there are usually questions of special damages, the right to recover which is saved by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 54; see p. 277, *post*.

(e) The value may be taken at a time subsequent to delivery, where the seller has delayed the buyer's resale, and the goods are resold within a reasonable time (*Loder v. Kekulé* (1857), 3 C. B. (N. S.) 128). So also where the warranty is of a future event, there is no breach until the event is determined, and the difference in value must then be taken (*Ashworth v. Wells* (1898), 78 L. T. 136, C. A.), unless the difference at some other time was contemplated (*Woodward v. Powers* (1870), 105 Massachusetts Reports, 108 (stock warranted to be of certain value within year)).

(f) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 53 (3); as to "quality," see p. 121, *ante*. See *Chesterman v. Lamb* (1834), 2 Ad. & El. 129 (horse); *Cox v. Walker* (1835), 6 Ad. & El. 523; *Clare v. Maynard* (1837), 6 Ad. & El. 519 (resale price when evidence of sound value); *Loder v. Kekulé*, *supra* (prime Russian tallow); *Pingle v. Hare* (1859), 7 C. B. (N. S.) 145 (superphosphates); *Jones v. Just* (1868), L. R. 3 Q. B. 197 (Manilla hemp); *Heilbutt v. Hickson* (1872), L. R. 7 C. P. 438, 453 (shoes for army); *Ashworth v. Wells*, *supra* (orchid warranted to flower white); see also title DAMAGES, Vol. X., p. 336. The provision stated in the text only applies to warranties of quality, and not to warranties of fitness for a particular purpose or of description (*Bostock & Co., Ltd. v. Nicholson & Sons, Ltd.*, [1904] 1 K. B. 725, 739). It is a sub-rule to the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 53 (2). Cases not falling within it must be governed by *ibid.*, s. 53 (2), or, where there are special damages, by *ibid.*, s. 54; see p. 277, *post*.

(g) The buyer must, of course, return the goods, if entitled to do so, if he sues for a return of the price (*Towers v. Barrett* (1786), 1 Term Rep. 133).

(h) *Fielder v. Starkin* (1788), 1 Hy. Bl. 17; followed in *Pateshall v. Tranter* (1835), 3 Ad. & El. 103; *Buchanan v. Parnshaw* (1788), 2 Term Rep. 745 (resale by buyer); *Poulton v. Lattimore* (1829), 9 B. & C. 259. *semble* overruling *Hopkins v. Appleby* (1816), 1 Stark. 477, and *Groning v. Mendham* (1816), 1 Stark. 257, on this point; *Grounsell v. Lamb* (1836), 1 M. & W. 352 (buyer's defence).

(i) *Caswell v. Coare* (1803), 1 Taunt. 566; 2 Camp. 82; *Chesterman v. Lamb*, *supra*; *Ellis v. Chinnoek* (1835), 7 C. & P. 169; *McKensie v. Hancock* (1826), Ry. & M. 436; see also *Watson v. Denton* (1835), 7 C. & P. 85.

(k) Under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 55.

(l) *Hinchcliffe v. Barwick* (1880), 5 Ex. D. 177, C. A.; *Chapman v.*

substituted remedy (*m*). In the latter case an action is excluded when the buyer elects to pursue the substituted remedy.

Where the substituted remedy, whether obligatory on the buyer or optional, is a return of the goods to the seller—

(1) the buyer may return them, although they may not be in the same condition as when he received them, unless the change of condition was caused by his act or default (*n*); and

(2) a failure by the buyer to return the goods is, without prejudice to his right to recover the price, if paid, excused where, without such act or default, the goods have, since their delivery, either physically perished, or have otherwise, in a commercial sense, ceased to exist as such (*o*).

SECT. 2. Remedies of the Buyer.

Where
remedy is a
return of
the goods.

SUB-SECT. 5.—*Special Damages, Interest, and Failure of Consideration.*

480. Nothing in the Act (*p*) affects the right of the buyer or the seller to recover interest (*q*) or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration (*q*) for the payment of it has failed (*r*).

Saving of
rights of
buyer or
seller.

Withers (1888), 20 Q. B. D. 824; *Bywater v. Richardson* (1834), 1 Ad. & El. 508; *Mcenard v. Aldridge* (1801), 3 Esp. 271 (return and trial of horse); *Buchanan v. Parushaw* (1788), 2 Term. Rep. 745; *Bush v. Freeman* (1887), 3 T. L. R. 449 (return of horse); compare *Best v. Osborn* (1825), 2 C. & P. 74, where the buyer was not shown to have been aware of the special term.

(*m*) *Magrane v. Loy* (1839), 1 Craw. & D. 286 (return of horse: action by buyer for price); *Wallace v. Jarman* (1817), 2 Stark. 162 (fraudulent warranty: option to take substituted goods); *Douglass Axe Manufacturing Co. v. Gardner* (1852), 64 Massachusetts Reports, 88; *Shupe v. Collender* (1888), 56 Connecticut State Reports, 489; *Love & Co. v. Ross* (1893), 89 Iowa Reports, 400 (stallion); *Eyers v. Hadden* (1895), 70 Federal Reporter, 648. *Semble*, if *Adam v. Richards* (1795), 2 Hy. Bl. 573, decided that a buyer, having an option only, must return the goods before suing on the warranty, it is not law; see *Douglass Axe Manufacturing Co. v. Gardner*, *supra*.

(*n*) *Head v. Tattersall* (1871), L. R. 7 Exch. 7.

(*o*) *Chapman v. Withers* (1888), 20 Q. B. D. 824; *Magrane v. Loy*, *supra*. In *Chapman v. Withers*, *supra*, the goods were specific goods from the first; it is submitted that goods which had become specific by delivery to the buyer would in this connexion fall within the rule in *Taylor v. Caldwell* (1863), 3 B. & S. 826.

(*p*) *I.e.*, the rules as to general damages in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 50, 51, 53.

(*q*) As to interest, see p. 238, *ante*; and as to failure of consideration, see pp. 278, 279, *post*.

(*r*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 54. As regards special damages there is nothing peculiar in contracts of sale. The rules applicable to contracts generally apply; see title DAMAGES, Vol. X., pp. 304, 311 *et seq.*; and compare title MONEY AND MONEY-LENDING, Vol. XXI., pp. 37 *et seq.* Many of the cases draw no distinction between general and special damage, the reason being that, where the special facts are properly pleaded, both general and special damages follow the same rule, that is to say, they must directly and naturally result from the breach in the circumstances; see title DAMAGES, Vol. X., pp. 311, 313. Illustrations of special damages under contracts of sale are:—Non-delivery—*Peterson v. Ayre* (1853), 13 C. B. 353 (existence of market: contingent profits of sub-buyer not recoverable); *Portman v. Middleton* (1858), 4 C. B. (N. S.) 322 (sub-contract with buyer not known to seller: compensation to sub-contractor not recoverable); *Smeed v. Foord* (1859), 1 E. & E. 602 (delay

SECT. 2.

Remedies of the Buyer.**Failure of consideration.**

481. Where the consideration for payment of the price wholly fails, or there has been a total failure of part(s) of the consideration, then, if the price has been paid, the price, or a proportionate part respectively, can be recovered by the buyer as money had and received to his use by the seller (t); and if it has not been paid

in delivery of threshing machine: damage by weather to crops etc.); *Borries v. Hutchinson* (1865), 18 C. B. (N. S.) 445 (goods bought for resale to seller's knowledge: no market: profits of sub-contract recoverable, not damages payable by buyer to indemnify sub-buyer against second sub-buyer); *Cory v. Thames Ironworks Co.* (1868), L. R. 3 Q. B. 181 (special purpose unknown to seller: loss of profits by ordinary use of article); *Elbinger Actien-Gesellschaft v. Armstrong* (1874), L. R. 9 Q. B. 473 (delay in delivery: sub-contract known to seller: reasonable compensation to sub-buyer recoverable by buyer); *Hydraulic Engineering Co. v. McHaffie* (1878), 4 Q. B. D. 670, C. A. (no market: profits of sub-contract, and expenses uselessly incurred); *Thol v. Henderson* (1881), 8 Q. B. D. 457 (profits of sub-contract: seller's knowledge of buyer's general intention to resell insufficient: *quære* whether this case is consistent with *Grébert-Borgnis v. Nugent* (1885), 15 Q. B. D. 85, C. A., and *Hammond & Co. v. Bussey* (1887), 20 Q. B. D. 79, C. A.); *Grébert-Borgnis v. Nugent, supra* (sub-contract known to seller: no market: loss of profit and damages payable to sub-buyer recoverable); *McNeill v. Richard*, [1899] 1 L. R. 79 (no market: resale value: loss of profits); *Agius v. Great Western Colliery Co.*, [1899] 1 Q. B. 413, C. A. (sub-contract known to seller: delay in delivery: costs in action at suit of sub-buyer); *Watson v. Gray* (1900), 16 T. L. R. 308 (delay in delivery of plates for barge: no market: extra cost of work recoverable, not possible profits on future contracts); *Molling & Co. v. Dean & Son* (1901), 18 T. L. R. 217 (goods sold to fulfil sub-contract abroad: rejection by sub-buyer: buyer's loss of profit, and expenses of consignment and return). Breach of warranty—*Bridge v. Wain* (1816), 1 Stark. 504 (goods sold for resale in China to seller's knowledge: no market: goods useless: value in China recoverable); *Wrightup v. Chamberlain* (1839), 7 Scott, 598 (warranted horse resold with warranty: defect discoverable: costs of buyer's defence not recoverable); *Hamillon v. Magill* (1883), 12 L. R. Ir. 186 (sub-contract: special value of goods to buyer); *Hammond & Co. v. Bussey, supra* ("steam coal" bought for resale to seller's knowledge: defect latent: damages and costs of buyer's defence reasonably incurred); *Smith v. Johnson* (1899), 15 T. L. R. 179 (bad mortar: house condemned: costs of pulling down and rebuilding). As to the recovery, as special damages, of damages or compensation for which the buyer is liable to a sub-buyer, see, in addition to cases cited in this note, title DAMAGES, Vol. X., pp. 315, 337; as to costs, see *ibid.*, pp. 326, 327; *Broom v. Hall* (1859), 7 C. B. (N. S.) 503; and, as to damages where the goods are bought for a particular purpose, see title DAMAGES, Vol. X., pp. 314, 316, 317, 336.

(s) *I.e.*, where the consideration is severable, and the price can be apportioned to the separate parts of it (*Chanter v. Leese* (1839), 8 M. & W. 698, Ex. Ch.; *Biggerstaff v. Rowatt's Wharf, Ltd., Howard v. Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93, C. A.).

(t) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 54: see p. 277, *ante*; and see, generally, title CONTRACT, Vol. VII., p. 481. Thus, the buyer may recover the price if the seller fails to deliver the goods (*Giles v. Edwards* (1797), 7 Term Rep. 181; *Portman v. Middleton* (1858), 4 C. B. (N. S.) 322; *Devauz v. Conolly* (1849), 8 C. B. 640 (part delivery); *secus*, if the seller is an infant (*Cowern v. Nield*, [1912] 2 K. B. 419)); or commits a breach of any condition, whether of title (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 12; *Eichholz v. Bannister* (1864), 17 C. B. (N. S.) 708 (a case which seems to be wrongly stated in title CONTRACT, Vol. VII., p. 481, note (o))); *Edwards v. Pearson* (1890), 6 T. L. R. 220), description (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 13), or quality (*ibid.*, ss. 14, 15), or otherwise, which the buyer has not waived, or been compelled to waive (*ibid.*, s. 11; *Bostock & Co., Ltd. v. Nicholson & Sons, Ltd.*, [1904] 1 K. B.

the buyer may set up the failure of consideration as a defence *pro tanto* (a).

SECT. 2.
Remedies of
the Buyer.

Part VII.—Supplementary Statutory Provisions.

SECT. 1.—General Explanatory Provisions.

482. Where any right, duty, or liability would arise (b) under a contract of sale by implication of law it may be negatived or varied by express agreement, or by the course of dealing between the parties, or by usage, if the usage is such as to bind (c) both parties to the contract (d).

Variation
of implied
rights by
agreement
etc.

725); but the buyer cannot recover the price where the goods delivered are merely inferior to the contract, no condition having been broken (*Fortune v. Lingham* (1810), 2 Camp. 416). So the buyer can recover the price where the contract is void as founded on some mutual mistake, as, e.g., under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 6 (see *Cox v. Prentice* (1815), 3 M. & S. 344 (part of price overpaid); title MISTAKE, Vol. XXI., p. 9), or has been avoided by implication of law, and the price was not payable at the time of the avoidance, as, e.g., under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 7; but he cannot recover the price if the contract is avoided in a specified event and by express agreement the seller is entitled to retain the money (*United States of America v. Pelly* (1899), 15 T. L. R. 166). Again, the buyer may recover the price where the contract has by agreement been rescinded (*Caswell v. Coare* (1809), 1 Taunt. 566; *Head v. Tattersall* (1871), L. R. 7 Exch. 7 (express condition subsequent); *Gomery v. Bond* (1815), 3 M. & S. 378; *Long v. Preston* (1828), 2 Moo. & P. 262 (conduct of seller showing rescission)), or the buyer is entitled to treat it as rescinded by the seller's wrongful repudiation; *secus*, where the buyer only is in default (*Fitt v. Cassanet* (1842), 4 Man. & G. 898; *Thomas v. Brown* (1876), 1 Q. B. D. 714). The buyer is not entitled to interest on the price (*Walker v. Constable* (1798), 1 Bos. & P. 306 (contract rescinded)), even although it was received by a fraudulent seller (*Crockford v. Winter* (1807), 1 Camp. 124, 129). Where the contract is in writing, parol evidence is not admissible to show that part of the price was paid in consideration of speedy delivery, which has not been made (*Brady v. Oastler* (1864), 3 H. & C. 112, MARTIN, B., dissenting). As to actions for money had and received, see title CONTRACT, Vol. VII., pp. 473 *et seq.*

(a) *Biggerstaff v. Rowatt's Wharf, Ltd., Howard v. Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93, C. A. (set-off); *Chanter v. Leese* (1839), 5 M. & W. 698, Ex. Ch.

(b) I.e., under a contract of sale *simpliciter*, apart from express agreement etc.

(c) As to the requisites of a valid usage, see title CUSTOM AND USAGES, Vol. X., pp. 252 *et seq.*

(d) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 55; *Iandauer & Co. v. Craven and Speeding Brothers*, [1912] 2 K. B. 94 (usage as to through bill of lading). This provision must be read subject to the ordinary rules governing the admissibility of oral evidence in relation to written contracts (*Re Walkers, Winsor & Hamm and Shaw, Son & Co.*, [1904] 2 K. B. 152 (usage); and see, generally, titles CONTRACT, Vol. VII., pp. 509 *et seq.*; CUSTOM AND USAGES, Vol. X., pp. 260 *et seq.*; EVIDENCE, Vol. XIII., pp. 566, 568). To exclude a term implied by law, the express agreement must be inconsistent with it, e.g., an express warranty of quality may be consistent with a condition implied by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14 (*Pigge v. Parkinson* (1862), 7 H. & N. 955, Ex. Ch.).

SECT. 1.

General
Explanatory
Provisions.

Meaning of
"reasonable
time."

Statutory
rights enforce-
able by
action.

Separate
contract for
each lot.

When sale
complete.

Reservation
by seller of
right to bid.

483. Where, by the Act (*e*), any reference is made to a reasonable time, the question what is a reasonable time is a question of fact (*f*).

484. Where any right, duty, or liability is declared by the Act, it may, unless otherwise (*g*) by the Act provided, be enforced by action (*h*).

SECT. 2.—*Sales at Auction.*

485. Where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale (*i*).

486. A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner (*k*). Until such announcement is made any bidder may retract his bid (*l*).

487. A right to bid at an auction may be reserved expressly by or on behalf of the seller (*l*), and, where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction (*m*).

For illustrations of this provision, see *Re Walkers, Winsor & Hamm and Shaw, Son & Co.*, *supra*; and this title, *passim*, particularly p. 163, *ante*.

(*e*) As in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 18, r. 4 (*b*), 29 (2), 35, 37, 48 (3).

(*f*) *Ibid.*, s. 56; see title TIME.

(*g*) These words appear to refer to the unpaid seller's rights of lien, stoppage *in transitu*, and resale (see pp. 242 *et seq.*, *ante*), which are enforceable without action. There may perhaps be also a reference to the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4.

(*h*) *Ibid.*, s. 57; see p. 118, *ante*. The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 57, was enacted probably to negative the English common law rule that, where a statute provides no specific penalty, disobedience to its provisions is indictable as a misdemeanour; see *R. v. Harris* (1791), 4 Term Rep. 202; and see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 459, note (*i*); STATUTES. The particular rights provided by the Act are in addition to the general rights and duties of the parties.

(*i*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 58 (1); *Emmerson v. Heelis* (1809), 2 Taunt. 38; *James and Chapman v. Shore* (1816), 1 Stark. 426; *Roots v. Dormer (Lord)* (1832), 4 B. & Ad. 77; *Couston v. Chapman* (1872), L. R. 2 Sc. & Div. 250; compare *Dykes v. Blake* (1838), 4 Bing. (N. C.) 463 (single contract in writing after knocking down of lots). See also title AUCTION AND AUCTIONEERS, Vol. I., p. 505.

(*k*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 58 (2); *Payne v. Cave* (1789), 3 Term Rep. 148; *McManus v. Fortescue*, [1907] 2 K. B. 1, C. A.; *Fenwick v. Macdonald, Fraser & Co.* (1904), 6 F. (Ct. of Sess.) 850; see title AUCTION AND AUCTIONEERS, Vol. I., pp. 510, 511. Conversely, the seller may withdraw the goods (*Fenwick v. Macdonald, Fraser & Co.*, *supra*). When the sale is notified to be subject to a reserve, every offer by bidding, and the acceptance by the auctioneer, is subject to the reserve having been reached (*McManus v. Fortescue*, *supra*). The same principle, it is conceived, applies where there is any other condition precedent to the existence of a contract.

(*l*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 58 (4).

(*m*) *Ibid.*, s. 58; *Thornett v. Haines* (1846), 15 M. & W. 367; *R. v. Marsh* (1829), 3 Y. & J. 331; *Parfitt v. Jepson* (1877), 46 L. J. (Q. B.) 529; see title AUCTION AND AUCTIONEERS, Vol. I., p. 509. It should be remarked that the Act does not limit the seller or his agent to one bid; also that the words "but not otherwise" show that the mere reservation of a price

Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it is not lawful for the seller himself to bid, or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale contravening this rule may be treated as fraudulent by the buyer (*n*).

SECT. 2.
Sales at
Auction.

Puffing at
auction.

488. A sale by auction may be notified to be subject to a reserve price (*o*).

Reserve price.

SECT. 3.—*Saving Clauses.*

489. The rules in bankruptcy (*p*) relating to contracts of sale continue to apply thereto, notwithstanding anything in the Sale of Goods Act, 1893 (*q*).

Rules in
bankruptcy
and of
common law.

The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Sale of Goods Act, 1893 (*r*), and in particular the rules relating to

does not justify the employment of a bidder; see *Gilliat v. Gilliat* (1869), L. R. 9 Eq. 60. On the other hand, it seems that the reservation of a right to bid justifies the seller in withdrawing the goods when the reserve has not been reached, although there is no notification of a reserve in the conditions of sale, and the seller does not actually exercise his right to bid (*Fenwick v. Macdonald, Fraser & Co.* (1904), 6 F. (Cl. of Sess.) 850, per Lord YOUNG, at p. 853).

(*n*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 58 (3). This clause enacts the common law rule; see also Cicero De Officiis, Bk. 3, ch. 15. The buyer has alternative remedies, to sue for the tort or to avoid the contract. See, generally, *Bexwell v. Christie* (1776), Cowp. 395 (no duty of auctioneer towards seller to bid for seller); *Howard v. Castle* (1796), 6 Term Rep. 642; *Crowder v. Austin* (1826), 3 Bing. 368 (highest bidder to be purchaser: seller cannot recover price); *Wheeler v. Collier* (1827), Mood. & M. 123 (puffer up to limited sum only: sale none the less void); *R. v. Marsh* (1829), 3 Y. & J. 331 (one bidding reserved to Crown, and exceeded); see S. C. (1831), 1 Cr. & J. 306 (*bond fide* bid for himself by Crown agent); *Thornett v. Haines* (1846), 15 M. & W. 367 (sale without reserve: buyer recovers price from auctioneer); *Green v. Baverstock* (1863), 14 C. B. (N. S.) 204 (highest bidder to be purchaser: action by auctioneer for non-clearance of goods); *Parfitt v. Jepson* (1877), 46 L. J. (Q. B.) 529 (highest bidder to be purchaser: one bid reserved, three made: law considered). An agent employed to make fictitious bids on behalf of the seller cannot recover his commission therefor (*Walker v. Nightingale* (1726), 4 Bro. Parl. Cas. 193); see, generally, title AUCTION AND AUCTIONEERS, Vol. I., pp. 508, 509.

(*o*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 58 (4). It seems to have been formerly a rule in equity that, where a sale of land was not notified to be without reserve, one bidder might, even without express stipulation, be employed to prevent a sale at an undervalue (*Green v. Baverstock* (1863), 14 C. B. (N. S.) 204, per WILLES, J., at p. 208; but see *Mortimer v. Bell* (1865), 1 Ch. App. 10, per Lord CRANWORTH, L.C.); and see title SALE OF LAND, p. 319, *post*. The present clause requires an express reservation.

(*p*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 1 *et seq.*, and, in particular, the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52); *ibid.*, ss. 4 (b), (c), 48 (fraudulent preference), 44 (2) (iii.) (reputed ownership), 49 (protected transactions), 50 (power of trustee to sell), 57 (4) (consideration for sale), 55 (1) (disclaimer by trustee of onerous contracts), 55 (5) (rescission by court of contract with bankrupt), 114 (non-joinder of bankrupt in action on joint contract).

(*q*) 56 & 57 Vict. c. 71, s. 61 (1).

(*r*) 56 & 57 Vict. c. 71.

SECT. 3.
Saving
Clauses.

Enactments
saved.

the law of principal and agent (*s*), and the effect of fraud, misrepresentation (*t*), duress (*a*), mistake (*b*), or other invalidating cause (*c*), continue to apply to contracts for the sale of goods (*d*).

490. Nothing in the Act (*e*), or in any repeal effected thereby, affects the enactments relating to bills of sale (*f*), or any enactment relating to the sale of goods (*g*) which is not expressly repealed (*h*) by the Act (*i*).

(*s*) See title AGENCY, Vol. I., pp. 145 *et seq.*

(*t*) See title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 653 *et seq.*

(*a*) See title CONTRACT, Vol. VII., pp. 356, 357.

(*b*) See *ibid.*, pp. 354, 355; title MISTAKE, Vol. XXI., pp. 1 *et seq.*

(*c*) *E.g.*, undue influence; see title CONTRACT, Vol. VII., pp. 357 *et seq.*; illegality (*ibid.*, pp. 390 *et seq.*); contemporaneous impossibility of performance (*ibid.*, pp. 385, 427); and see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 77 *et seq.*

(*d*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 61 (2).

(*e*) *I.e.*, the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

(*f*) The Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), is the only one of these statutes which affects sales of goods. As to the effect of a bill of sale in transferring property, see p. 186, *ante*; and see, generally, title BILLS OF SALE, Vol. III., pp. 1 *et seq.*

(*g*) See the following titles:—AGRICULTURE, Vol. I., pp. 285 *et seq.*, 291, 292, and (for the sale of poisoned grain) the Protection of Animals Act, 1911 (1 & 2 Geo. 5, c. 27), s. 8; ANIMALS, Vol. I., pp. 398, 400 (stray and unmuzzled dogs), 406 (wild birds), and see the Protection of Animals Act, 1911 (1 & 2 Geo. 5, c. 27); AUCTION AND AUCTIONEERS, Vol. I., pp. 500—502 (auctioneer's and hawkers' licence), 506—508 (regulations as to sales by auctioneers); CARRIERS, Vol. IV., p. 94 (railway company's right in respect of tolls to sell carriage hauled); CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 567, 568 (selling goods with forged marks), 515 (buying counterfeit coin), 554, 555 (selling unwholesome provisions), 760 (forging warranty under Food and Drugs Acts); FISHERIES, Vol. XIV., pp. 616—620, 626, 627 (restrictions on sale of fish); FOOD AND DRUGS, Vol. XV., pp. 5 *et seq.* (adulteration), 35 *et seq.* (unwholesome food), 45 *et seq.* (adulteration of particular articles); GAME, Vol. XV., pp. 254 *et seq.* (licence to deal in game); GAS, Vol. XV., pp. 332 *et seq.*, 375 *et seq.* (supply of gas); INTOXICATING LIQUORS, Vol. XVIII., pp. 1 *et seq.* (intoxicating liquors); MARKETS AND FAIRS, Vol. XX., pp. 53—55 (market overt), 54 (horses), 18, 34, 35 (hay and straw in Metropolis), 47—49 (protection of owner of statutory market), 34 (sale at fair of tobacco or snuff); MEDICINE AND PHARMACY, Vol. XX., pp. 381 *et seq.* (poisons), 385 (acids: poison for agricultural purposes: arsenic), 379 (licence for sale of dutiable drugs), 377 (drugs generally); RAILWAYS AND CANALS, Vol. XXIII., p. 698 (refreshments for passengers); REVENUE, Vol. XXIV., pp. 648 *et seq.* (licences to sell); SHIPPING AND NAVIGATION; TRADE MARKS, TRADE NAMES, AND DESIGNS; TRADE AND TRADE UNIONS.

(*h*) The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71) repeals the following English statutes:—(1603) 1 Jac. 1, c. 12 (brokers); Statute of Frauds (29 Car. 2, c. 3), ss. 16, 17; Statute of Frauds Amendment Act, 1829 (9 Geo. 4, c. 14), s. 7; Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), ss. 1, 2. The schedule of repeals is itself repealed, with *ibid.*, s. 60, by the Statute Law Revision Act, 1908 (8 Edw. 7, c. 49). It should be noticed that the Act does not expressly repeal the Irish Statute of Frauds, stat. (1695) 7 Will. 3, c. 12, s. 13.

(*i*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 61 (3).

SALE OF HAY AND STRAW.

See AGRICULTURE; MARKETS AND FAIRS.

SALE OF HORSES.

See ANIMALS; MARKETS AND FAIRS.

SALE OF INTOXICATING LIQUORS.

See INTOXICATING LIQUORS.

SALE OF LAND.

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Part I.—The Contract of Sale.

SECT. 1.—*Requisites for Existence of the Contract.*

SECT. 1. Requisites for Exist- ence of the Contract.

491. A contract for the sale of land is governed by the same legal rules as any other contract (*a*); and it is only necessary to consider here the application of the general law to the particular subject-matter of the sale of land. Thus a contract for sale of land may be made either by private agreement between the parties or by public auction (*b*); but, however made, it must contain the ordinary essentials of a contract, namely, an offer by one party to the other, and an acceptance of that offer by the party to whom it was made (*c*).

Offer and
acceptance.

492. On a sale by auction, the offer is made by the purchaser in the form of the bid which is ultimately accepted by the auctioneer as the agent of the vendor (*d*). The advertisement of the sale is not itself an offer, but only a declaration of intention to hold the sale and allow the public generally to make offers (*e*).

Offer at
auction.

493. An acceptance must be absolute and unqualified (*f*). There is no completed contract if the acceptance is "subject to approval of terms of contract" (*g*), or "subject to a formal contract being prepared and signed by both parties as approved by their solicitors" (*h*), or where it otherwise appears that all the terms of the contract are not definitely settled or that additional terms are to be agreed to and inserted in the formal contract (*i*).

Acceptance
subject to
formal con-
tract.

(*a*) See title CONTRACT, Vol. VII., pp. 327 *et seq.* As to illegal contracts, see *ibid.*, pp. 390 *et seq.*; as to "pretenced titles," see note (*e*), p. 342, *post*.

(*b*) See title AUCTION AND AUCTIONEERS, Vol. I., pp. 499 *et seq.*

(*c*) See title CONTRACT, Vol. VII., p. 345. As to what amounts to an offer, see *ibid.*, p. 346. As to option to purchase, see note (*b*), p. 364, *post*.

(*d*) See title AUCTION AND AUCTIONEERS, Vol. I., p. 511.

(*e*) *Harris v. Nickerson* (1873), L. R. 8 Q. B. 286. As to withdrawal of the property from sale, see title AUCTION AND AUCTIONEERS, Vol. I., p. 511, and notes (*q*), (*r*), *ibid.* A bid, like any other offer, may be retracted before it is accepted, *i.e.*, before the fall of the auctioneer's hammer; see *Payne v. Cave* (1789), 3 Term Rep. 148.

(*f*) See title CONTRACT, Vol. VII., p. 350; compare title LANDLORD AND TENANT, Vol. XVIII., p. 370.

(*g*) *Chatterley v. Nicholls* (1884), 1 T. L. R. 14, C. A.; *Harvey v. Barnard's Inn (Principal and Ancients)* (1881), 50 L. J. (CH.) 750; *Vale of Neath Colliery v. Furness* (1876), 45 L. J. (CH.) 276; *Page v. Norfolk* (1894), 70 L. T. 781, C. A.

(*h*) *Winn v. Bull* (1877), 7 Ch. D. 29; *Hawkesworth v. Chaffey* (1886), 54 L. T. 72; *Watson v. McAllum* (1902), 87 L. T. 547; *Bromet v. Neville* (1909), 53 Sol. Jo. 321; *Von Hatzfeldt-Wildenburg v. Alexander*, [1912] 1 Ch. 284, doubting *North v. Percival*, [1898] 2 Ch. 128; see *Honeyman v. Marryatt* (1857), 6 H. L. Cas. 112, 113; *Chinnock v. Ely (Marchioness)* (1865), 4 De G. J. & Sm. 638, *per* Lord WESTBURY, at p. 646; see also title LANDLORD AND TENANT, Vol. XVIII., p. 371.

(*i*) *Donnison v. People's Caf  Co.* (1881), 45 L. T. 187, C. A. Where what purports to be a clean acceptance of an offer is accompanied by a formal contract containing terms which were not referred to in the offer, there is no completed agreement (*Jones v. Daniel*, [1894] 2 Ch. 332; *Clark v. Robinson* (1903), 51 W. R. 443) but where the formal contract contains no new terms, there is an enforceable contract even though the formal document is not executed (*Filby v. Hounsell*, [1896] 2 Ch. 737, 742; *Rouse v.*

SECT. 1.

Requisites for Existence of the Contract.

On the other hand, if it appears that the parties have agreed upon the essential terms of the sale, a mere intimation of a desire that the agreement shall be embodied in another document of a more formal nature (*k*), or the expression of what is necessarily a condition, not of the acceptance, but of the contract itself (*l*), does not prevent the agreement being enforceable.

Final agreement.

494. It is a question of construction whether the parties have come to a final agreement, though they intend to have a more formal document drawn up (*m*). Where the agreement depends on a series of letters or other documents, the whole of them must be considered, and a document which, taken alone, appears to be an absolute acceptance of a previous offer does not make the contract binding if, in fact, it does not extend to all the terms under negotiation, of which the vendor can adduce verbal evidence (*n*).

Contract on correspondence.SECT. 2.—*Evidence of the Contract.*SUB-SECT. 1.—*Memorandum in Writing.***Writing required.**

495. A contract for the sale of land is not enforceable unless evidenced by some memorandum or note thereof in writing, signed by the party to be charged or some person lawfully authorised by him to sign (*o*).

Statute of Frauds.

Ginsberg (1911), 55 Sol. Jo. 632). Similarly, there is no completed contract where the acceptance is subject to conditions stated therein or to be stated by the acceptor or someone on his behalf (*Crossley v. Maycock* (1874), L. R. 18 Eq. 180); see also *Santa Fé Land Co., Ltd. v. Forestal Land, Timber and Railways Co., Ltd.* (1910), 26 T. L. R. 534 ("subject to a formal contract to be approved by your solicitors and ourselves on acceptance of the offer, when any minor details can be settled"); and compare *May v. Thomson* (1882), 20 Ch. D. 705, C. A. "The circumstance that the parties do intend a subsequent agreement to be made, is strong evidence to show that they did not intend the previous negotiations to amount to an agreement" (*Ridgway v. Wharton* (1857), 6 H. L. Cas. 238, per Lord CRANWORTH, L.C., at p. 268); and see *Rossiter v. Miller* (1878), 3 App. Cas. 1124, per Lord BLACKBURN, at p. 1152; *Wood v. Midgley* (1854), 5 De G. M. & G. 41, C. A.

(*k*) *Rossiter v. Miller*, *supra*, at p. 1143; *Fowle v. Freeman* (1804), 9 Ves. 351; *Thomas v. Dering* (1837), 1 Jur. 211, 427; *Cowley v. Watts* (1853), 17 Jur. 172; *Lewis v. Brass* (1877), 3 Q. B. D. 667; *Bonnewell v. Jenkins* (1878), 8 Ch. D. 70, C. A.; *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295, C. A.; *Rouse v. Ginsberg* (1911), 55 Sol. Jo. 632; compare *Gibbins v. North Eastern Metropolitan Asylum District* (1847), 11 Beav. 1; *Gray v. Smith* (1889), 43 Ch. D. 208, C. A.; *Filby v. Hounsell*, [1896] 2 Ch. 737.

(*l*) *E.g.*, the approval of the vendor's title; see *Gordon v. Mahony* (1850), 13 I. Eq. R. 383, 404; *Hussey v. Horne-Payne* (1879), 4 App. Cas. 311, per Lord CAIRNS, L.C., at p. 322; *Chatterley v. Nicholls* (1884), 1 T. L. R. 14, C. A.

(*m*) *Rossiter v. Miller*, *supra*, per Lord BLACKBURN, at p. 1152; *Lloyd v. Nowell*, [1895] 2 Ch. 744. The payment and acceptance of a deposit is not conclusive (*Syer v. Alder* (1898), 14 T. L. R. 550, C. A.).

(*n*) *Hussey v. Horne-Payne*, *supra*; *Bristol, Cardiff and Swansea Aerated Bread Co. v. Maggs* (1890), 44 Ch. D. 616; *Bellamy v. Debenham* (1890), 45 Ch. D. 481, 493; [1891] 1 Ch. 412, C. A.; compare *Pattie v. Hornibrook*, [1897] 1 Ch. 25.

(*o*) Statute of Frauds (29 Car. 2, c. 3), s. 4, referring to "any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them"; see title CONTRACT, Vol. VII., pp. 361, 362; and compare title LANDLORD AND TENANT, Vol. XVIII., p. 372, note (*d*). As to the

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Evidence
of the
Contract.

Contents of
memorandum.
Parties.

496. The memorandum must contain all the essential terms of the contract and must show that the parties have agreed to those terms (*p*). The essential terms are (1) the parties (*q*); (2) the property (*r*); and (3) the price (*s*).

As regards the parties, it is sufficient if they are so described as to be definitely ascertainable. A party may be described by some character which he fills, but the description must be one to which the person intended to be described, and no other, can answer (*a*).

signature, see title CONTRACT, Vol. VII., pp. 375—379; *Brooks v. Billingham* (1912), 56 Sol. Jo. 503; and, as to authority to sign, as distinguished from authority to arrange terms or settle the form of a contract, see title CONTRACT, Vol. VII., p. 378, note (*r*). In *Wallace v. Roe*, [1903] 1 I. R. 32, a vendor was held to be bound where the memorandum was signed by the purchaser and by the vendor's agent, though the latter signed as "witness." As to the auctioneer failing to sign a memorandum, see title AUCTION AND AUCTIONEERS, Vol. I., p. 518.

The expression "contract or sale of lands" etc. has been held to cover a contract to procure that another shall acquire a lease or other interest in land (*Horsey v. Graham* (1869), L. R. 5 C. P. 9); an offer and the acceptance thereof made in pursuance of an option clause contained in a former document (*Birmingham Canal Co. v. Cartwright* (1879), 11 Ch. D. 421, 434); a contract for sale of the benefit of a mortgage or charge upon land (*Toppin v. Lomas* (1855), 16 C. B. 145; *Driver v. Broad*, [1893] 1 Q. B. 744, C. A. (debentures)), or of an equity of redemption in land (*Massey v. Johnson* (1847), 1 Exch. 241, 255); and an agreement to give a charge on land or rent (*Re Whitting, Ex parte Hall* (1879), 10 Ch. D. 615, 620, C. A.); see also title LANDLORD AND TENANT, Vol. XVIII., p. 582.

Easements and profits à prendre are both interests in land within the statute; see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 237, 340; and so also is an advowson (*Stafford (Earl) v. Buckley* (1751), 2 Ves. Sen. 170, 178), and the profits of a clergyman's living (*Aitchin v. Hopkins* (1834), 1 Bing. (N. C.) 99, 102). As to what general descriptions include an advowson, see title ECCLESIASTICAL LAW, Vol. XI., p. 564. A collateral agreement, not involving an obligation on either party to acquire an interest in land, though depending for its operation upon the acquisition of such an interest, is not within the statute (see *Angell v. Duke* (1875), L. R. 10 Q. B. 174; *Boston v. Boston*, [1904] 1 K. B. 124, C. A. (where A. agreed verbally that if B. bought certain land A. would pay B. the amount of the purchase-money); compare also *Erskine v. Adeane* (1873), 8 Ch. App. 756; *Re Banks, Weldon v. Brinks* (1912), 56 Sol. Jo. 362); though in general a stipulation referring to the subject-matter of the contract must be found in it (*Jones v. Lavington*, [1903] 1 K. B. 253, 256, C. A.; *Crawford v. White City Rink (Newcastle-on-Tyne), Ltd.* (1913), 57 Sol. Jo. 357); but a representation made at the time of the sale may operate as a warranty (*De Lassalle v. Guildford*, [1901] 2 K. B. 215, C. A.); see also *Heilbut, Symons & Co. v. Buckleton*, [1913] A. C. 30, 50; and see titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 447; LANDLORD AND TENANT, Vol. XVIII., p. 373. As to sales of growing crops etc., see title AGRICULTURE, Vol. I., pp. 293, 294; *Teal v. Auty* (1820), 2 Brod. & Bing. 99; *Coombe v. Mitchem* (1912), 134 L. T. Jo. 159; Dart, Vendors and Purchasers, 7th ed., pp. 226 *et seq.*

(*p*) See title CONTRACT, Vol. VII., p. 372. A letter may be a sufficient memorandum although it repudiates the contract (*Dewar v. Mintoft*, [1912] 2 K. B. 373, 387); and see title CONTRACT, Vol. VII., p. 368.

(*q*) *Ibid.*, pp. 370—372.

(*r*) *Ibid.*, p. 372.

(*s*) *Ibid.*, pp. 374, 375.

(*a*) Thus "proprietor" may be a sufficient description, but not "vendor"; see *ibid.*, pp. 371, 372, and the cases there cited. The purchaser must be clearly indicated as such (*Dewar v. Mintoft, supra*). A contract made in the name of one who is an agent binds the undisclosed principal; see title AGENCY, Vol. I., p. 206.

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Evidence
of the
Contract.

Property.

Similarly the property must be so described ^{as} to show clearly, in the circumstances of the case, what is the subject-matter of the contract (b).

The application of the description in the memorandum to particular persons, or to particular property, may be ascertained by parol evidence (c), but the result of such ascertainment must be unambiguous (d).

Price.

If the price has been definitely fixed, the memorandum must state what it is (e); if it is to be ascertained in a definite manner, that manner must be specified (f); if the price is to be the fair value of the property, that fact must be stated or implied (g). But where the memorandum does not fix the price or provide for its ascertainment, an agreement that the sale is to be for a reasonable price is not implied (h), and the contract is unenforceable (i).

SUB-SECT. 2.—Where Writing Dispensed With.

Exceptions
from opera-
tion of
Statute of
Frauds.

497. To the general rule that a contract for the sale of land is not enforceable unless it complies with the requirements of the Statute of Frauds (k) there are certain exceptions.

(b) See title CONTRACT, Vol. VII., p. 372, and the cases cited *ibid.*, note (e). The interest sold need not be stated: unless the contrary appears, this is presumed to be the unincumbered fee simple; see p. 301, *post*.

(c) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 448.

(d) *Ogilvie v. Foljambe* (1817), 3 Mer. 53; *Shardlow v. Cotterell* (1881), 20 Ch. D. 90, C. A.; *Plant v. Bourne*, [1897] 2 Ch. 281, C. A.; compare *Bainbridge v. Wade* (1850), 16 Q. B. 89.

(e) See *Elmore v. Kingscote* (1826), 5 B. & C. 583; *Re Kharaskhoma Exploring and Prospecting Syndicate*, [1897] 2 Ch. 464, 467, C. A. But it is not necessary that the price should be definitely stated; "it would undoubtedly be sufficient in any case if the memorandum were so framed that any person of ordinary capacity must infer from the perusal of it that such and no other was the consideration . . . there must be a well-grounded inference to be necessarily collected from the terms of the memorandum that the consideration stated in the declaration" (i.e., the statement of claim in an action on the contract) "and no other than such consideration was intended by the parties to be the ground of the promise" (*Hawes v. Armstrong* (1835), 1 Scott, 661, *per* TINDAL, C.J., at p. 668; and see *Re Eyre, McAndrew v. Norris* (1895), 72 L. T. 585).

(f) *Milnes v. Gery* (1807), 14 Ves. 400, 408; *Wilks v. Davis* (1817), 3 Mer. 507; see *Frewen v. Hays* (1912), 106 L. T. 516, P.C. But where the manner so specified cannot be followed, e.g., by reason of the death of the person agreed upon as valuer, there is in effect no agreement as to price, and the court cannot ascertain the price in any other manner and enforce the contract with the price so ascertained, for that would be making a new agreement for the parties; see *Milnes v. Gery*, *supra*; *Wilks v. Davis*, *supra*; *Blundell v. Brettargh* (1810), 17 Ves. 232; *Gourlay v. Somerset (Duke)* (1815), 19 Ves. 429, 430; *Morgan v. Milman* (1853), 3 De G. M. & G. 24, 34, C. A.; *Vickers v. Vickers* (1867), L. R. 4 Eq. 529; *Firth v. Midland Rail. Co.* (1875), L. R. 20 Eq. 100.

(g) *Milnes v. Gery*, *supra*, at p. 407.

(h) *Gourlay v. Somerset (Duke)*, *supra*, at p. 431; *Morgan v. Milman*, *supra*, *per* KNIGHT BRUCE, L.J., at p. 37. Such a term would be implied in the case of an agreement for the sale of goods, but the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 8 (2) (see title SALE OF GOODS, p. 147, *ante*), has no application to land.

(i) See note (c), *supra*; title CONTRACT, Vol. VII., p. 374; *Blagden v. Bradbear* (1806), 12 Ves. 466, 471. As to valuation of fixtures, see p. 321, *post*.

(k) 29 Car. 2, c. 3: see p. 291, *ante*.

SECT. 2.
Evidence
of the
Contract.Sale by the
court.Admission
in pleading.

Where the sale is made by order of the court, whether by auction or private contract, the nature of the proceedings precludes the possibility of the mischief which the statute was intended to prevent, and although in practice the purchaser is always required to sign the bidding paper, this is not essential to make the sale binding on him (*l*).

If, in an action on the contract, the defendant does not plead the Statute of Frauds (*m*) specifically (*n*), he is taken to have admitted that there is a sufficient note or memorandum to satisfy the requirements of the statute, or the contract may be proved by oral evidence (*o*), and is enforceable against him although in fact it does not comply with those requirements (*p*).

498. A party cannot rely upon non-compliance with the Statute of Frauds (*q*) where it would in effect be a fraud on his part for him to do so (*r*). Thus, in an action for specific performance, where the

Fraud.

(*l*) See *A.-G. v. Day* (1749), 1 Ves. Sen. 218, per Lord HARDWICKE, L.C., at p. 221; *Blayden v. Bradbear* (1806), 12 Ves. 466, 472; *Re Goren, Ex parte Cutts* (1838), 3 Deac. 242, 267; Sugden, Vendors and Purchasers, 14th ed., p. 109. As to sale by order of the court, see pp. 314 et seq., post; title PARTITION, Vol. XXI., pp. 842 et seq.

(*m*) 29 Car. 2, c. 3.

(*n*) R. S. C., Ord. 19, rr. 15, 20. It is not necessary to plead any particular section of the statute, but where a particular section is pleaded, that alone can be relied on, and the pleading cannot be amended so as to plead another section (*James v. Smith*, [1891] 1 Ch. 384; affirmed on other grounds (1891), 65 L. T. 544, C. A.; see Yearly Practice of the Supreme Court, 1913, p. 251). If an alleged contract is not denied, it is taken to be admitted (R. S. C., Ord. 19, r. 13); see title PLEADING, Vol. XXII., p. 429.

(*o*) See *Olley v. Fisher* (1886), 34 Ch. D. 367.

(*p*) Where "in a bill by purchaser of lands against the vendor, to carry into execution the agreement, though not in writing, nor so stated by the bill, the vendor puts in an answer admitting [or not denying—see R. S. C., Ord. 19, r. 13; title PLEADING, Vol. XXII., p. 429] the agreement as stated in the bill, it takes it entirely out of the mischief, and there being no danger of perjury, the court would decree it" (*A.-G. v. Day*, supra, per Lord HARDWICKE, L.C., at p. 221); see also *Clarke v. Callow* (1876), 46 L. J. (Q. B.) 53, C. A.; *Callin v. King* (1877), 5 Ch. D. 660, 662, C. A.; *Toule v. Topham* (1877), 37 L. T. 308; *Morgan v. Worthington* (1878), 38 L. T. 443; *Dawkins v. Penrhyn (Lord)* (1878), 4 App. Cas. 51, 58; *Manchester and Oldham Bank, Ltd. v. Cooke & Co.* (1883), 49 L. T. 674; *Gunter v. Halsey* (1739), Amb. 586, and older cases in note, *ibid.*; compare *Fraser v. Pupe* (1904), 91 L. T. 340, C. A. As to a plaintiff pleading the statute in reply to a counterclaim, see *Miles v. New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266, C. A., per NORTH, J., at p. 279. If the plaintiff alleges a written contract and then seeks at the trial to prove an oral contract, the defendant, if he has omitted to plead the statute, will be allowed to amend (*Bunning v. Odhams Brothers, Ltd.* (1896), 75 L. T. 602, H. L.). As to pleading the statute, see, further, Yearly Practice of the Supreme Court, 1913, p. 251.

(*q*) 29 Car. 2, c. 3.

(*r*) "Cases in this court are perfectly familiar deciding that a fraudulent use shall not be made of that statute" (i.e., the Statute of Frauds); "where this court has interfered against a party meaning to make it an instrument of fraud, and said he should not take advantage of his own fraud" (*Master v. Gillespie* (1805), 11 Ves. 621, per Lord ELDON, L.C., at p. 628). "The principle of the court is, that the Statute of Frauds was not made to cover fraud" (*Lincoln v. Wright* (1859), 4 De G. & J. 16, C. A., per TURNER, L.J., at p. 22). The statute is "a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of

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of the
Contract.

plaintiff seeks to enforce a written contract which was entered into by the defendant in reliance on a verbal agreement for variation or amplification of its terms, or for the performance of some other collateral condition, the defendant is allowed to prove such verbal agreement, on the ground that to insist upon his performance of the written contract without performance of the verbal agreement would amount to a fraud upon him (a); and, where the making of a memorandum sufficient to satisfy the statute is prevented by the fraud of one of the parties, he cannot rely upon the absence of such a memorandum (t).

Part per-
formance.

499. Where the contract has been partly performed by one party to it the court, in a suitable case, ascertains what the actual contract between the parties was, notwithstanding that there is no memorandum in writing, and enforces its performance (a).

The acts relied upon must be such as to be consistent with the agreement alleged and with no other title, and must be unequivocally referable exclusively to the agreement, so that the existence of the contract is the only reasonable inference to be drawn from the fact that they have been done (b).

the parties" (*Jervis v. Berridge* (1873), 8 Ch. App. 351, 360; *Hussey v. Horne-Payne* (1879), 4 App. Cas. 311, per Lord SELBORNE, at p. 323). See also *Haigh v. Kaye* (1872), 7 Ch. App. 469, 474; *Booth v. Turle* (1873), L. R. 16 Eq. 182, 188; *Rochevoucauld v. Boustead*, [1897] 1 Ch. 196, 206, C. A. For the general principle governing these and other cases, see title EQUITY, Vol. XIII., p. 75, and the cases there cited; and, as to parol evidence that a conveyance in form absolute was in fact intended to be a mortgage, see title MORTGAGE, Vol. XXI., p. 72; *Anon.* (undated), 1 Eq. Cas. Abr. 20, pl. 5; *Davies v. Otty* (No. 2) (1865), 35 Beav. 208.

(s) *Clarke v. Grant* (1807), 14 Ves. 519; see *Pember v. Mathers* (1779), 1 Bro. C. C. 52; *Jervis v. Berridge*, *supra*, at p. 360, *Pearson v. Pearson* (1884), 27 Ch. D. 145, 148, C. A. The verbal agreement must be made at the time of the making of the written contract, so as in effect to form part of a single agreement; a distinct and collateral verbal contract cannot be so given effect to (*Snelling v. Thomas* (1874), L. R. 17 Eq. 303); and see title SPECIFIC PERFORMANCE.

(t) *Maxwell v. Montacute (Lady)* (1719), 1 Eq. Cas. Abr. 19, pl. 4; *Whitchurch v. Beris* (1789), 2 Bro. C. C. 559, 565; *Wood v. Midgley* (1854), 2 Sm. & G. 115, 122.

(a) *Ungley v. Ungley* (1877), 5 Ch. D. 887, 890, C. A. The doctrine of part performance is based either upon the ground referred to in note (r), p. 293, *ante*, that the statute is not to be made an instrument of fraud, or upon the ground that the action is not based upon the contract, but upon the equities resulting from the acts done in execution of the contract (*Maddison v. Alderson* (1883), 8 App. Cas. 467, per Lord SELBORNE, L. C., at p. 475). Part performance does not cure uncertainty (*Waring and Gillow, Ltd. v. Thompson* (1912), 29 T. L. R. 154, per BUCKLEY, L. J., at p. 156); and, as to part performance, see, further, titles EQUITY, Vol. XIII., pp. 12, 65; SPECIFIC PERFORMANCE; and, for the application of the doctrine to agreements for leases, see title LANDLORD AND TENANT, Vol. XVIII., pp. 375 *et seq.*

(b) *Gunter v. Halsey* (1739), Amb. 586; *Maddison v. Alderson*, *supra*, at pp. 479, 485, 492; *Dickinson v. Barrow*, [1904] 2 Ch. 339 (where the plaintiffs (builders) made alterations at defendant's request in the course of building a house in reliance upon a verbal agreement for its sale to the defendant); compare *Wills v. Stradling* (1797), 3 Ves. 378 (parol agreement for a new lease); *Ungley v. Ungley*, *supra*; *Frame v. Dawson* (1807), 14 Ves. 385. It has been said that the acts must be of such a nature that for the party charged to refuse to perform the contract on the ground of

500. Payment by a purchaser of the whole or any part of his purchase-money is not a sufficient act of part performance (c). But where possession is taken and money is expended in repairs or improvements, this amounts to part performance, provided the court is satisfied that the expenditure would not have been made if no contract had been in existence (d); and the mere taking possession of land under a verbal contract, without anything else, may be enough to take the contract out of the statute (e).

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Evidence
of the
Contract.

Payment of
money.

In order that the doctrine of part performance may apply, the oral evidence (f) must clearly show that there is a concluded contract of such a nature that, if it were evidenced by writing, the court would enforce it (g).

When
doctrine
of part
performance
applies.

non-compliance with the statute would amount to fraud (*Gunter v. Halsey* (1739), Amb. 586; *Walker v. Walker* (1740), 2 Atk. 98, 100; *Buckmaster v. Harrop* (1802), 7 Ves. 341, 345; *Clinan v. Cooke* (1802), 1 Sch. & Lef. 22, 41; *Mundy v. Jolliffe* (1839), 5 My. & Cr. 167, 177; *McManus v. Cooke* (1887), 35 Ch. D. 681, 697).

(c) *Maddison v. Alderson* (1883), 8 App. Cas. 467, per Lord SELBORNE, L.C., at p. 479 ("the best explanation of it seems to be, that the payment of money is an equivocal act, not (in itself), until the connection is established by parol testimony, indicative of a contract concerning land"); *Hughes v. Morris* (1852), 2 De G. M. & G. 349, C. A., per KNIGHT BRUCE, L.J., at p. 356; *Britain v. Rossiter* (1879), 11 Q. B. D. 123, 131, C. A. But in the case of an agreement for a lease, payment of an increased rent appears to be a sufficient act of part performance; see *Nunn v. Fabian* (1865), 1 Ch. App. 35, and the other cases cited in title LANDLORD AND TENANT, Vol. XVIII., pp. 376, 377. *Nunn v. Fabian*, *supra*, was explained by BAGGALLAY, L.J., in *Humphreys v. Green* (1882), 10 Q. B. D. 148, C. A., at p. 156. In *Thursby v. Eccles* (1900), 70 L. J. (Q. B.) 91, however, BIGHAM, J., was of opinion that the payment of rent did not take a contract for tenancy out of the Statute of Frauds (29 Car. 2, c. 3), and stated that he saw no distinction in principle between payment of purchase-money and payment of rent. The old authorities disclose a conflict of opinion on this point; see *Pengall (Lord) v. Ross* (1709), 2 Eq. Cas. Abr. 46, pl. 12 (part payment of fine for grant of a lease held not to be sufficient part performance); *Lacon v. Mertins* (1743), 3 Atk. 1, per Lord HARDWICKE, L.C., at p. 4 ("paying of money has been always held in this court as a part performance"); *Main v. Melbourn* (1799), 4 Ves. 720, 722, 724 (payment of a substantial part will do); *Clinan v. Cooke*, *supra*, at p. 41 ("part payment does not take such agreement out of the statute"). In *Watt v. Evans* (1834), 4 Y. & C. (EX.), Appendix, 579, it was stated that the balance of authority was in favour of the contract not being taken out of the statute although the payment was of a substantial part of the purchase-money. In other cases the point had been left open (*Coles v. Trecothick* (1804), 9 Ves. 234; *Aveling v. Knipe* (1815), 19 Ves. 441, 446; *Ex parte Hooper* (1815), 19 Ves. 477, 480).

(d) *Wills v. Stradling* (1797), 3 Ves. 378; *Ex parte Hooper*, *supra*, at p. 479; *Sutherland v. Briggs* (1841), 1 Hare, 26; *Skillicbeer v. Jarvis* (1856), 8 De G. M. & G. 79, 87, C. A.; *Williams v. Evans* (1875), L. R. 19 Eq. 547; *Caton v. Caton* (1866), 1 Ch. App. 137, 148.

(e) *Reddin v. Jarman* (1867), 16 L. T. 449; *Morphett v. Jones* (1818), 1 Swan. 172; *Pain v. Coombs* (1857), 1 De G. & J. 34, C. A.; *Gregory v. Mighell* (1811), 18 Ves. 328; *Hodson v. Heuland*, [1896] 2 Ch. 428 (where possession was taken before, and continued after, the parol contract was made); *McManus v. Cooke*, *supra*, at p. 692; compare title LANDLORD AND TENANT, Vol. XVIII., pp. 376, 377.

(f) *Gunter v. Halsey*, *supra*; *Cooth v. Jackson* (1801), 6 Ves. 12, 38; *Thynne (Lady E.) v. (Pengall (Earl))* (1848), 2 H. L. Cas. 131, per Lord BROUGHAM, at p. 158; *Maddison v. Alderson*, *supra*, per Lord O'HAGAN, at p. 484; compare *Ungley v. Ungley* (1877), 5 Ch. D. 887, C. A.; *Elliot v. Roberts* (1912), 107 L. T. 18.

(g) In *Britain v. Rossiter*, *supra*, it was held that the doctrine was confined to questions relating to land; but this seems to be

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Evidence
of the
Contract.

Ambiguous
 acts.

The principle applies to cases where a contract with a corporation, which would otherwise be unenforceable owing to the absence of the corporate seal (*h*), has been partly performed (*i*).

501. Where the doing of the act relied on is equally consistent with the existence or non-existence of the contract sought to be enforced, the act does not amount to part performance (*k*). Thus the fact that a tenant does repairs for which he is not liable under the terms of his holding, or does any other thing which might be calculated to benefit him as tenant, is not necessarily referable to a contract to purchase, and cannot be given in evidence as part performance of such a contract (*k*). An act which is merely preparatory to the contract cannot be an act of part performance (*l*).

SECT. 3.—Disclosure of Material Facts.

SUB-SECT. 1.—In General.

Avoidance
 of contract.

502. In certain cases a contract may be avoided on the ground that the consent of one of the parties was given in ignorance of material facts which were within the knowledge of the other party (*m*). A contract for the sale of land is not a contract *uberrimæ fidei*, in which there is an absolute duty upon each party to make full disclosure to the other of all material facts of which he has

inconsistent with the opinion of Lord COTTENHAM, L.C., as expressed in *Hammersley v. De Biel (Baron)* (1845), 12 Cl. & Fin. 45, 64, n., and in *Lassence v. Tierney* (1849), 1 Mac. & G. 551, 572; see *Muldison v. Alderson* (1883), 8 App. Cas. 467, *per* Lord SELBORNE, L.C., at p. 474; and in *McManus v. Cooke* (1887), 35 Ch. D. 681, KAY, J., held that "probably" it applies "to all cases in which a court of equity would entertain a suit for specific performance if the alleged contract had been in writing" (*ibid.*, at p. 697). But, where the circumstances are such that a decree for specific performance could not be obtained, the doctrine cannot be relied upon to support a claim for damages based upon the informal agreement; see *Re Northumberland Avenue Hotel Co.* (1886), 33 Ch. D. 16, C. A., *per* CHITTY, J., at p. 18; *Lavery v. Pursell* (1888), 39 Ch. D. 508, *per* CHITTY, J., at p. 518. Thus the doctrine does not apply in any case in which, even if the contract were proved, specific performance would be refused on the ground that damages afford an adequate remedy (*Turner v. Melladew* (1903), 19 T. L. R. 273); and see, further, pp. 409 *et seq.*, *post*; titles CONTRACT, Vol. VII., p. 380; SPECIFIC PERFORMANCE.

(*h*) See title CORPORATIONS, Vol. VIII., pp. 380, 381.

(*i*) *Wilson v. West Hartlepool Rail. Co.* (1865), 2 De G. J. & Sm. 475, C. A., *per* TURNER, L.J., at pp. 492, 493; see *Marwell v. Dulwich College* (1783), stated in 7 Sim. 222; *Marshall v. Queenborough Corporation* (1823), 1 Sim. & St. 520; *London and Birmingham Rail. Co. v. Winter* (1840), Cr. & Ph. 57, 63; *Lindsey (Earl) v. Great Northern Rail. Co.* (1853), 10 Hare, 664, 700; *Crook v. Seaford Corporation* (1870), L. R. 10 Eq. 678, affirmed on this point (1871), 6 Ch. App. 551. "The rule of equity that part performance will take a case out of the Statute of Frauds applies to an incorporated company, and an incorporated company which comes within that doctrine of part performance is just as much bound by it as if it were an individual" (*Re Patent Ivory Manufacturing Co., Howard v. Patent Ivory Manufacturing Co.* (1888), 38 Ch. D. 156, *per* KAY, J., at p. 163); and see title CORPORATIONS, Vol. VIII., p. 385. But this is not so where a specific statutory requirement is not complied with; see *Hoare v. Kingsbury Urban Council*, [1912] 2 Ch. 462.

(*k*) *Frame v. Dawson* (1807), 14 Ves. 386; and see the cases cited in note (*b*), p. 294, *ante*.

(*l*) *O'Reilly v. Thompson* (1791), 2 Cox, Eq. Cas. 271.

(*m*) See titles CONTRACT, Vol. VII., pp. 354 *et seq.*; MISREPRESENTATION AND FRAUD, Vol. XX., pp. 737 *et seq.*; MISTAKE, Vol. XXI., p. 18.

knowledge (*n*), but the contract may be avoided on the ground of misrepresentation, fraud or mistake in the same way as any other contract (*o*).

SECT. 3.
Disclosure
of Material
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SUB-SECT. 2.—Disclosure by the Vendor.

(i.) *In General.*

503. Information in the possession of the vendor, which it is his duty to disclose to the purchaser, may relate either to defects in the quality of the land sold or to defects in his title. Disclosure.

In one sense all defects in the quality of land agreed to be sold are defects of title, since their existence precludes the vendor from showing a good title to such enjoyment of the particular piece of land as he has agreed to sell. But in practice, defects which will prejudice a purchaser in the physical enjoyment of the property are treated as defects of quality (*p*), and defects which will expose him to adverse claims to the land are defects of title (*q*). Defects of quality and defects of title.

(ii.) *Defects of Quality.*

504. Defects of quality may be either patent or latent. Patent defects are such as are discoverable by inspection and ordinary vigilance on the part of a purchaser; latent defects are such as would not be revealed by any inquiry which a purchaser is in a position to make before entering into the contract for purchase. Nature of defects.

As regards patent defects, the primary rule is *caveat emptor*; a purchaser should make inspection and inquiry as to that which he is proposing to buy (*r*). If he omits to ascertain whether the land is such as he desires to acquire he cannot complain afterwards on discovering defects of which he would have been aware if he had taken ordinary steps to ascertain its physical condition, and which are not inconsistent with the description by which the vendor contracted to sell the property (*s*). Patent defects: *caveat emptor*.

On the other hand, any active concealment by the vendor of defects which would otherwise be patent, or any conduct calculated to mislead a purchaser or lull his suspicions with respect to a defect known to the vendor, is treated as fraudulent and renders the

Concealment by vendor.

(*n*) See title INSURANCE, Vol. XVII., pp. 404, 532, 550; PARTNERSHIP, Vol. XXII., p. 47.

(*o*) See titles CONTRACT, Vol. VII., pp. 354 *et seq.*; MISREPRESENTATION AND FRAUD, Vol. XX., pp. 653 *et seq.*; MISTAKE, Vol. XXI., pp. 1 *et seq.*

(*p*) See the text, *infra*.

(*q*) See pp. 301 *et seq.*, *post*.

(*r*) Sugden, Vendors and Purchasers, 14th ed., pp. 2, 328; *Lowndes v. Lane* (1789), 2 Cox, Eq. Cas. 363; *Edwards-Wood v. Majoribanks* (1860), 7 H. L. Cas. 806, *per* Lord CAMPBELL, L.C., at pp. 809, 811; *Cook v. Waugh* (1860), 2 Giff. 201; see title EQUITY, Vol. XIII., p. 14, note (*o*).

(*s*) *Bowles v. Round* (1800), 5 Ves. 508 (contract for sale of a meadow without mention of a footpath across it); *Dyer v. Hargrave*, *Hargrave v. Dyer* (1805), 10 Ves. 505; *Keates v. Cadogan (Earl)* (1851), 10 C. B. 591, 600 (agreement for tenancy of dwelling-house in an obviously ruinous and unsafe condition); *White v. Bradshaw* (1851), 16 Jur. 738 (sale of house by inaccurate but usual description); *Cook v. Waugh*, *supra*; *Haywood v. Cope* (1858), 25 Beav. 140, *per* ROMILLY, M.R., at p. 148: "It would be no excuse for a man, who had himself personally inspected a house, for the purpose of seeing whether it was in a proper state of repair, afterwards to contradict his own judgment, on the ground that he was not a surveyor, and was unable to say whether the house was in a sufficient state of repair or not."

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contract voidable by the purchaser (z); and the consequences are the same whether the vendor misrepresents the condition of the property, or an agent employed by him to effect the sale does so, even innocently (u).

Erroneous
opinion of
purchaser.

505. A vendor is not, however, bound to correct an erroneous opinion of the purchaser upon matters as to which the purchaser has the opportunity of forming an independent opinion, whether in fact he uses such opportunity or not (v); and this is so notwithstanding that the vendor knows or believes that the purchaser contracts in reliance upon such erroneous opinion (a). But where the purchaser mistakenly believes the vendor to be in effect giving a warranty as to quality and enters into the contract on this footing, the vendor, if he is aware of the mistake, must correct it, and, if he fails to do so, the contract is not binding on the purchaser, though if the vendor is not aware of the mistake, the purchaser is bound (b).

Latent
defects of
quality.

506. *Primâ facie*, the rule *carcat emptor* (c) applies also to latent defects of quality, and there is no implied warranty that land agreed to be sold is of any particular quality or suitable for any particular purpose (d).

(t) Sugden, Vendors and Purchasers, 14th ed., pp. 2, 333—335; *Shirley v. Stratton* (1785), 1 Bro. C. C. 440; *Pickering v. Dawson* (1813), 4 Taunt. 779, 785; *Small v. Attwood* (1832), You. 407, 490; on appeal, *sub nom. Attwood v. Small* (1838), 6 Cl. & Fin. 232, 11. L.; notwithstanding that the property is sold with all faults (*Baglehole v. Walters* (1811), 3 Camp. 154, 156; *Schneider v. Heath* (1813), 3 Camp. 506). In *Horsfall v. Thomas* (1862), 1 H. & C. 90, a vendor of goods concealed a defect, but as the purchaser neglected to make any inspection at all he was not allowed to avoid the contract on the ground of the vendor's fraud. See also titles EQUITY, Vol. XIII., pp. 14, 15; MISREPRESENTATION AND FRAUD, Vol. XX., pp. 682, 684, 685, 724, 728, 760; MISTAKE, Vol. XXI., p. 9; *Denny v. Hancock* (1870), 6 Ch. App. 1 (where inspection of the property did not reveal the fact that a plan was misleading); *Re Arnold, Arnold v. Arnold* (1880), 14 Ch. D. 270, C. A.

(u) See *National Exchange Co. of Glasgow v. Drew and Dick* (1855), 2 Macq. 103, H. L., per Lord St. LEONARDS, at pp. 145, 146; *Mullens v. Miller* (1882), 22 Ch. D. 194; *Ludgater v. Love* (1881), 44 L. T. 694, C. A.; *Wauton v. Coppard*, [1899] 1 Ch. 92. *Cornfoot v. Fowke* (1840), 6 M. & W. 358, cannot be regarded as an authority to the contrary; see the cases cited in this note, *supra*, and *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Exch. 259, Ex. Ch., per WILLES, J., at p. 262; and see titles AGENCY, Vol. I., p. 214; MISREPRESENTATION AND FRAUD, Vol. XX., pp. 708, 709.

(v) *Smith v. Hughes* (1871), L. R. 6 Q. B. 597; compare *Lowndes v. Lane* (1789), 2 Cox, Eq. Cas. 363; and see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 684, 685.

(a) *Smith v. Hughes*, *supra*, per BLACKBURN, J., at p. 607.

(b) *Ibid.*, per HANNEN, J., at p. 610; *Grant v. Munt* (1815), Coop. G. 173. As to warranty, see title CONTRACT, Vol. VII., p. 435, note (e); and compare title SALE OF GOODS, pp. 149 *et seq.*, *ante*.

(c) See p. 297, *ante*. But not where there has been a misrepresentation by the vendor (*Colby v. Gadsden* (1867), 17 L. T. 97, C. A.; see *Mills v. Oddy* (1835), 2 Cr. M. & R. 103).

(d) *Spoor v. Green* (1874), L. R. 9 Exch. 99, per CLEASBY, B., at p. 110. The rule appears to be as stated in the text, though there does not seem to be any authority directly in point; see Williams, Vendor and Purchaser, 2nd ed., pp. 763, 764, and an article by the same author in 50 Sol.

507. Where, however, the latent defects are of such a nature that, if known to the purchaser, they would to the vendor's knowledge prevent him from entering into the contract, the vendor is, it seems, bound to disclose them, and if he fails to do so he cannot obtain specific performance of the contract (*e*).

SECT. 8.
**Disclosure
of Material
Facts,**

Disclosure
by vendor.
Misrepresentation
as to
quality.

508. The contract is not enforceable by a vendor who actually represents that the property has certain qualities which it does not in fact possess (*f*), such as that land is ripe for immediate development, or suitable for development, when there is a covered culvert running under the land (*g*), or where special expense must be incurred before it can be used for building (*h*); that a farm is in a high state of cultivation (*i*); that premises are in good

Jo. 611, 613; and compare the decisions on contracts for tenancy (*Sutton v. Temple* (1843), 12 M. & W. 52; *Hart v. Windsor* (1843), 12 M. & W. 68; *Keates v. Cadogan (Earl)* (1851), 10 C. B. 591); though it is otherwise as to contracts for tenancy of furnished houses; see title LANDLORD AND TENANT, Vol. XVIII., p. 569.

(*e*) *Cook v. Waugh* (1860), 2 Giff. 201, 207; *Lucas v. James* (1849), 7 Hare, 410, 418; Sugden, Vendors and Purchasers, 14th ed., p. 333. In *Lucas v. James*, *supra*, an intending lessee refused to complete on the ground that the character of the neighbouring houses made it impossible to use the house in question for a family residence. WIGRAM, V.-C., decided that no complete contract was in fact made, but dealt *obiter* with the present point, on the footing, apparently, that the purpose for which the house was required was known to the intending lessor. Some authorities suggest that the rule as laid down in Sugden, Vendors and Purchasers, 14th ed., p. 333, would not be now applied, and that mere silence as to a defect of quality cannot be a ground for rescission or a defence to a claim for specific performance; see Fry, Specific Performance, 5th ed., ss. 705, 713; *Turner v. Green*, [1895] 2 Ch. 205, 208 (non-disclosure of a fact likely to dispose the other party not to compromise proceedings); *Greenhalgh v. Brindley*, [1901] 2 Ch. 324 (non-disclosure of deed preventing acquisition of easement of light); *Re Ward and Jordan's Contract*, [1902] 1 I. R. 73 (non-disclosure on sale of licensed premises of fact that a conviction has been indorsed on the licence); *Percival v. Wright*, [1902] 2 Ch. 421 (purchase of shares in a company by directors without disclosing pending negotiations for sale of company's undertaking); and see 50 Sol. Jo. 613. On the other hand, the proposition stated in the text is supported by *Carlsh v. Salt*, [1906] 1 Ch. 335, where JOYCE, J., held that the service of a party with notice under the London Building Act, 1894 (57 & 58 Vict. c. cxxiii.), and the making of an award thereon throwing part of the expense of works upon the owner of the property agreed to be sold, was a material latent defect, non-disclosure of which entitled the purchaser to rescission and the return of his deposit with the costs of investigating title; and in *Shepherd v. Croft*, [1911] 1 Ch. 521, PARKER, J., distinguished between non-disclosure of latent defects of quality which is within the principle of *Flight v. Booth* (1834), 1 Bing. (N. C.) 370 (*i.e.*, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such non-disclosure, the purchaser might never have entered into the contract at all), and entitles the purchaser to rescind, and non-disclosure of latent defects of quality which is not sufficiently material to be within that principle and only entitles a purchaser to compensation: see also *Re Puckett and Smith's Contract*, [1902] 2 Ch. 258, C. A.

(*f*) *Flight v. Booth*, *supra*; *Small v. Attwood* (1832), You. 407, 460; *Attwood v. Small* (1838), 6 Cl. & Fin. 232, H. L., *per* Lord LYNTHURST, at p. 395; *Higgins v. Samels* (1862), 2 John. & H. 460.

(*g*) *Re Puckett and Smith's Contract*, *supra*.

(*h*) *Baker v. Moss* (1902), 66 J. P. 360.

(*i*) *Dyer v. Hargrave*, *Hargrave v. Dyer* (1805), 10 Ves. 505.

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repair (*k*); that drains are in good order (*l*); that a house is not damp (*m*); that a farm was "lately in the occupation of Mr. R. H. at an annual rent of £290 15s., now in hand," when in fact the farm could not possibly be let for nearly that rent, and R. H. had been out of possession for nearly a year and a half (*n*); that property has been valued by a certain surveyor at a specified sum (*o*); that the timber on a timber estate averages a certain size (*p*); on the sale of a manor, that the fines are arbitrary (*q*); or other matters of fact, as distinct from opinion, affecting the value (*r*).

Where a vendor makes a false representation as to a material fact, it is for him to show, if he wishes to enforce the contract, that the purchaser did not rely upon the representation (*s*).

(*k*) *Grant v. Munt* (1815), Coop. G. 173; *Dyer v. Hargrave, Hargrave v. Dyer* (1805), 10 Ves. 505; *Cree v. Stone* (1907), *Times*, 10th May.

(*l*) *Cree v. Stone, supra*. In *De Lassalle v. Guildford*, [1901] 2 K. B. 215, C. A., a lessee recovered damages for breach of a collateral warranty as to drains being in order; and see title LANDLORD AND TENANT, Vol. XVIII., p. 502; note (*o*), p. 290, *ante*.

(*m*) *Strangways v. Bishop* (1857), 29 L. T. (o. s.) 120.

(*n*) *Dimmock v. Hallett* (1866), 2 Ch. App. 21; and, as to errors in rents, see *Lysney v. Selby* (1705), 2 Ld. Raym. 1118; *Price v. Muenluy* (1852), 2 De G. M. & G. 339, C. A.; *Davenport v. Charsley* (1886), 54 L. T. 372; as to "estimated" annual value, see *Re Hurlbatt and Chaytor's Contract* (1888), 57 L. J. (CH.) 421; and compare *Re Kyan's Estate* (1868), 3 I. R. Eq. 255.

(*o*) *Buxton v. Lister* (1746), 3 Atk. 382, 386; compare *Abbott v. Sworder* (1851), 4 De G. & Sm. 448.

(*p*) *Brooke (Lord) v. Rounthwaite* (1846), 5 Hare, 298, 304; compare *Lowndes v. Lane* (1789), 2 Cox, Eq. Cas. 363.

(*q*) *White v. Cuddon* (1842), 8 Cl. & Fin. 766, H. L., per Lord CAMPBELL, at p. 795.

(*r*) See *Pike v. Vigers* (1839), 2 Dr. & Wal. 1, per Lord PLUNKET, L.C., at p. 258; on appeal (1842), 8 Cl. & Fin. 562, H. L.; *Stanton v. Tattersall* (1853), 1 Sm. & G. 529 (where a house described as "No. 58 Pall Mall, opposite Marlborough House" had no windows or frontage towards Pall Mall, and could only be approached by a narrow passage from the street); *Leyland v. Illingworth* (1860), 2 De G. F. & J. 248, C. A. (where premises were described as "well supplied with water," and the only water on the premises was that obtained from the local waterworks on payment of the water rate). But a representation of water supply on the sale plan does not necessarily entitle the purchaser to the supply (*Fewster v. Turner* (1841), 6 Jur. 144).

(*s*) *Redgrave v. Hurd* (1881), 20 Ch. D. 1, C. A.; see *Attwood v. Small* (1838), 6 Cl. & Fin. 232, H. L.; *Clapham v. Shillito* (1844), 7 Beav. 146; *Roots v. Snelling* (1883), 48 L. T. 216. It is not sufficient for the vendor to offer the means of verification. "The mere fact that a party has the opportunity of investigating and ascertaining whether a representation is true or false is not sufficient to deprive him of his right to rely on a misrepresentation as a defence to an action for specific performance. . . . The representation once made relieves the party from an investigation, even if the opportunity is afforded" (*Redgrave v. Hurd, supra, per BAGGALLAY, L.J.*, at pp. 22, 23; *Stanley v. M'Gauran* (1882), 11 L. R. Ir. 314, 331, C.A.). In *Smith v. Chadwick* (1884), 9 App. Cas. 187, Lord BLACKBURN stated, at p. 196, that the inference, that the representation was the inducement to the contract, was not one of law, as reported to have been said by JESSEL, M.R. (*Redgrave v. Hurd, supra*, at p. 21), but of fact, and that its weight as evidence must greatly depend on the degree to which the action of the plaintiff was likely to be influenced, and on the absence of other grounds on which he might have acted; and

509. But representations of fact as to the quality of the subject-matter of a contract must be distinguished from such expressions of opinion as to its value or desirability as do not involve any representation of fact. A purchaser cannot avoid liability to perform his contract on the ground that he has been misled by statements which are mere puffing. It has been held to be "puffing" to describe property as "a desirable residence for a family of distinction," though in fact it is a small farmhouse (a), or to describe renewable leaseholds as "nearly equal to freehold" (b), or to describe a house as "substantial and convenient" (c), or "well-built" (d), or "eligible" (e). But where a landlord who has the means of knowing the character of his tenant describes him to an intending purchaser as a "most desirable tenant," this is a representation of fact, and the purchaser is entitled to rescission if it turns out that the tenant has paid his last quarter's rent by dribblets under pressure (f).

SECT. 3.
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Puffing.

(iii.) *Defects of Title.*

510. An agreement to sell land implies, in the absence of any indication to the contrary, that the whole of the vendor's interest in the land is the subject of the agreement (g), and that that interest is an estate in fee simple (h) free from incumbrances (i), unless the purchaser had notice, before entering into the contract, that the title which the vendor was able to give was subject to limitations or incumbrances which the vendor could not remove (k); but such notice

Vendor's
interest.

it has been generally recognised that the statement of JESSEL, M.R., if correctly reported (as to this see 48 L. T. 219, n.) was incorrect; see title MISREPRESENTATION AND FRAUD, Vol. XX., p. 701, note (a); and see also *Jennings v. Broughton* (1854), 5 De G. M. & G. 126, C. A.; titles MISREPRESENTATION AND FRAUD, Vol. XX., pp. 694 *et seq.*; SPECIFIC PERFORMANCE.

(a) *Magennis v. Fallon* (1829), 2 Mol. 561, 589.

(b) *Fenton v. Browne* (1807), 14 Ves. 144, 149.

(c) *Johnson v. Smart* (1860), 2 Giff. 151.

(d) *Kennard v. Ashman* (1894), 10 T. L. R. 213. But a house of which the external walls are composed partly of brick and partly of lath and plaster must not be described as "brick-built"; see *Powell v. Double* (1832), cited in Sugden, Vendors and Purchasers, 14th ed., p. 29.

(e) *Hope v. Waller*, [1900] 1 Ch. 257, *per* LINDLEY, M.R., at p. 258. "I do not attach any importance to the word 'eligible': it is the ordinary auctioneer's language." It has also been held to be mere "puffing" to describe an imperfectly watered piece of land as "uncommonly rich water meadow land" (*Scott v. Hanson* (1826), 1 Sim. 13); or land as "fertile and improvable," when part of it has been abandoned as useless (*Dimmock v. Hallett* (1866), 2 Ch. App. 21, *per* TURNER, L.J., at p. 27); but these cases seem to involve misrepresentation of fact. Compare *Robinson v. Musgrove* (1838), 8 C. & P. 469; and see, further, title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 670, 671.

(f) *Smith v. Land and House Property Corporation* (1884), 28 Ch. D. 7, C. A., *per* BOWEN, L.J., at pp. 15, 16.

(g) *Bower v. Cooper* (1843), 2 Hare, 408.

(h) *Hughes v. Parker* (1841), 8 M. & W. 244; *Cox v. Middleton* (1854), 2 Drew. 200, 216.

(i) *Phillips v. Caldcleugh* (1868), L. R. 4 Q. B. 159; *Cato v. Thompson* (1882), 9 Q. B. D. 616, C. A.

(k) *Cowley v. Watts* (1853), 17 Jur. 172; *Cox v. Middleton*, *supra*, *per* KINDERSLEY, V.-C., at p. 216; *Re Gloag and Miller's Contract* (1883), 23 Ch. D. 320, *per* FRY, J., at p. 327; *Ellis v. Rogers* (1885), 29 Ch. D. 661, C. A.

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Facts.Duty to
disclose
defects of
title.

does not affect the liability of a vendor who expressly agrees to show a good title (*l*).

511. Inasmuch as a vendor's title to land is exclusively within his own knowledge, he is bound to disclose all defects in his title to an intending purchaser, and if a purchaser subsequently becomes aware of a defect of title which the vendor did not disclose to him before entering into the contract, he may rescind the contract or resist its specific performance on that ground (*m*). Whether the sale is made by auction or by private treaty, the purchaser is under no obligation to make inquiry as to defects in the vendor's title, but it is the duty of the vendor to disclose all that is necessary for his own protection (*n*). The vendor's disclosure should be frank and full; he ought to state that which, if it is not stated, makes what he does state ambiguous or misleading (*o*). If he desires to preclude a purchaser from objecting to a defect he must do so in plain terms, stating clearly the exact nature of the defect to which the purchaser is not to make objection (*p*).

(*l*) *Cato v. Thompson* (1882), 9 Q. B. D. 616, C. A.

(*m*) *Re Banister, Broad v. Munton* (1879), 12 Ch. D. 131, C. A.; *Heywood v. Mallalieu* (1883), 25 Ch. D. 357; *Nottingham Patent Brick and Tile Co. v. Butler* (1886), 16 Q. B. D. 778, C. A., per Lord ESNER, M.R., at p. 786, "It is impossible for a vendor, knowing of a defect in his title, either by himself or his agent, to put forward conditions of sale which are to force upon a purchaser a bad title of which he knew, but which he did not disclose"; *Reeve v. Berridge* (1888), 20 Q. B. D. 523, C. A.; *Re Davis and Cavey* (1888), 40 Ch. D. 601; *Re Haedicke and Lipski's Contract*, [1901] 2 Ch. 666 (where the agreement contained a stipulation that the purchaser accepted the title, but it was held that this did not affect the vendor's general duty of disclosure); *Carlsh v. Salt*, [1906] 1 Ch. 335; see *Mostyn v. West Mostyn Coal and Iron Co.* (1876), 1 C. P. D. 145.

(*n*) *Reeve v. Berridge*, *supra*, at p. 528; *Re White and Smith's Contract*, [1896] 1 Ch. 637, 643. In *Carlsh v. Salt*, *supra*, JOYCE, J., ordered the return of the purchaser's deposit, stating (*ibid.*, at p. 341) that it was unnecessary for him "to decide that there was on the part of the defendants any fraud, even in the sense in which that word is sometimes used in courts of equity, but the defendants concealed, for they did not divulge, a fact known only to themselves which was material to the value of the property"; a fact which constituted a latent defect not in the quality of, but in the title to, the property; see *ibid.*, at p. 340; see also *Dougherty v. Oates* (1900), 45 Sol. Jo. 119; *Brewer v. Brown* (1884), 28 Ch. D. 309. "A vendor who seeks a specific performance, should come prepared with his title; he ought to have it ready before he carries his estate to market. If he will sell it with a confused title, he must be at the expense of clearing it" (*Wilson v. Allen* (1820), 1 Jac. & W. 611, per PLUMER, M.R., at p. 623; *Flood v. Pritchard* (1879), 40 L. T. 873, per FRY, J., at p. 875); and see title SPECIFIC PERFORMANCE.

(*o*) *Re Marsh and Granville (Earl)* (1883), 24 Ch. D. 11, C. A., per FRY, J., at p. 15; *Re Banister, Broad v. Munton*, *supra*, per FRY, J., at p. 136; *Baskcomb v. Beckwith* (1869), L. R. 8 Eq. 100, 109; compare title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 682 *et seq.*

(*p*) *Edwards v. Wickwar* (1865), L. R. 1 Eq. 68; *Re Banister, Broad v. Munton*, *supra*, at p. 136; *Re Marsh and Granville (Earl)* (1883), 24 Ch. D. 11, C. A., per FRY, J., at p. 17, "He must tell the truth, and all the truth, which is relevant to the matter in hand"; *Nottingham Patent Brick and Tile Co. v. Butler*, *supra*, per LINDLEY, L.J., at p. 789; see also *Taylor v. Martindale* (1842), 1 Y. & C. Ch. Cas. 658, per KNIGHT BRUCE, V.-C., at p. 663; *Martin v. Cotter* (1846), 3 Jo. & Lat. 496. "It is the obvious duty of a vendor to make himself fully acquainted with all the peculiarities and incidents of the property which he is going to sell; and when he describes the property for the information of the purchaser, it is

512. If the non-disclosure by the vendor is coupled with any want of good faith, the purchaser's right is to rescission and the return of his deposit; if there is no want of good faith, but the non-disclosure is owing to ignorance of the existence or materiality of the defect, the purchaser can resist specific performance though he is not entitled to rescind (*g*). Where a sale is made under the direction of the court, and the purchaser is relieved from his contract on the ground of misrepresentation, he can recover, in addition to his costs of investigating the title, the costs occasioned by his bidding for and becoming the purchaser of the property (*r*).

SECT. 3.
Disclosure
of Material
Facts.

Purchaser's
remedies.

513. Any facts calculated to prevent the purchaser obtaining such a title to the property as he was led to expect constitute defects of title (*s*); such as the fact that the deed forming the stipulated root of title is a voluntary one, upon which ordinarily there would not have been an investigation of the title (*t*); the existence or rumoured existence of an easement over the property (*a*), or of covenants restricting its use and enjoyment (*b*); in the case of leasehold property, the onerous or unusual nature of the covenants in the lease under which the property is held (*c*); the existence of restrictions as to the use for certain trades of premises described as "leasehold business premises" (*d*); or of a covenant to expend a specified sum in building within a limited time on land described in general terms as "freehold building land" (*e*); or of a party-wall

What
amounts to
a defect of
title.

his duty to describe everything which it is material to know in order to judge of the nature and value of the property" (*Brandling v. Plummer* (1854), 2 Drew. 427, *per* KINDERSLEY, V.-C., at p. 430); and see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 727, 728, 747, 748.

(*g*) *Re Banister, Brouss v. Munton* (1879), 12 Ch. D. 131, 142, 147, C. A.; *Nottingham Patent Brick and Tile Co. v. Buller* (1886), 16 Q. B. D. 778, 787, 790, 791, C. A. As to rescission for misrepresentation, see p. 405, *post*; title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 682, 683.

(*r*) *Hollinell v. Seacombe*, [1906] 1 Ch. 426, following *Perkins v. Ede* (1852), 16 Beav. 268, and *Powell v. Powell* (1875), L. R. 19 Eq. 422; and see p. 411, *post*.

(*s*) See *Denne v. Light* (1857), 8 De G. M. & G. 774, C. A. (where it appeared reasonably uncertain whether any means of entering at all times upon the piece of agricultural land agreed to be sold would be conferred upon the purchaser); *Langford v. Selmes* (1857), 3 K. & J. 220, *per* PAGE WOOD, V.-C., at pp. 225, 229 (where the purchaser of freehold ground rents would not have been able to employ the ordinary remedies for their recovery); compare *Stanton v. Tattersall* (1853), 1 Sm. & G. 529; note (*r*), p. 300, *ante*.

(*t*) *Re Marsh and Granville (Earl)* (1883), 24 Ch. D. 11, C. A.

(*a*) *Heywood v. Mallalieu* (1883), 25 Ch. D. 357; compare *Burnell v. Brown* (1820), 1 Jac. & W. 168, 172 (undisclosed reservation of right of sporting); *Gibson v. Spurrier* (1795), Peake, Add. Cas. 49 (right of common); *Shackleton v. Sutcliffe* (1847), 1 De G. & Sm. 609 (easement of watercourse).

(*b*) *Nottingham Patent Brick and Tile Co. v. Buller*, *supra*; compare *Andrew v. Aitken* (1882), 22 Ch. D. 218; *Cato v. Thompson* (1882), 9 Q. B. D. 616, C. A.

(*c*) *Keeve v. Berridge* (1888), 20 Q. B. D. 523, C. A.; see also title LANDLORD AND TENANT, Vol. XVIII., p. 410, note (*t*); p. 305, *post*. But a purchaser is not affected by restrictive covenants of which his vendor had not notice, either actual or constructive, though he himself has notice of them (*Wilkes v. Spooner*, [1911] 2 K. B. 473, C. A.). As to notice generally, see title EQUITY, Vol. XII., pp. 84 *et seq.*; and compare *ibid.*, pp. 82, 100 *et seq.*

(*d*) *Re Davis and Cavey* (1888), 40 Ch. D. 601.

(*e*) *Dougherty v. Oates* (1900), 45 Sol. Jo. 119.

SECT. 3.
Disclosure
of Material
Facts.

notice under the London Building Act, 1894 (*f*), and an award made thereunder imposing a pecuniary liability on the owner of the property sold (*g*). Similarly it is a defect of title if the maxim *cujus est solum ejus est usque ad celum et ad inferos* (*h*) is not applicable to the property sold, owing to the vendor's title not extending to an underground cellar (*i*) nor to the subjacent minerals (*j*), or owing to a third party having a right to overhang part of the property (*k*); all such matters must be disclosed by the vendor (*l*).

Existing
tenancies.

514. In the absence of an intimation to the contrary, a purchaser is entitled to assume that property offered for sale is in hand, so that he will obtain possession of the property on completion; consequently any existing lease or tenancy must be mentioned in the particulars or referred to in the agreement for sale (*m*). The information as to past or existing tenancies must not be misleading (*n*); for example, by stating the rent paid by the last tenant and implying, contrary to the fact, that a similar rent can be obtained at the time of the sale (*o*), or stating the existing tenancies without mentioning that the tenants have given notice to quit (*p*); or stating that the property is sold with the benefit of leases containing certain covenants without stating that the covenants are not enforceable (*q*). But on a sale of agricultural land subject to a tenancy, where particulars of the tenancy are given, the fact that the tenant has made improvements which will entitle him to compensation need not be specifically mentioned (*r*).

Leasehold
property.

515. Where the subject-matter of the contract is a leasehold interest, the vendor must make it clear whether the interest he is

(*f*) 57 & 58 Vict. c. cexiii.; see title METROPOLIS, Vol. XX., pp. 483, 491, 492.

(*g*) *Carlisk v. Salt*, [1906] 1 Ch. 335; but compare *Re Leyland and Taylor's Contract*, [1900] 2 Ch. 625, C. A., where a notice was served on the vendor under the Public Health Act, 1875 (38 & 39 Vict. c. 55), and not disclosed by him, but the work was not executed or the expense incurred until after completion of the purchase.

(*h*) See titles MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 506, 507; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 156, note (*f*).

(*i*) *Whittington v. Corder* (1852), 16 Jur. 1034.

(*j*) *Upperton v. Nickolson* (1871), 6 Ch. App. 436, 444; *Bellamy v. Debenham*, [1891] 1 Ch. 412, C. A.; compare *Seaman v. Vaudrey* (1810), 16 Ves. 390; *Ramsden v. Hirst* (1858), 6 W. R. 349.

(*k*) *Pope v. Garland* (1841), 4 Y. & C. (Ex.) 394, 403; compare *Laybourn v. Gridley*, [1892] 2 Ch. 53.

(*l*) If the vendor states the effect of a deed, he is bound by his statement; if instead of doing so he offers the deed for inspection, the risk is on the purchaser (*Cox v. Coventon* (1862), 31 Beav. 378, 388); and see note (*s*), p. 300, *ante*.

(*m*) *Hughes v. Jones* (1861), 3 De G. F. & J. 307, C. A.; *Edwards v. Wickwar* (1865), L. R. 1 Eq. 68; compare *Royal Bristol Permanent Building Society v. Bomash* (1887), 35 Ch. D. 394, where, on a sale by mortgagees, the mortgageor was in possession at the time fixed for completion and remained so until turned out by the sheriff more than a month later.

(*n*) *Swaissland v. Dearsley* (1861), 29 Beav. 430; *Lachlan v. Reynolds* (1853), Kay, 52; *Farebrother v. Gibson* (1857), 1 De G. & J. 602, C. A.; *Re Edwards to Sykes (Daniel) & Co., Ltd.* (1890), 62 L. T. 445.

(*o*) *Dimmock v. Hallett* (1866), 2 Ch. App. 21; see note (*n*), p. 300, *ante*.

(*p*) *Dimmock v. Hallett*, *supra*, at pp. 28, 30.

(*q*) *Flint v. Woodin* (1852), 9 Hare, 618, 621.

(*r*) *Re Derby (Earl) and Fergusson's Contract*, [1912] 1 Ch. 479.

selling is created by an original lease or an underlease(s); and where the premises sold are held under a lease comprising other property (t), or are held by underlease derived from a head lease which comprises other property (u), these are material facts which must be disclosed. Further, where the lease contains the usual covenant to deliver up in repair at the expiration of the term, and part of the demised buildings has been demolished (a), or where underleases have been granted not containing the same covenants as the head lease under which the interest agreed to be sold is derived (b), such facts must be stated.

SECT. 3.
Disclosure
of Material
Facts.

Where leasehold property is held subject to any onerous or unusual covenants, the vendor must either disclose to the purchaser their existence and nature or give him a reasonable opportunity of inspecting the lease or other document containing the covenants before he enters into the contract (c); and a stipulation in the contract that the vendor's title is accepted does not enable a vendor to compel a purchaser to complete the contract where neither of these courses has been taken (d). The question whether in any

Unusual
covenants
in lease.

(s) *Madeley v. Booth* (1848), 2 De G. & Sm. 718; *Re Beyfus and Masters's Contract* (1888), 39 Ch. D. 110, C. A.; *Henderson v. Hudson* (1867), 15 W. R. 860; see also *Heyford v. Criddle* (1855), 22 Beav. 477, per ROMILLY, M.R., at p. 480; *Brumfit v. Morton* (1857), 3 Jur. (N. S.) 1198, per STUART, V.-C., at p. 1200; *Flood v. Pritchard* (1879), 40 L. T. 873; and compare *Bartlett v. Salmon* (1855), 6 De G. M. & G. 33; *Camberwell and South London Building Society v. Holloway* (1879), 13 Ch. D. 754; *Waring v. Scotland* (1888), 57 L. J. (CH.) 1016. In *Jones v. Rimmer* (1880), 14 Ch. D. 588, C. A., on a sale of leaseholds held under a corporation which usually reserved only a nominal rent, no mention of the ground rent in fact payable was made, and the purchaser was held entitled to be discharged.

(t) *Sheard v. Venable* (1867), 36 L. J. (CH.) 922; and compare *Tomkins v. White* (1806), 3 Smith, K. B. 435; *Leuty v. Hillas* (1858), 2 De G. & J. 110, per Lord CRANWORTH, L.C., at p. 122; *Warren v. Richardson* (1830), You. 1; see also *Re Boulton and Cullingford's Contract* (1892), 37 Sol. Jo. 25 (where six houses, in fact held under one lease at a rent of £24, were described as held at ground rents of £4 each).

(u) *Re Lloyds Bank, Ltd. and Lillingston's Contract*, [1912] 1 Ch. 601; *Darlington v. Hamilton* (1854), Kay, 550, 558; *Creswell v. Davidson* (1887), 56 L. T. 811; see also *Taylor v. Martindale* (1842), 1 Y. & C. Ch. Cas. 658.

(a) *Granger v. Worms* (1814), 4 Camp. 83; compare *Re Taunton and West of England Perpetual Benefit Building Society and Roberts' Contract*, [1912] 2 Ch. 381; see also *Re Martin, Ex parte Dixon (Trustee) v. Tucker* (1912), 106 L. T. 381 (where it was held that a lessee who has rendered his lease liable to forfeiture by a continuing breach of covenant cannot make a good title under an open contract even though the landlord has accepted the rent).

(b) *Darlington v. Hamilton*, *supra*, at p. 559; *Waring v. Hoggart* (1824), Ry. & M. 39.

(c) *Reeve v. Berridge* (1888), 20 Q. B. D. 523, C. A.; *Re White and Smith's Contract*, [1896] 1 Ch. 637; *Re Haedicke and Lipski's Contract*, [1901] 2 Ch. 666; *Molyneux v. Hawtrej*, [1903] 2 K. B. 487, C. A.; see title LANDLORD AND TENANT, Vol. XVIII., p. 410, note (t); compare *Jones v. Edney* (1812), 3 Camp. 285 (leasehold premises described as a "free public house"; auctioneer read over lease at auction, including covenant making premises a "tied" house, but said the covenant was not enforceable: held, purchaser entitled to rescission); see also *Flight v. Booth* (1834), 1 Bing. (N. C.) 370; *Bentley v. Craven* (1853), 17 Beav. 204 (where the lease did not in fact contain a restriction stated in the particulars).

(d) *Re Haedicke and Lipski's Contract*, *supra*; compare title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 727, 728, 747, 748.

SECT. 3.
Disclosure
of Material
Facts.

Matters
which need
not be dis-
closed.

particular case the vendor has given the purchaser such a reasonable opportunity of inspection as to discharge the duty of disclosure is one of fact (e).

516. The vendor need not specifically disclose matters which are necessarily incidental to his tenure of the property. Thus land tax (f) and tithe or tithe rentcharge (g) are liabilities to which all land is presumed to be subject unless the contrary is stated (h); and on a sale of copyhold land the fines and customs of the manor and the lord's rights in respect of minerals need not be referred to in the particulars or agreement for sale (i); and the same, perhaps, applies to rights of mining under the local customs of the mining districts, such customs being notorious (k). The existence of undisclosed quit rents on the property, being incidents of tenure, is a subject for compensation, not a ground of rescission (l).

SUB-SECT. 3.—Disclosure by the Purchaser.

Duty of the
purchaser.

517. A purchaser is under no obligation to disclose to the vendor any fact known to him and not to the vendor which enhances, or appears to the purchaser to enhance, the value of the property (m). But though simple reticence does not amount to legal fraud, yet, if

(e) *Cosser v. Collinge* (1832), 3 My. & K. 283; *Brumfit v. Morton* (1857), 3 Jur. (N. S.) 1198, per STUART, V.-C., at p. 1202; *Hyde v. Warden* (1877), 3 Ex. D. 72, 80, C. A.; *Bank of Ireland v. Brookfield Linen Co.* (1884), 15 L. R. Ir. 37; *Dougherty v. Oates* (1900), 45 Sol. Jo. 119 (where BUCKLEY, J., at p. 120, said that a man had not a fair opportunity of ascertaining the contents of deeds if he came into the auction room not even knowing that the deeds existed); *Molyneux v. Hawtrey*, [1903] 2 K. B. 487, C. A.; *Re Childe and Hodgson's Contract* (1905), 54 W. R. 234.

(f) See title LAND TAX, Vol. XVIII., pp. 307 *et seq.* As to the duties on land values, see title REVENUE, Vol. XXIV., pp. 549, 558, 571, 575.

(g) See title ECCLESIASTICAL LAW, Vol. XI., p. 742 *et seq.*

(h) Sugden, Vendors and Purchasers, 14th ed., p. 322.

(i) *Hayford v. Criddle* (1855), 22 Beav. 477, per ROMILLY, M.R., at p. 480; see also *White v. Cuddon* (1842), 8 Cl. & Fin. 766, H. L. (where, on the sale of a manor, it was stated that the fines were arbitrary and amounted on the average to £150 a year, whereas in fact only some of the fines were arbitrary, but the total amount exceeded £200 a year).

(k) As to such local customs, see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 635 *et seq.* In Derbyshire the local customs are defined and regulated by statute; see High Peak Mining Customs and Mineral Courts Act, 1851 (14 & 15 Vict. c. 94); Derbyshire Mining Customs and Mineral Courts Act, 1852 (15 & 16 Vict. c. clxiii.); title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 639 *et seq.* The customs of the Forest of Dean are also regulated by statute; see *ibid.*, pp. 645 *et seq.*

(l) *Eadaile v. Stephenson* (1822), 1 Sim. & St. 122, 124.

(m) Sugden, Vendors and Purchasers, 14th ed., p. 5; *Fox v. Mackreth*, Pitt v. Mackreth (1788), 2 Bro. C. C. 400, per Lord THURLOW, L.C., at p. 419; *Turner v. Harvey* (1821), Jac. 169, 178; *Walters v. Morgan* (1861), 3 De G. F. & J. 718; *Coaks v. Boswell* (1886), 11 App. Cas. 232, per Lord SELBORNE, at p. 235: "Inasmuch as a purchaser is (generally speaking) under no antecedent obligation to communicate to his vendor facts which may influence his own conduct or judgment when bargaining for his own interest, no deceit can be implied from his mere silence as to such facts, unless he undertakes or professes to communicate them. This, however, he may be held to do, if he makes some other communication which, without the addition of those facts, would be necessarily, or naturally and probably, misleading. If it is a just conclusion that he did this intentionally, and with a view to mislead in any material point, that is fraud; and it is a sufficient ground for setting aside a contract, if the vendor was

the purchaser by any act or word induces the vendor to believe in the existence of a non-existent fact (*n*), or if he attempts to hurry the vendor into a contract without giving him an opportunity to ascertain the value of the property (*o*), a court of equity may refuse to order specific performance of the contract at the suit of the purchaser; and the same consequence follows where a purchaser makes false statements of fact which discourage other possible purchasers from competing with him for the property (*p*).

SECT. 3.
Disclosure
of Material
Facts.

SECT. 4.—*Interpretation of Particular Expressions.*

518. A contract for sale of land is subject to the same rules for the interpretation of the terms used in it as other instruments (*q*). Interpreta-
tion.

in fact so misled." A purchaser of mines who by trespassing has abstracted some of the property must disclose this fact (*Phillips v. Homfray, Fothergill v. Phillips* (1871), 6 Ch. App. 770, *per* Lord HATHERLEY, L.C., at p. 779); and see titles MISREPRESENTATION AND FRAUD, Vol. XX., p. 685, note (*n*); MINES, MINERALS, AND QUARRIES, Vol. XX., p. 547.

(*n*) See the cases cited in note (*m*), p. 306, *ante*. "A single word, or (I may add) a nod or a wink, or a shake of the head, or a smile from the purchaser, intended to induce the vendor to believe the existence of a non-existing fact, which might influence the price of the subject to be sold, would be sufficient ground for a court of equity to refuse a decree for a specific performance of the agreement" (*Walters v. Morgan* (1861), 3 De G. F. & J. 718, *per* Lord CAMPBELL, L.C., at p. 724); see also *Davies v. London and Provincial Marine Insurance Co.* (1878), 8 Ch. D. 469; *Davis v. Ohrlly* (1898), 14 T. L. R. 260; compare title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 681 *et seq.*; and, as to specific performance generally, see title SPECIFIC PERFORMANCE.

(*o*) See *Walters v. Morgan*, *supra*, *per* Lord CAMPBELL, L.C., at p. 724; compare *Vernon v. Keys* (1810), 12 East, 632, 638, affirmed (1812), 4 Taunt. 488, Ex. Ch. (where a purchaser represented that he was buying on behalf of himself and others who would not consent to his offering more than a certain figure).

(*p*) Sugden, Vendors and Purchasers, 14th ed., p. 5; see title AUCTION AND AUCTIONEERS, Vol. I., p. 512; *Howard v. Hopkyns* (1742), 2 Atk. 371; and compare *Fuller v. Abrahams* (1821), 3 Brod. & Bing. 116. As to an action for slander of title in such cases, see title TORT.

(*q*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 433 *et seq.*; compare titles BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., pp. 174 *et seq.*; INCOME TAX, Vol. XVI., p. 621 (rack rent); LANDLORD AND TENANT, Vol. XVIII., pp. 411 *et seq.*; MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 501 *et seq.*; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 156 *et seq.*; TIME; WEIGHTS AND MEASURES; note (*t*), p. 423, *post*.

The following are further illustrations of the meaning of expressions:—the expressions "derivative lease" and "underlease" appear to be in practice synonymous; though strictly, perhaps, an underlease comprises the whole property included in the original lease, while a derivative lease includes only part of the property (*Brumfit v. Morton* (1857), 3 Jur. (N. S.) 1198, *per* STUART, V.-C., at p. 1201); the expression "ground rent" is used generally to mean a rent less than a rack rent (*Stewart v. Alliston* (1815), 1 Mer. 26, *per* Lord ELDON, L.C., at p. 34); strictly, it means the sum paid by the owner or builder of houses for the use of land to build on (*Bartlett v. Salmon* (1855), 6 De G. M. & G. 33, *per* Lord CRANWORTH, L.C., at p. 41): where what is described as a ground rent is in fact a payment of another kind, not recoverable in the same way as a ground rent, the purchaser is entitled to rescind the contract (*Evans v. Robins* (1862), 1 H. & C. 302): a "clear yearly rent" means a rent clear of all deductions usually paid by a tenant, but subject to such as are borne by the landlord, e.g., land tax and property tax (*Tyrconnell (Lord) v. Ancaster (Duke)* (1754), Amb. 237, 240, n.); as to such deductions, see title LANDLORD AND TENANT,

Part II.—Sales by and to Persons having Limited or Special Capacity.

SECT. 1.

Aliens.

Aliens.

SECT. 1.—*Aliens.*

519. An alien can acquire and dispose of real property in the United Kingdom in the same manner in all respects as a natural-born British subject (*r*).

SECT. 2.—*Bankrupts.*

Bankrupts.

520. An adjudication in bankruptcy operates to vest in the trustee in bankruptcy the property belonging to or vested in the bankrupt at the commencement of the bankruptcy, or acquired by or devolving upon him before his discharge (*s*). The power to sell the property is exercisable by the trustee in bankruptcy and not by the bankrupt (*t*); but this does not apply to property, other than real estate, acquired by the bankrupt during the bankruptcy which has not been claimed by the trustee; and until the trustee intervenes, the bankrupt can sell such property to a purchaser (*u*), who takes *bond fide* and for value, whether the purchaser has or has not knowledge of the bankruptcy (*u*).

SECT. 3.—*Convicts.*

Contract of convict.

521. A convict within the meaning of the Forfeiture Act, 1870 (*r*), is incapable of entering into any contract or of alienating any property so long as he is subject to the operation of the Act (*w*);

Vol. XVIII., pp. 474 *et seq.* As to "more or less," see title LANDLORD AND TENANT, Vol. XVIII., p. 411, note (*e*); *Townshend (Marquis) v. Stangroom* (1801), 6 Ves. 328, 341; *Hill v. Buckley* (1811), 17 Ves. 394, 400; *Winch v. Winchester* (1812), 1 Ves. & B. 375; *Simpson v. Dendy* (1860), 8 C. B. (N. S.) 433; *Dendy v. Simpson* (1861), 7 Jur. (N. S.) 1058, Ex. Ch.; *Dodd v. Burchell* (1862), 1 H. & C. 113.

(*r*) Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 2. But no right is conferred on aliens to hold real property situate out of the United Kingdom; see *ibid.*, s. 2 (1). For the state of the law prior to 1870, see title ALIENS, Vol. I., pp. 306, 307. As to the effect of letters of denization, see *ibid.*, pp. 312, 313, and, as to the effect of an outbreak of war pending completion of contract, see *ibid.*, p. 311; and see p. 388, *post*.

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 20 (1), 44, 54; but not property held by the bankrupt as trustee (*ibid.*, s. 44 (1)). As to the relation back of the trustee's title, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 181 *et seq.*; as to protected transactions, *ibid.*, pp. 288 *et seq.*; and as to the trustee's right of disclaimer, *ibid.*, pp. 191 *et seq.* As to the effect of the bankruptcy of the vendor or purchaser pending completion, see pp. 381 *et seq.*, *post*.

(*t*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 183. For sales by the trustee in bankruptcy, see *ibid.*, pp. 119—121; and, for sales by trustees under a composition or scheme of arrangement, see *ibid.*, p. 84; Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (16).

(*u*) See *Cohen v. Mitchell* (1890), 25 Q. B. D. 262, C. A.; title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 164, 165.

(*v*) 33 & 34 Vict. c. 23; see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429; PRISONS, Vol. XXIII., p. 260.

(*w*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 8; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429. As to his ceasing to be subject to the statutory disability, see Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 7; title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429, note (*u*).

but he is under no disability in respect of property acquired by him while lawfully at large under any licence (a).

SECT. 3.
Convicts.

522. The Crown has power to appoint an administrator in whom the real and personal property of the convict vests for all the estate and interest of the convict therein, and such administrator has full powers of dealing therewith, whether by way of sale or otherwise (b). Where property is held by the convict as trustee or mortgagee, only such beneficial interest as he may have therein vests in the administrator (c).

Adminis-
trator of
convict's
estate.

SECT. 4.—Corporations.

523. Corporations (d), whether sole or aggregate, cannot hold land otherwise than under the authority of a statute or of a licence from the Crown (e). But many incorporated bodies, including companies registered under the Companies (Consolidation) Act, 1908 (f), have been empowered by various statutes (g) to acquire and hold land without licence in mortmain and to deal with it, subject, however, to certain consents and restrictions. Thus:—

Statutory
powers of
incorporated
bodies.

County councils may acquire and hold land for the purpose of any of their powers and duties (h), and for the purpose of providing allotments and small holdings (i);

Local
authorities.

Urban district councils may purchase or sell land for the purposes of the Public Health Act, 1875 (k);

(a) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 30.

(b) See titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 429, 430; PRISONS, Vol. XXIII., pp. 261, 262; see also *Carr v. Anderson*, [1903] 2 Ch. 279, 283, C. A. The administrator has no power under this provision to bar the estate tail of a convict, but the convict may himself execute a disentailing assurance, this not being an "alienation" within the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 8 (*Re Gaskell and Walters' Contract*, [1906] 1 Ch. 440; [1906] 2 Ch. 1, C. A.); see title PRISONS, Vol. XXIII., p. 262, note (a). An *interim* curator appears not to have power to sell land belonging to the convict; see Forfeiture Act, 1870 (33 & 34 Vict. c. 23), ss. 21, 24; see, generally, titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 430; PRISONS, Vol. XXIII., pp. 262, 263.

(c) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 48; see title TRUSTS AND TRUSTEES.

(d) For the distinction between statutory and non-statutory corporations, see title CORPORATIONS, Vol. VIII., pp. 358 *et seq.* As to the formalities of contracts with corporations, see *ibid.*, pp. 379 *et seq.*; and, as to the application of the doctrine of part performance to the contracts of corporations, see *ibid.*, pp. 385, 386; p. 296, *ante*. As to foreign corporations, see Encyclopædia of Forms and Precedents, Vol. XII., p. 34. As to sales of Crown Lands, see title CONSTITUTIONAL LAW, Vol. VII., p. 157. As to purchase and sale of land by railway and tramway companies, see titles RAILWAYS AND CANALS, Vol. XXIII., pp. 624 *et seq.*, 647 *et seq.*, 776; TRAMWAYS AND LIGHT RAILWAYS.

(e) Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), ss. 1, 2; see title CORPORATIONS, Vol. VIII., pp. 367 *et seq.*

(f) 8 Edw. 7, c. 69; see title COMPANIES, Vol. V., pp. 334, 335.

(g) See title CHARITIES, Vol. IV., pp. 137, 138.

(h) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 65, 79; see also Military Lands Act, 1892 (55 & 56 Vict. c. 43), s. 1 (3); title ROYAL FORCES, p. 100, *ante*; and they may sell land with the consent of the Local Government Board (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 65 (3)); see title LOCAL GOVERNMENT, Vol. XIX., p. 364.

(i) Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 7 (1); see titles ALLOTMENTS, Vol. I., pp. 341, 344, 348, 350; SMALL HOLDINGS AND SMALL DWELLINGS.

(k) 38 & 39 Vict. c. 55, s. 175; see title COMPULSORY PURCHASE OF

SECT. 4.
Corporations.

Rural district councils may purchase or sell land for the purpose of their powers and duties as rural sanitary authorities and highway boards (*l*);

Metropolitan borough councils may purchase and hold land for the purposes of the Metropolis Management Act, 1855 (*m*), and the London Government Act, 1899 (*n*), but cannot sell without the sanction of the Local Government Board (*o*);

Municipal corporations may hold land not exceeding five acres for the purpose of municipal buildings, and, with the approval of the Local Government Board, for other purposes (*a*);

Parish councils may purchase and hold land for the purpose of public offices, or for allotments, recreation grounds or public walks (*b*); but the consent of the Local Government Board is required in the case of sales by them (*c*);

Local education authorities (formerly school boards) have power to acquire and hold land for the purpose of providing sufficient school accommodation in their districts (*d*), but they cannot sell without the consent of the Education Department (*e*);

Poor law authorities.

Guardians of the poor may, subject to the sanction of the Local Government Board, purchase land for any purpose relating to the relief of the poor, and may sell the same, subject to the same sanction (*f*);

Ecclesiastical corporations.

Ecclesiastical corporations can in general only sell their lands under statutory provisions (*g*).

Unincorporated bodies.

524. Unincorporated bodies of persons cannot, as such, acquire land, but only as individuals in their private capacity; thus, the

LAND AND COMPENSATION, Vol. VI., p. 163; and compare *ibid.*, pp. 166, 171; and as to the purchase of land for particular purposes, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 439, 491, 538, 546, 549, 586, 588; and as to sale, see *ibid.*, p. 493.

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 144—148, 175; Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 24 (7), 25 (1); title LOCAL GOVERNMENT, Vol. XIX., p. 329; and see note (*k*), p. 309. *ante*.

(*m*) 18 & 19 Vict. c. 120, s. 42.

(*n*) 62 & 63 Vict. c. 14, s. 34; see title METROPOLIS, Vol. XX., p. 456; and see, generally, *ibid.*, pp. 402 *et seq.*, 430 *et seq.*, 455 *et seq.*

(*o*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 6 (5); see title METROPOLIS, Vol. XX., p. 459.

(*a*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 105, 107. But they cannot sell without the sanction of the Local Government Board (*ibid.*, s. 108); and see *Davis v. Leicester Corporation*, [1894] 2 Ch. 208, C. A.; title LOCAL GOVERNMENT, Vol. XIX., p. 318.

(*b*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 3 (9), 8 (1); and as to parish meetings in small parishes, see *ibid.*, s. 19 (6); see titles ALLOTMENTS, Vol. I., pp. 335 *et seq.*; LOCAL GOVERNMENT, Vol. XIX., pp. 247, 250 *et seq.*, 259; OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., pp. 584, 592, 593.

(*c*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (2); see titles LOCAL GOVERNMENT, Vol. XIX., pp. 248, 250 *et seq.*; OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., p. 591.

(*d*) Elementary Education Act, 1870 (33 & 34 Vict. c. 75), ss. 19—21; and see Education Act, 1902 (2 Edw. 7, c. 42).

(*e*) Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 22; see title EDUCATION, Vol. XII., pp. 21, 26.

(*f*) Union and Parish Property Act, 1835 (5 & 6 Will. 4, c. 69), ss. 1, 3, 6; see title POOR LAW, Vol. XXII., pp. 557, 558.

(*g*) See title ECCLESIASTICAL LAW, Vol. XI., pp. 760, 794. As to sale of glebe land, see title ECCLESIASTICAL LAW, Vol. XI., pp. 764, 765; as to the powers of the Ecclesiastical Commissioners, see *ibid.*, pp. 797 *et seq.*;

inhabitants of a place, or the parishioners or churchwardens of a parish, or the commoners of a waste cannot *eo nomine* purchase land (*h*).

SECT. 4.
Corporations.

SECT. 5.—*Fiduciary Vendors, Limited Owners, and Mortgagees.*

525. Sales of land by persons acting in a fiduciary capacity, such as trustees under private trusts (*i*), trustees of charity lands (*j*), and the personal representatives of a deceased person (*k*), sales by limited owners under the Settled Land Acts (*l*), and sales by mortgagees under express or statutory powers (*m*), are dealt with elsewhere (*n*).

Fiduciary
vendors etc.

SECT. 6.—*Infants.*

526. An infant cannot bind himself by a contract for the sale or purchase of land (*o*); nor can the infant on coming of age ratify the contract (*p*). The contract is void if it is clearly prejudicial to

Contract
of infant
void or
voidable.

and see titles BURIAL AND CREMATION, Vol. III., pp. 436 *et seq.*; LITERARY AND SCIENTIFIC INSTITUTIONS, Vol. XIX., pp. 197 *et seq.*

(*h*) Co. Litt. 3 a. But by the custom of London and some other places the parson and churchwardens together constitute a corporation with power to take and hold land; see *Warner's Case* (1619), Cro. Jac. 532; compare *Fell v. Charity Lands Official Trustee*, [1898] 2 Ch. 44, 51, C. A. Churchwardens may hold land jointly with the overseers of a parish for the purposes of poor relief; see Poor Relief Act, 1819 (59 Geo. 3, c. 12), s. 17; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6; see title LOCAL GOVERNMENT, Vol. XIX., pp. 250 *et seq.*; see also title POOR LAW, Vol. XXII., p. 557.

(*i*) As to the persons by whom trusts for or powers of sale are to be executed or exercised and the mode of selling, see titles POWERS, Vol. XXIII., pp. 72 *et seq.*; SETTLEMENTS, pp. 626 *et seq.*, 653, *post*; TRUSTS AND TRUSTEES. As to the use of depreciatory conditions, see *ibid.*; Dart, Vendors and Purchasers, 7th ed., p. 195. As to a purchaser being required by conditions to take the risk of a breach of trust, see *Micholls v. Corbett* (1865), 3 De G. J. & Sm. 18, C. A. For the powers and duties of trustees purchasing land for the purposes of the trust, and as to the disability of a trustee to purchase the trust property himself, see title TRUSTS AND TRUSTEES; as to purchases by solicitors, see title SOLICITORS; and, generally, see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 108 *et seq.*

(*j*) See title CHARITIES, Vol. IV., pp. 216 *et seq.* As to what charities are exempt from the jurisdiction of the Charity Commissioners, see *ibid.*, pp. 304 *et seq.*; and, as to assurances of land to charities generally, see *ibid.*, pp. 124 *et seq.*, 138 *et seq.*

(*k*) For the implied or statutory powers of personal representatives to sell land, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 236 *et seq.* (in the case of death before the 1st January, 1898); and *ibid.*, pp. 238 (in the case of death on or after that date). Trustees and personal representatives have also a statutory power of sale for the purpose of raising the estate duty, whether the property is or is not vested in them; see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 223. As to the power of personal representatives to complete a contract, in the event of the death of a vendor or purchaser pending completion, see pp. 378 *et seq.*, *post*; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 239. As to the mode of sale, see *ibid.*, pp. 299, 300.

(*l*) See Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 2, 58; title SETTLEMENTS, pp. 652, 653, *post*. As to the Settled Land Acts, see title SETTLEMENTS, p. 624, note (*e*), *post*.

(*m*) See title MORTGAGE, Vol. XXI., pp. 245 *et seq.*

(*n*) See also title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 523 *et seq.*

(*o*) See title INFANTS AND CHILDREN, Vol. XVII., pp. 63, note (*e*), 76, 78, 79. As to gavelkind land, see *ibid.*, pp. 80, 81; and, as to fraudulent misrepresentation by the infant as to his age, see *ibid.*, pp. 66, 67.

(*p*) Infants Relief Act, 1874 (37 & 38 Vict. c. 62), s. 2; but practically

SECT. 6.
Infants.

his interests, and otherwise is voidable by himself on his coming of age, or by his representatives if he dies under age (*q*). If the contract is voidable only it is valid until repudiated, and it remains valid unless the infant repudiates it within a reasonable time after obtaining his majority, or his representatives so repudiate it on his death and whilst it is still voidable (*r*).

Special
powers.

In particular cases, land belonging to an infant can be dealt with by him, or by persons acting on his behalf, under statutory powers, which are dealt with elsewhere (*s*).

SECT. 7.—*Lunatics and Persons of Unsound Mind.*

Contract of
lunatic.

527. A contract for the sale or purchase of land entered into by a lunatic not so found is voidable if the other party knew of the insanity, and in such a case the transaction can be set aside by the lunatic himself if he recovers, or by his representatives. If the other party had no notice of the insanity and acted in good faith, the contract is valid, and if it is fair and the parties cannot be put *in statu quo ante*, it will be enforced against the lunatic (*r*). But in the case of a lunatic so found by inquisition, every contract entered into by him, even during a lucid interval, is absolutely void, his committee alone having power to contract on his behalf so long as the inquisition has not been superseded (*a*).

Statutory
power.

528. Statutory powers of sale have been conferred on the committees and *quasi*-committees (*b*) of lunatics and persons of unsound mind (*c*).

SECT. 8.—*Married Women.*

Capacity
of married

529. Women married on or after the 1st January, 1883, and women married before that date with respect to property the title to which has accrued on or after that date, have the same capacity

ratification seems to forbid subsequent repudiation; compare *Duncan v. Diron* (1890), 44 Ch. D. 211, 213; and see title INFANTS AND CHILDREN, Vol. XVII., p. 65.

(*q*) See note (*o*), p. 311, *ante*.

(*r*) See title INFANTS AND CHILDREN, Vol. XVII., pp. 64, note (*l*), 65. If the contract is voidable, it remains so notwithstanding that it has been executed by conveyance of the property to the infant (*ibid.*, pp. 76, 78, 79).

(*s*) See titles INFANTS AND CHILDREN, Vol. XVII., pp. 81 *et seq.*, 94, 95; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 152; SETTLEMENTS, pp. 559 *et seq.*, 684 *et seq.*, *post*. As to the exercise of powers by an infant, see title INFANTS AND CHILDREN, Vol. XVII., p. 54.

(*t*) *Molton v. Camroux* (1848), 2 Exch. 487, 501; affirmed (1849), 4 Exch. 17, Ex. Ch.; *Elliot v. Ince* (1857), 7 De G. M. & G. 475, 488; *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599, 601, C. A.; *Baldwyn v. Smith*, [1900] 1 Ch. 588, 590. As to the contracts of lunatics generally, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 396 *et seq.*, and, as to when the contract is enforceable, see *ibid.*, pp. 397 *et seq.* As to lunacy supervening before completion, see *ibid.*, pp. 447, 448; pp. 387, 388, *post*.

(*a*) *Re Walker (a Lunatic so found)*, [1905] 1 Ch. 160, C. A.; see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 399, note (*a*).

(*b*) See title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 415, note (*p*).

(*c*) See *ibid.*, pp. 443—445, 456. As to the exercise of beneficial or fiduciary powers vested in the lunatic, or the giving of consents to such exercise, see *ibid.*, pp. 448, 449, 455; as to lunatic mortgagees, see *ibid.*, p. 454; and, as to lunatic trustees, see title TRUSTS AND TRUSTEES.

to sell and convey land as if they were unmarried, unless they hold it subject to a restraint upon anticipation (*d*). The capacity of a woman married before the 1st January, 1883, whose title accrued before that date, to sell and convey land which is either her separate property in equity or her non-separate property, and her capacity to enter into contracts of purchase, are dealt with elsewhere (*e*).

SECT. 8.
**Married
Women.**
—

SECT. 9.—*Persons Exercising Compulsory Statutory Powers.*

530. The exercise of compulsory powers for the purchase of land is regulated by the Lands Clauses Consolidation Act, 1845 (*f*). These powers are exercisable when the special Act authorising a public undertaking incorporates the compulsory clauses of that statute (*g*), and they are then exercisable with respect to the lands specified or referred to in the special Act (*h*). To put the compulsory powers in operation the promoters give notice to treat for the land required to be taken (*i*). This does not in itself take the place of a contract, but, when the price or compensation has been ascertained (which may be done either before or after entry on the land (*k*)), the actual relation of vendor and purchaser is established between the parties as though there were a formal agreement, with all the rights and obligations ordinarily incident thereto, except so far as they may be excluded by the special Act (*l*). Compulsory purchase.

SECT. 10.—*Persons Selling under Order of Court.*

531. The court has jurisdiction to make an order for the sale of any land whenever, in any cause or matter relating thereto, a sale appears necessary or expedient (*a*). Jurisdiction of court.

(*d*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1, 2, 5, 19; Married Women's Property Act, 1907 (7 Edw. 7, c. 18), s. 1; and see title HUSBAND AND WIFE, Vol. XVI., pp. 348 *et seq.*, 380, note (*f*). As to the imposition and effect of a restraint upon anticipation and the circumstances in which the court will dispense with it, see *ibid.*, pp. 363 *et seq.*, 372 *et seq.*

(*e*) As to separate property in equity, see title HUSBAND AND WIFE, Vol. XVI., pp. 341 *et seq.*, 377 *et seq.*; as to non-separate property, see *ibid.*, pp. 322 *et seq.*, 376; title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 298 *et seq.* As to the power of a married woman in certain cases to dispose of property acquired by her on or after the 9th August, 1870, and before the 1st January, 1883, see title HUSBAND AND WIFE, Vol. XVI., pp. 351, 352; and, as to her capacity to enter into contracts of purchase, see *ibid.*, pp. 411 *et seq.*

(*f*) 8 & 9 Vict. c. 18.

(*g*) *Ibid.*, ss. 16—68; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 13, 14, 62 *et seq.* For the meaning of "special Act," see *ibid.*, p. 13.

(*h*) *Ibid.*, p. 21.

(*i*) As to the notice to treat, see pp. 64 *et seq.*; for the meaning of promoters, see *ibid.*, p. 14.

(*k*) For the methods of assessment under the Lands Clauses Acts, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 69 *et seq.* (before entry), 104 *et seq.* (after entry); and in special cases, *ibid.*, pp. 153 *et seq.*

(*l*) See *Adams v. London and Blackwall Rail. Co.* (1850), 2 Mac. & G. 118; *Harding v. Metropolitan Rail. Co.* (1872), 7 Ch. App. 154; and title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 106 *et seq.*

(*a*) R. S. C., Ord. 51, r. 1. This rule is founded upon the Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86), s. 55 (now repealed), omitting

SECT. 10.
Persons
Selling
under
Order of
Court.

Effect of
order.

532. The effect of the order is to bind the legal and equitable interests in the land sold of all persons who are either parties to or bound by the proceedings in which the order is made, and on a conveyance of the legal estate to the purchaser, the concurrence of persons who have equitable interests only is not necessary (*b*). Formerly, if the court exceeded its jurisdiction or if the sale was not carried out according to the order, though the order itself was validly made, the purchaser obtained no protection from the order (*c*). But now the order cannot be invalidated as against a purchaser on the ground of want of jurisdiction, or of want of any

the words "for the purposes of such suit"; but though the omission gives the court a larger power than it had under that provision, the rule has not extended the jurisdiction of the court so as to enable it to make an order for the sale of land in cases where none could have been made previously (*Re Robinson, Pickard v. Wheeler* (1885), 31 Ch. D. 247, 249). The original jurisdiction of the Court of Chancery seems to have extended only to (1) sales in satisfaction of creditors' claims enforceable in equity against the land; (2) sales in execution of valid trusts for sale; (3) sales for the purpose of enforcing equitable liens; and (4) sales of partnership lands on dissolution; see *Lechmere v. Brasier* (1821), 2 Jac. & W. 287; *Calvert v. Godfrey* (1843), 6 Beav. 97; *Mackreth v. Symmons* (1808), 15 Ves. 329; *Featherstonhaugh v. Fenwick* (1810), 17 Ves. 298. This original jurisdiction and the statutory jurisdiction conferred by the Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86), passed, under the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 16, to the High Court of Justice, and is mainly exercisable in the Chancery Division (*ibid.*, s. 34 (3)). It has been further extended by the Partition Acts, 1868 (31 & 32 Vict. c. 40) and 1876 (39 & 40 Vict. c. 17); the Judgments Act, 1864 (27 & 28 Vict. c. 112); the Settled Estates Act, 1877 (40 & 41 Vict. c. 18); and the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 25, now supplemented by R. S. C., Ord. 51, r. 1B, enabling the court to make an order for sale in a debenture-holder's action; see *Re Crigglestone Coal Co., Stewart v. Crigglestone Coal Co.*, [1906] 1 Ch. 523. See and compare titles COMPANIES, Vol. V., pp. 384 *et seq.*; COURTS, Vol. IX., pp. 59, 60; JUDGMENTS AND ORDERS, Vol. XVIII., p. 220; LIEN, Vol. XIX., p. 27; MORTGAGE, Vol. XXI., pp. 155, 156, 291, 292; PARTITION, Vol. XXI., pp. 842 *et seq.*, 861 *et seq.*; PARTNERSHIP, Vol. XXII., pp. 88, 89, 102, 103; PRACTICE AND PROCEDURE, Vol. XXIII., p. 190; SETTLEMENTS, pp. 640 *et seq.*, 679, *post*; TRUSTS AND TRUSTEES. For the appropriate forms, see Daniell, Chancery Forms, 5th ed., pp. 633 *et seq.* When an order for sale has been made, a sale otherwise than under the order will not be permitted (*Annesley v. Ashurst* (1734), 3 P. Wms. 282).

(*b*) *Basnett v. Moxon* (1875), L. R. 20 Eq. 182; *Massy v. Batwell* (1843), 4 Dr. & War. 58; *Cole v. Sewell* (1849), 17 Sim. 40; *Cottrell v. Cottrell* (1866), L. R. 2 Eq. 330; *Re Whitham, Whitham v. Davies* (1901), 84 L. T. 585. On the other hand, it does not affect either the legal or equitable interests in the land of those persons who are neither parties to nor bound by the proceedings in which the order is made (*Craddock v. Piper* (1844), 14 Sim. 310; *Grey Coat Hospital (Governors) v. Westminster Improvement Commissioners* (1857), 1 De G. & J. 531, C. A.; *Freeland v. Pearson* (1869), L. R. 7 Eq. 246). Where the legal estate in land sold under the order of the court is vested in a person under disability, or for any other reason cannot be assured to the purchaser by an ordinary conveyance, the court effects the assurance by means of a vesting order or the appointment of a nominee to convey; see Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 26—41; Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 14; see title TRUSTS AND TRUSTEES.

(*c*) *Lechmere v. Brasier* (1821), 2 Jac. & W. 287; *Blacklow v. Laws* (1842), 2 Hare, 40; *Calvert v. Godfrey* (1843), 6 Beav. 97; *Powell v. Powell* (1874), 10 Ch. App. 130. It was the duty of the purchaser to see that the directions of the order had been observed (*Colclough v. Sterum* (1821), 3 Bli. 181, 186, H. L.).

concurrence, consent, notice or service, whether the purchaser has notice of any such want or not (*l*).

SECT. 10.
Persons
Selling
under
Order of
Court.

Mode of sale.

533. The sale may be made either in court or out of court. Where the order directs that the land shall be sold with the approbation of the judge (*e*), the sale is made in court; that is, all the steps are taken under the direction of the court (*f*). Usually the court directs the property to be sold by public auction (*g*), but the sale may be by private treaty (*h*), and in the latter case a conditional contract is executed and then brought in for confirmation by the court (*i*). The order may also direct that the sale shall be effected out of court. This is only done when the sale is to be by public auction. The court fixes the reserve price and the auctioneer's remuneration (*k*), and the proceeds of sale are directed to be paid into court or to trustees, or otherwise dealt with (*l*). But proceedings altogether out of court are not to be authorised until the judge is satisfied by such evidence as he deems sufficient that all persons interested in the land to be sold are before the court or are bound by the order for sale, and every order authorising such

(*d*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 70 (1)—(3); *Re Hall Dare's Contract* (1882), 21 Ch. D. 41, C. A.; *Mostyn v. Mostyn*, [1893] 3 Ch. 376, C. A. But this does not confer a good title on the purchaser as against perfect strangers to the proceedings who were not in the contemplation of the court at all when it made the order for sale (*Jones v. Barnett*, [1899] 1 Ch. 611; affirmed, [1900] 1 Ch. 370, C. A.). As to misrepresentation on sales by order of the court, see *Mahomed Kala Mea v. Harperink* (1908), 25 T. L. R. 180, P. C.; p. 303, *ante*, note (*k*), p. 318, *post*.

(*e*) For form of such order, see 1 Seton, Judgments and Orders, 7th ed., p. 324. Where the action is commenced in a district registry it is in the judge's discretion whether the sale shall take place there or in his chambers (*Macdonald v. Foster* (1877), 6 Ch. D. 193, C. A.).

(*f*) See R. S. C., Ord. 51, rr. 1A (a), 3. For form of proceedings, see Daniell, Chancery Forms, 5th ed., p. 633.

(*g*) But the court has power to direct a sale before a master in chambers (*Lemberton v. Barnes* (1872), L. R. 13 Eq. 349), in which case the sale is by open bidding or tender, or by tender followed by open bidding. As to the necessity for an auctioneer's licence, see titles AUCTION AND AUCTIONEERS, Vol. I., p. 501; REVENUE, Vol. XXIV., p. 650, note (*o*).

(*h*) See *Pimm v. Insall* (1853), 10 Hare, Appendix II., lxxiv.; *Osborne v. Foreman* (1856), 8 De G. M. & G. 122, C. A.; on appeal, *sub nom. Barlow v. Osborne* (1858), 6 H. L. Cas. 556.

(*i*) The conditional contract is confirmed upon application by summons. For form of summons, see Daniell, Chancery Forms, 5th ed., p. 675. This course is usually adopted where there has been a previous ineffectual attempt to sell by public auction; compare *Bousfield v. Hodges* (1863), 33 Beav. 90; *Berry v. Gibbons, Ex parte Lee* (1872), L. R. 15 Eq. 150. But though the sale has been confirmed by the master, the court can reopen it before the order has been passed and entered (*Re Thomas, Bariley v. Thomas* (1911), 55 Sol. Jo. 567).

(*k*) See *Pitt v. White* (1887), 57 L. T. 650; *Re Stedman, Coombe v. Vincent* (1888), 58 L. T. 709; for form of order, see 1 Seton, Judgments and Orders, 7th ed., p. 324. For the scales of remuneration usually allowed, see Yearly Practice of the Supreme Court, 1913, p. 732. As to a purchaser knowing the reserve price, see *Dowle v. Lucy* (1845), 4 Hare, 311.

(*l*) R. S. C., Ord. 51, r. 1A (b). No order is necessary for payment of purchase-money into court, but a direction for that purpose signed by the master is sufficient authority for the Paymaster-General to receive the money (R. S. C. Ord. 51, r. 3A).

SECT. 10.
Persons
Selling
under
Order of
Court.

Conduct
of sale.

Leave to bid.

Preparation
of particulars,
conditions,
and abstract.

proceedings must be prefaced by a declaration that the judge is so satisfied and a statement of the evidence upon which such declaration is made (*m*).

534. Usually the conduct of the sale is committed to the plaintiff or other person having the carriage of the order (*n*); but the court has a discretion in the matter, and will give the conduct of the sale to any other party if such a course is shown to be for the benefit of those interested (*o*). The solicitor of the party having the conduct of the sale is deemed, as between the vendor and the purchaser, to be the agent of all parties to the action (*p*).

Leave to bid may be given to the parties to the action by the order of sale (*q*), or may be applied for by summons in chambers; but none of the parties ought to bid without such leave (*r*). If all obtain leave to bid, the conduct of the sale will be given to an independent solicitor (*s*).

535. The solicitor of the party having the conduct of the sale prepares the particulars, which are entitled in the cause or matter and state that the sale is made with the approbation of the judge under an order, and also the abstract of title. Before the property is put up for sale the abstract must, unless otherwise ordered, be laid before one of the six official conveyancing counsel to the court, or in special circumstances some other conveyancing counsel (*t*)

(*m*) R. S. C., Ord. 51, r. 1A; see *Cumberland Union Banking Co. v. Maryport Hematite Iron and Steel Co.*, [1892] 1 Ch. 92.

(*n*) *Dule v. Hamillon* (1853), 10 Hare, Appendix I., vii. And this is so notwithstanding that, as between the parties, the plaintiff, if there were no action, would not be entitled to interfere with the sale (*ibid.*).

(*o*) *Dixon v. Pyner* (1850), 7 Hare, 331; *Knott v. Coltee* (No. 4) (1859), 27 Beav. 33; *Re Gardner, Gardner v. Beaumont* (1879), 48 L. J. (Ch.) 644; *Davies v. Wright* (1886), 32 Ch. D. 220; *Hewitt v. Nanson* (1858), 7 W. R. 5. The Court of Appeal will not interfere with the exercise of the discretion; see *Re Love, Hill v. Spurgeon* (1885), 29 Ch. D. 348, C. A. The conduct of the sale in an action for administration or execution of trusts is, unless otherwise ordered, given to the executor, administrator, or trustee in whom the property is vested (R. S. C., Ord. 50, r. 10); as to resale where the purchaser was not independent, see *Re Dumbell, Ex parte Hughes, Ex parte Lyon* (1802), 6 Ves. 617; and see, generally, titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 333 *et seq.*; TRUSTS AND TRUSTEES.

(*p*) *Dalby v. Pullen* (1830), 1 Russ. & M. 296. So also is the conveyancing counsel of the court (*Re Banister, Broude v. Munton* (1879), 12 Ch. D. 131, C. A.). As to the relations of solicitors and clients generally, see title SOLICITORS; as to the duties of conveyancing counsel to the court and the allocation of business to them, see R. S. C., Ord. 51, rr. 7—13; as to their appointment, see title BARRISTERS, Vol. II., pp. 381, 382; and see the text, *infra*.

(*q*) For form of order, see 1 Seton, Judgments and Orders, 7th ed., p. 324.

(*r*) *Elworthy v. Billing* (1841), 10 Sim. 98. But if a party bids without leave, the purchase may be allowed to stand (*ibid.*). The person having the conduct of the sale will not be permitted to bid (*Sidney v. Ranger* (1841), 12 Sim. 118); and see Dart, Vendors and Purchasers, 7th ed., p. 1160. A person to whom leave to bid has been given is under no greater obligations as to disclosure and good faith than those which are imposed on ordinary purchasers; see *Coake v. Boswell* (1886), 11 App. Cas. 232; and see pp. 306, 307, *ante*.

(*s*) *Dean v. Wilson* (1878), 10 Ch. D. 136. For the form of summons, see Daniell, Chancery Forms, 5th ed., p. 634.

(*t*) As to the conveyancing counsel of the court, see note (*p*), *supra*; and as to the power of the court to dispense with a reference of the title to

approved by the court for his opinion thereon, to enable proper directions to be given respecting the sale and other matters connected with the sale (*u*). The master refers the matter to the conveyancing counsel "in rotation," and this reference being taken to the registrar's office, the proper clerk writes upon it the name of the proper conveyancing counsel. The particulars and conditions of sale having been settled by conveyancing counsel, and his certificate that the sale may proceed having been obtained, the auctioneer is appointed and the amount of his remuneration fixed, and the statement of the reserve price handed to him in a sealed envelope not to be opened till the sale (*v*).

SECT. 10.
Persons
Selling
under
Order of
Court.

After the sale the auctioneer and the solicitor of the party having the conduct of the sale certify the result (*a*). Upon reading their certificate the master makes his certificate of the result of the sale, and, if no application be made within eight days to discharge or vary it, it becomes absolute (*b*), and the highest bidder then first becomes, strictly speaking, the purchaser (*c*).

Certificate
of sale.

Part III.—Conditions of Sale and Special Stipulations in the Contract.

SECT. 1.—In General.

536. An agreement for the sale of land which merely satisfies the requirements of the Statute of Frauds (*d*), leaving all other terms

Special
conditions.

conveyancing counsel, see *Rolph v. Horton* (1870), 19 W. R. 220; *Gibson v. Woollard* (1854), 5 De G. M. & G. 835, C. A.; *Re Jones* (1855), 3 W. R. 564.

(*u*) R. S. C., Ord. 51, r. 2. The conditions of sale must specify a time for the delivery of the abstract to the purchaser or his solicitor (*ibid.*).

(*v*) See *Pitt v. White* (1887), 57 L. T. 650; *Re Stedman, Coombe v. Vincent* (1888), 58 L. T. 709; *Re Walford, Walford v. Walford*, [1888] W. N. 178. For the scale of remuneration usually allowed, see *Yearly Practice of the Supreme Court*, 1913, p. 732. There is no practice which entitles an auctioneer to further remuneration if a purchaser is obtained otherwise than through him after an ineffectual attempt to sell by auction (*Re Maitland, Pickthall v. Dawes*, [1903] W. N. 143). The auctioneer must usually give security, if he is authorised to receive the deposit: and he is justified in paying it to the solicitor having the conduct of the sale for the purpose of payment into court (*Biggs v. Bree*, [1881] W. N. 150; affirmed [1882] W. N. 2, C. A.; *Brown v. Farebrother* (1888), 58 L. J. (CH.) 3). As to the reserve price, see *Daniell, Chancery Forms*, 5th ed., pp. 644, 649.

(*a*) R. S. C., Ord. 51, r. 6A. This rule in effect repeals *ibid.*, r. 6, which required, an affidavit of the result of the sale.

(*b*) See R. S. C., Ord. 55, r. 70; unless there are special circumstances (*ibid.*, r. 71). The practice of opening biddings, except in cases of fraud or misconduct bordering on fraud, is abolished by the Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48); see *Delves v. Delves* (1875), L. R. 20 Eq. 77; *Guest v. Smythe* (1870), 5 Ch. App. 551; *Union Bank v. Munster* (1887), 37 Ch. D. 51; *Re Bartlett, Newman v. Hook* (1880), 16 Ch. D. 561.

(*c*) *Ex parte Minor* (1805), 11 Ves. 559; see *Twigg v. Fifield* (1807), 13 Ves. 517, 518. Consequently on a subsale at a profit before the certificate is absolute the profit goes to the parties to the action (*Hodder v. Ruffin* (1830), Tam. 341), but on a subsale afterwards, the original purchaser takes it (*Dewell v. Tuffnell* (1855), 1 K. & J. 324).

(*d*) 29 Car. 2, c. 3. As to the matters which must be contained in an

SECT. 1.
In General.

to be implied by law, is called an "open contract" (e). But usually the vendor desires to exclude or modify the terms which would be implied by law, and provisions for this purpose are inserted in a formal contract or in conditions of sale (f).

Good faith.

537. Special stipulations must be expressed in clear and unambiguous language (g), and must neither state nor suggest what is to the knowledge of the vendor incorrect. A condition is misleading, and therefore not binding, if it requires the purchaser to assume that which the vendor knows to be false; or if it affirms that the state of the title is not accurately known to the vendor when in fact it is known (h); or if it stipulates for the commencement of the title with a certain conveyance *simpliciter*, without disclosing, as is the fact, that the conveyance is a voluntary one (i); or if it is used by a vendor, who knows that he has a bad title, in order to palm such title off upon the purchaser (k).

Particulars.

538. On a sale by auction the property to be sold is described in the particulars; the conditions state the terms on which it is sold (l). A verbal correction of the particulars made by the

agreement for the sale of land, if it is to be enforceable, see pp. 290 *et seq.*, *ante*.

(e) See note (b), p. 341, *post*.

(f) See *Hyde v. Dallaway* (1842), 4 Beav. 606. In the country it is the practice to use the general printed conditions of the local law society, and supplement them by special conditions. Where after an abortive auction the property is sold by private treaty, the conditions of sale will not be incorporated unless referred to in the contract (*Cowley v. Watts* (1853), 17 Jur. 172; see *Dewar v. Minloft*, [1912] 2 K. B. 373); and see title AUCTION AND AUCTIONEERS, Vol. I., p. 509.

(g) *Symons v. James* (1842), 1 Y. & C. Ch. Cas. 487, 490; *Taylor v. Martindale* (1842), 1 Y. & C. Ch. Cas. 658. In case of any ambiguity they will be construed in favour of the party whose rights are restricted, *i.e.*, as a rule, the purchaser (*Seaton v. Mupp* (1846), 2 Coll. 556, 562; *Osborne v. Harvey* (1842), 7 Jur. 229; *Rhodes v. Ibbetson* (1853), 4 De G. M. & G. 787, C. A.; *Drysdale v. Mace* (1854), 5 De G. M. & G. 103; *Cruse v. Nowell* (1856), 2 Jur. (N. S.) 536; *Brumfit v. Morton* (1857), 3 Jur. (N. S.) 1198; *Allmann v. McDaniel*, [1912] 1 I. R. 467, 472). But in considering the effect of a condition it may be material that the purchaser is a lawyer (*Minet v. Leman* (1855), 7 De G. M. & G. 340, 352, C. A.).

(h) *Re Banister, Broad v. Munton* (1879), 12 Ch. D. 131, 143, C. A.; see *Harnett v. Baker* (1875), L. R. 20 Eq. 50; *Boyd v. Dickson* (1876), 10 I. R. Eq. 239; p. 302, *ante*. But if the vendor believes the truth of the facts, which the purchaser is required to assume, the condition is not misleading, although it precludes the purchaser from requiring evidence which is essential to the title; and it is not necessary to state in the condition the specific defect which the condition is intended to cover (*Re Sandbach and Edmondson's Contract*, [1891] 1 Ch. 99, C. A.; compare *Nash v. Browne* (1863), 9 Jur. (N. S.) 431, which seems questionable; and see *Blenkhorn v. Penrose* (1880), 29 W. R. 237; *Blaiberg v. Keeves*, [1906] 2 Ch. 175); and see note (p), p. 302, *ante*.

(i) *Re Marsh and Granville (Earl)* (1883), 24 Ch. D. 11, C. A.; see p. 303, *ante*.

(k) *Re Scott and Alvarez's Contract*, *Scott v. Alvarez*, [1895] 1 Ch. 596, 606, C. A. *A fortiori*, in the case of a sale by the court, the utmost good faith must be shown (*Elsie v. Elsie* (1872), L. R. 13 Eq. 196, 201; *Manifold v. Johnston*, [1902] 1 I. R. 7); and see pp. 303, note (d), 315, *ante*.

(l) *Torrance v. Bolton* (1872), L. R. 14 Eq. 124, 130; see note (o), p. 331, *post*. The particulars should be accurate (see *Calverley v. Williams*, *Williams v. Calverley* (1790), 1 Ves. 210), and state any incumbrances, easements, restrictive covenants, and other matters affecting the value of the

auctioneer at the sale cannot be admitted to vary the written contract, but it usually prevents the purchaser from obtaining specific performance without the correction (n).

SECT. 1.
In General.

SECT. 2.—*Rights under Particular Conditions.*

SUB-SECT. 1.—*Bidding.*

539. On a sale by auction the conditions usually state that the highest bidder shall be the purchaser, that not less than a specified sum, or such sum as shall be fixed by the auctioneer, shall be advanced at each bidding, and that no bidding shall be retracted (n). But the right of a purchaser to retract his bidding before the fall of the hammer (o) does not seem to be negated by such a condition (p).

Bidding.

540. The particulars or conditions of sale must state whether the land will be sold without reserve, or subject to a reserve price, or whether a right to bid is reserved; and, if the sale is without reserve, the vendor may not employ any person to bid thereat, nor may the auctioneer knowingly accept any bidding from such person (q). A sale subject to a reserve price and the reservation of a right to bid are distinct matters (r), and a sale expressed to be subject to a reserve price or to a "reserved bidding" (s) does not give the vendor the right to bid by himself or his agent up to the reserve price (t). Where the conditions expressly reserve the right to bid without further defining it, the vendor may bid himself or employ any one person to do so on his behalf (u); and if the vendor or

Sale subject to reserve or vendor's right to bid.

property (*Burnell v. Brown* (1820), 1 Jac. & W. 168; *Baskcomb v. Beckwith* (1869), L. R. 8 Eq. 100; *Torrance v. Bolton* (1872), 8 Ch. App. 118).

(m) *Manser v. Back* (1848), 6 Hare, 443; *Re Hare and O'More's Contract*, [1901] 1 Ch. 93; see Dart, *Vendors and Purchasers*, 7th ed., p. 120; title AUCTION AND AUCTIONEERS, Vol. I., p. 510.

(n) See *Encyclopædia of Forms and Precedents*, Vol. XII., p. 275.

(o) *Payne v. Cave* (1789), 3 Term Rep. 148; see title AUCTION AND AUCTIONEERS, Vol. I., p. 511.

(p) The bidder comes under no obligation until the vendor accepts his bid by the fall of the hammer (see *Jones v. Nanney* (1824), 13 Price, 76, 103; Sugden, *Vendors and Purchasers*, 14th ed., p. 14); but under special circumstances the bidder may be bound (*Freer v. Rimner* (1844), 14 Sim. 391); compare titles AUCTION AND AUCTIONEERS, Vol. I., pp. 510 *et seq.*; SALE OF GOODS, pp. 280, 281, *ante*.

(q) *Sale of Land by Auction Act*, 1867 (30 & 31 Vict. c. 48), s. 5; see title AUCTION AND AUCTIONEERS, Vol. I., pp. 508, 509.

(r) Although the *Sale of Land by Auction Act*, 1867 (30 & 31 Vict. c. 48), s. 5, is expressed in the alternative, the conditions may both state that the sale is subject to a reserve price and reserve a right to bid (*Gilliat v. Gilliat* (1869), L. R. 9 Eq. 60), and this is usually done; see *Encyclopædia of Forms and Precedents*, Vol. XII., pp. 275, 276.

(s) *Gilliat v. Gilliat*, *supra*; see *Nolley v. Salmon* (1853), 1 W. R. 240.

(t) *Gilliat v. Gilliat*, *supra*.

(u) *Sale of Land by Auction Act*, 1867 (30 & 31 Vict. c. 48), s. 6. For a form, see *Encyclopædia of Forms and Precedents*, Vol. XII., p. 322. Formerly a puffer—i.e., an agent to bid on behalf of the vendor—was not allowed at law, unless the sale was stated to be subject to a reserve. Whether it was stated to be without reserve, or whether the conditions were silent as to reserve, the employment of a puffer made the sale fraudulent and therefore voidable (*Howard v. Castle* (1796), 6 Term Rep. 642; *R. v. Marsh* (1829), 3 Y. & J. 331 (sale on behalf of Crown); *Thornett v. Haines* (1846), 15 M. & W. 367, 371; *Green v. Baverstock* (1863), 10 Jur. (N. S.) 47; *Mainprice v. Westley* (1865), 11 Jur. (N. S.) 975; *Mortimer v. Bell* (1865),

SECT. 2.
Rights
under
Particular
Conditions.

Deposit
and memo-
randum.

Timber and
fixtures.

his agent is to be at liberty to bid more than once (a) and beyond the reserve this should be expressly stated (b).

541. On a sale by auction it is usual to stipulate (c) that the purchaser shall, immediately after the fall of the hammer, pay a deposit to the auctioneer or to the vendor's solicitor (d), and sign a memorandum of the agreement (e). On a sale by private contract also, the vendor frequently insists on payment of a deposit, and it is then usual to provide for payment to the vendor's solicitor or agent as stakeholder (f). The deposit is not merely part payment, but a guarantee of the due performance of the contract by the purchaser. Hence it may be forfeited if the sale goes off owing to his default (g).

SUB-SECT. 2.—*Fixtures.*

542. In the absence of special provision, a sale of land includes the fixtures and timber growing on it at the time of the sale (h).

1 Ch. App. 10), and it was the same in equity where the sale was stated to be without reserve (*Meadows v. Tanner* (1820), 5 Madd. 34; *Robinson v. Wall* (1847), 2 Ph. 372; *Thornett v. Haines*, *supra*). If, however, the conditions were silent as to reserve, then, in equity, one puffer was allowed in order to prevent a sale at an under-value (*Woodward v. Miller* (1845), 2 Coll. 279; *Flint v. Woodin* (1852), 9 Harc. 618; *Mortimer v. Bell*, *supra*); see *Smith v. Clarke* (1806), 12 Ves. 477. This was restricted to one puffer, since the employment of more could not be intended for protection against under-value merely, but to enhance the price (*Smith v. Clarke*, *supra*; *Thornett v. Haines*, *supra*; *Mortimer v. Bell*, *supra*). Prevalence has now been given by statute (Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48)) to the common law rule, and it is provided (*ibid.*, s. 4) that a sale of land by auction which would be invalid at law owing to the employment of a puffer is to be deemed invalid also in equity.

(a) See *Parfitt v. Jepson* (1877), 46 L. J. (Q. B.) 529; title AUCTION AND AUCTIONEERS, Vol. I., p. 509.

(b) See Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48), s. 6; Encyclopædia of Forms and Precedents, Vol. XII., pp. 276, 323.

(c) See Encyclopædia of Forms and Precedents, Vol. XII., p. 277. Without this stipulation no deposit could lawfully be demanded, as the whole consideration is not payable until completion, when the vendor will have shown a good title (*Binks v. Rokeby (Lord)* (1818), 2 Swan. 222).

(d) The auctioneer receives it as stakeholder (*Harrington v. Hoggart* (1830), 1 B. & Ad. 577). He is not justified in taking an I.O.U. in payment of the deposit (*Hodgens v. Keon*, [1894] 2 I. R. 657). As to payment by cheque or bill, see title AUCTION AND AUCTIONEERS, Vol. I., pp. 503, 512, 513.

(e) If the purchaser refuses to sign the memorandum, it seems that he cannot be compelled to do so (see *Wood v. Midgley* (1854), 5 De G. M. & G. 41, 45, C. A.), though the signature of the auctioneer as his agent will bind him; see title AUCTION AND AUCTIONEERS, Vol. I., p. 504. A vendor who improperly prevents a purchaser from signing is liable in damages; see *Johnston v. Boyes*, [1899] 2 Ch. 73, *per* COZENS-HARDY, J., at p. 77.

(f) See *Wiggins v. Lord* (1841), 4 Beav. 30; *Ellis v. Goulton*, [1893] 1 Q. B. 350, C. A. If the payment is not made to the solicitor as stakeholder, he receives it as agent for the vendor (*Bamford v. Shuttleworth* (1840), 11 Ad. & El. 926; *Edgell v. Day* (1865), L. R. 1 C. P. 80; *Ellis v. Goulton*, *supra*). As to interest on the deposit, see title AUCTION AND AUCTIONEERS, Vol. I., p. 513; *Townshend v. Townshend* (1826), 2 Russ. 303; and as to investment of the deposit, see p. 399, *post*.

(g) *Howe v. Smith* (1884), 27 Ch. D. 89, C. A.; *Hall v. Burnett*, [1911] 2 Ch. 551; and see pp. 398 *et seq.*, *post*, where the subject is fully discussed.

(h) See *Colegrave v. Dias Santos* (1823), 2 B. & C. 76. As to timber, see title LANDLORD AND TENANT, Vol. XVIII., pp. 429 *et seq.*; as to fixtures, see *ibid.*, pp. 416 *et seq.*

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Hence it is very common, both in private sales and on sales by auction, to insert a condition that the fixtures and timber shall be taken at a price stated in the particulars, or at a valuation to be made in a specified manner (i). It is sometimes further provided that, failing such valuation, they shall be taken at a fair valuation or price. This last provision enables the court to direct a reference to ascertain the price (k), whereas without it, if the valuation cannot be made in the manner specified, the court cannot interfere, since that would be to make a new contract for the parties (l).

SUB-SECT. 3.—Title.

543. It is usual to specify the instrument with which the title is to commence (m), and it is necessary to do so if the vendor wishes to commence his abstract with an instrument which is not otherwise a good root of title or to deduce a title for less than the statutory period (n). A purchaser should, however, insist as far as possible on having the full statutory length of title, since he is deemed to have notice of everything that he would have discovered if he had insisted on and investigated the title for the statutory period (o).

Commence-
ment of title.

A condition that the abstract shall commence with a specified document does not preclude the purchaser from investigating the earlier title *aliunde* if he can (p); but, if the condition stipulates that the earlier title, whether appearing in any abstracted documents or not, shall not be required, investigated or objected to, this

Investigation
of earlier
title.

(i) See *Encyclopædia of Forms and Precedents*, Vol. XII., p. 277. Ordinarily trustees cannot contract to sell property at a price to be fixed by valuation, since this is a delegation of their authority (*Peters v. Lewes and East Grinstead Rail. Co.* (1880), 16 Ch. D. 703, 713; (1881), 18 Ch. D. 429, 437, C. A.; *Re Wilton's (Earl) Settled Estates*, [1907] 1 Ch. 50, 55). Hence they cannot in strictness contract to sell timber or fixtures in this way; but since the sale is merely incidental to the sale of the land, it is doubtful whether the strict rule applies; and the court habitually sells timber and fixtures in this way. The difficulty can be avoided by having a valuation made before the sale and stating the amount as the price in the particulars. As to timber on copyhold land, see *Crosse v. Keene* (1852), 9 Hare, 469; and see note (g), p. 328, *post*. As to the powers of sale of trustees, see *Trustee Act, 1893* (56 & 57 Vict. c. 53), s. 44 (2); title TRUSTS AND TRUSTEES.

(k) See *Wilks v. Davis* (1817), 3 Mer. 507; *Morgan v. Milman* (1853), 3 De G. M. & G. 24, C. A.

(l) See *Milnes v. Gery* (1807), 14 Ves. 400; *Vickers v. Vickers* (1867) L. R. 4 Eq. 529; p. 292, *ante*. But the failure of the provision as to valuation does not necessarily make the whole agreement unenforceable (*Jackson v. Jackson* (1853), 1 Sm. & G. 184; *Richardson v. Smith* (1870), 5 Ch. App. 648; compare *Darkey v. Whitaker* (1857), 4 Drew. 134). The court will compel the vendor to allow the valuation to be made (*Smith v. Peters* (1875), L. R. 20 Eq. 511); compare, at law, *Tattersall v. Groote* (1800), 2 Bos. & P. 131, 135; *Livingston v. Halli* (1855), 5 E. & B. 139; title ARBITRATION, Vol. I., p. 441.

(m) See *Encyclopædia of Forms and Precedents*, Vol. XII., p. 278.

(n) See p. 342, *post*. As to the necessity of expressing such a condition in clear and unambiguous terms, see p. 318, *ante*.

(o) *Re Cox and Neve's Contract*, [1891] 2 Ch. 109; *Re Nisbet and Potts' Contract*, [1905] 1 Ch. 391, C. A.

(p) *Sellick v. Trevor* (1843), 11 M. & W. 722, 728; *Darlington v. Hamilton* (1854), Kay, 550, 558; and the effect of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3 (3), is the same; see *Nottingham Patent Brick and Tile Co. v. Butler* (1885), 15 Q. B. D. 261, 272; affirmed (1886), 16 Q. B. D. 778, C. A.; *Re Cox and Neve's Contract*, *supra*,

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Vendor's
title to be
accepted.

precludes inquiry and investigation for every purpose (g); though, if the vendor allows the purchaser to inspect the deeds relating to the earlier title, and thus discloses some blot in the title to the purchaser, the latter is not precluded from raising the objection (r).

544. A vendor may stipulate that the purchaser shall accept such title as he has (s). This condition does not relieve the vendor from the obligation of making out the best title he can from the material in his possession (t); and a purchaser is bound by it, although the title prove defective (a). But the purchaser is entitled to assume that the vendor has disclosed what it was his duty to disclose, and non-disclosure of the existence of onerous covenants affecting the property prevents the condition from being binding upon him (b).

SUB-SECT. 4.—Abstract of Title.

Delivery of
abstract.

545. Although a vendor is, independently of any condition for that purpose, bound to deliver an abstract of the title, and that within a reasonable time (c), the contract sometimes contains a condition providing for the delivery of an abstract to the purchaser

(q) *Re National Provincial Bank of England and Marsh*, [1895] 1 Ch. 190; see *Hume v. Bentley* (1852), 5 De G. & Sm. 520; *Re Arran (Earl) and Knowlesden and Cree's Contract*, [1912] 2 Ch. 141; *Re M'Lure and Garrett's Contract*, [1899] 1 L. R. 225; but such a condition is construed strictly, and its terms must be clear and unambiguous (*Waddell v. Wolfe* (1874), L. R. 9 Q. B. 515, where the language was held not sufficient to preclude objection to the earlier title).

(r) *Warren v. Richardson* (1830), You. 1; *Smith v. Robinson* (1879), 13 Ch. D. 148.

(s) See *Freme v. Wright* (1819), 4 Madd. 364; *Groom v. Booth* (1853), 1 Drew. 548; *Tweed v. Mills* (1865), L. R. 1 C. P. 39.

(t) *Keyse v. Heydon* (1853), 20 L. T. (o. s.) 244; *Hume v. Pocock* (1866), 1 Ch. App. 379, 385; nor from paying off a mortgage on the property (*Goold v. Birmingham, Dudley and District Banking Co.* (1888), 4 T. L. R. 413).

(a) *Wilmut v. Wilkinson* (1827), 6 B. & C. 506; *Duke v. Barnett* (1846), 2 Coll. 337; *Ashworth v. Mounsey* (1853), 9 Exch. 175; but though the purchaser is bound at law, and therefore cannot recover his deposit, specific performance will not be ordered against him if he will not get a holding title (*Re Scott and Alvarez's Contract*, *Scott v. Alvarez*, [1895] 2 Ch. 603, C. A.); see *Re National Provincial Bank of England and Marsh*, *supra*, and compare *Lethbridge v. Kirkman* (1855), 2 Jur. (N. S.) 372.

As to the distinction between stating facts and leaving the purchaser to take such title as the facts give, and stating that the vendor has power to sell, see *Johnson v. Smiley* (1853), 17 Beav. 223; and, as to the obligation to show that a trust is being properly exercised, see *Re O'Flanagan and Ryan's Contract*, [1905] 1 I. R. 280. A condition excluding evidence of payment of a charge, where for more than twelve years there has been no payment or acknowledgment, is valid (*Hopkinson v. Chamberlain*, [1908] 1 Ch. 853).

(b) *Re Haedicke and Lipski's Contract*, [1901] 2 Ch. 666; compare *Blake v. Phinn* (1847), 3 C. B. 976; as to the sale of an underlease, see p. 305, *ante*; and as to the duty to disclose, see p. 302, *ante*.

(c) *Compton v. Bagley*, [1892] 1 Ch. 313. In case of unreasonable delay, the purchaser should give the vendor notice in writing, fixing a reasonable time within which a proper abstract must be delivered, when the failure of the vendor to deliver accordingly will entitle the purchaser to rescind the contract and recover his deposit (*Compton v. Bagley*, *supra*); see, further, as to rescission, p. 402, *post*.

or his solicitor within a specified time (*d*). Delivery within such time is not of the essence of the contract (*e*), and it is for the purchaser, on default by the vendor, to insist on the abstract being sent. If he neglects to apply for it on the day fixed for its delivery (*f*), or within such a period as will leave time for completion of the contract on the agreed day (*g*), or if, upon its being tendered after that time, he receives it without demur (*h*), he will be held to have waived the condition; but, if the vendor fails to deliver an abstract on being pressed by the purchaser to do so, the purchaser can treat the contract as at an end as soon as a reasonable time for delivery has expired (*i*). Failure to deliver the abstract within the specified time relieves the purchaser from any condition binding him to make his requisitions or objections within a given period after delivery of the abstract (*k*). The effect is the same if the abstract delivered be imperfect, since the time limited for making requisitions or objections only runs from the time of delivery of a perfect abstract (*l*), that is an abstract as perfect as the vendor could furnish at the time of delivery, though it may be an abstract of a defective title (*m*).

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SUB-SECT. 5.—*Requisitions.*

546. The conditions of sale usually provide that any requisition or objection arising on the abstract, particulars, or conditions shall be made within a fixed time from the delivery of the abstract; that every requisition and objection not so stated shall be considered as waived; that in default of, or subject only to, such requisitions or objections the purchaser shall be deemed to have accepted the title; and that in this respect time shall be of the essence of the contract (*n*). Time for
requisitions.

(*d*) See *Encyclopædia of Forms and Precedents*, Vol. XII., p. 278, note (*l*); *Steer v. Crowley* (1863), 14 C. B. (N. S.) 337; and see pp. 324 *et seq.*, *post*.

(*e*) *Roberts v. Berry* (1853), 3 De G. M. & G. 284, C. A. Formerly, such time was regarded at law as of the essence of the contract, and non-delivery of the abstract within that time relieved the purchaser from the contract and entitled him to the return of his deposit (*Berry v. Young* (1788), 2 Esp. 640, n.; *Wilde v. Fort* (1812), 4 Taunt. 334), but now time is not of the essence of the contract unless it would be so treated in equity; see title *EQUIT*, Vol. XIII., p. 154; note (*f*), p. 332. *post*.

(*f*) *Guest v. Homfray* (1801), 5 Ves. 818.

(*g*) *Jones v. Price* (1797), 3 Anst. 924.

(*h*) *Smith v. Burnam* (1795), 2 Anst. 527; compare *Re Priestley and Davidson's Contract* (1892), 31 L. R. Ir. 122; *Oakden v. Pike* (1865), 11 Jur. (N. S.) 666, 667.

(*i*) *Venn v. Cattell* (1872), 27 L. T. 469; see *Pincke v. Curteis* (1793), 4 Bro. C. C. 329; *Selon v. Slade*, *Hunter v. Selon* (1802), 7 Ves. 265; *Magennis v. Fallon* (1829), 2 Mol. 561, 576; *Hipwell v. Knight* (1835), 1 Y. & C. (EX.) 401; Sugden, *Vendors and Purchasers*, 14th ed., p. 261.

(*k*) *Upperton v. Nickolson* (1871), 6 Ch. App. 436; *Re Todd and M'Fadden's Contract*, [1908] 1 I. R. 213; see *Southby v. Hutt* (1837), 2 My. & Cr. 207, 211; note (*p*), p. 324, *post*.

(*l*) *Hobson v. Bell* (1839), 2 Boav. 17, 24.

(*m*) *Morley v. Cook* (1842), 2 Hare, 106, 111; *Blackburn v. Smith* (1848), 2 Exch. 783, 789; *Want v. Stallibrass* (1873), L. R. 8 Exch. 175, 184; *Pryce-Jones v. Williams*, [1902] 2 Ch. 517, 522. An abstract is presumed to be perfect until the contrary is shown (*Gray v. Fowler* (1873), L. R. 8 Exch. 249, 279, Ex. Ch.).

(*n*) See *Encyclopædia of Forms and Precedents*, Vol. XII., p. 278. The condition is valid as regards waiver of objection; see *Blackburn v.*

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The time must be computed only from the delivery of a perfect abstract (*o*); hence it is usually further provided that the abstract shall be deemed perfect for the purpose of any particular requisition or objection, if it supplies the information suggesting the same, though otherwise defective (*p*). If the abstract is imperfect, the purchaser is not precluded from making any requisition as to matters subsequently discovered which were not disclosed on the face of the abstract, though the time has expired (*q*).

Where
vendor's title
wholly bad.

A condition limiting the time for requisitions or objections does not apply, where the title of the vendor is wholly bad; it merely applies to such requirements as might have been properly enforced against a vendor who had a valid title (*r*). Hence it cannot be used to force a bad title on a purchaser who has made his requisitions as to title too late (*s*), and he is entitled to recover his deposit (*t*).

Rescission
on requisition
being
pressed.

547. The conditions usually provide that, if the purchaser insists on any requisition or objection as to title which the vendor is unable or unwilling to remove or comply with, the vendor may, notwithstanding any intermediate negotiation or litigation, or any attempt to remove or comply with the same, by notice in

Smith (1848), 2 Exch. 783; *Smithson v. Powell*, *Powell v. Smithson* (1852), 20 L. T. (O. S.) 105. It has been said that in this condition time is of the essence of the contract without express words to that effect (*Oakden v. Price* (1865), 11 Jur. (N. S.) 666). If there is no stipulation as to time, the purchaser must make his objections within a reasonable time after the delivery of the abstract (*Spurrier v. Hancock* (1799), 4 Ves. 667). In the event of unreasonable delay, the vendor can by notice limit a reasonable time for sending in objections, and, upon the purchaser's default, rescind the contract (*Taylor v. Brown* (1839), 2 Beav. 180), or the purchaser may perhaps be assumed to have accepted the title (*Pegg v. Wisden* (1852), 16 Beav. 239, 244). As to waiver of the condition, see *Oults v. Thodey* (1842), 13 Sim. 206.

(*o*) See p. 323, *ante*; and as to computation of time, see title TIME.

(*p*) See *Encyclopædia of Forms and Precedents*, Vol. XII., p. 278. The purchaser is not bound by the condition if the vendor fails to deliver the abstract within the time, if any, specified for that purpose in the conditions; see pp. 322, 323, *ante*.

(*q*) *Warde v. Dixon* (1858), 28 L. J. (Ct.) 315; and see *Gray v. Fowler* (1873), L. R. 8 Exch. 249, 267, Ex. Ch. A time corresponding to that in the conditions will be allowed for requisitions after the delivery of the further abstract: compare *Sherwin v. Shakspear* (1854), 5 De G. M. & G. 517, 536, C. A. Consequently, the purchaser is not precluded from taking an objection arising out of evidence called for before, but supplied by the vendor after, the expiration of the time fixed (*Blacklow v. Laws* (1842), 2 Hare, 40).

(*r*) *Want v. Stallibrass* (1873), L. R. 8 Exch. 175, 185.

(*s*) *Re Tanqueray-Willwaine and Landau* (1882), 20 Ch. D. 465, C. A.; *Want v. Stallibrass*, *supra*; *Sarby v. Thomas* (1891), 64 L. T. 65, 67, C. A. In *Pryce-Jones v. Williams*, [1902] 2 Ch. 517, a distinction was made between requisitions as to the root of title and requisitions as to the subsequent devolution of the title, and it was held that the latter cannot be insisted on if made out of time; but it seems that the true distinction is between matters which would vitiate the title and mere technical objections when a good holding title is shown.

(*t*) *Want v. Stallibrass*, *supra*. Unless he can only show the want of title by means of inquiries which he is precluded by the contract from making (*Rosenberg v. Cook* (1881), 8 Q. B. D. 162, C. A.). As to recovery of the deposit, see, further, pp. 401, 402, *post*.

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writing (*u*) annul the sale upon returning the deposit, without interest or costs of investigating title or other compensation (*v*).

When the condition is framed in this way, it applies only to objections as to title and not to objections as to conveyance (*a*). Thus, the condition covers an objection in respect of an undisclosed right of way (*b*), or for want of title to minerals (*c*); or a requisition that the land should be released from a rentcharge (*d*), or that legatees or annuitants, whose concurrence the vendor cannot compel, should concur in the conveyance (*e*). But the condition is usually framed so as to cover also requisitions and objections as to conveyance, such as requisitions requiring a legal estate (*f*) or the outstanding day of a term (*g*) to be got in; requiring the concurrence of mortgagees (*h*), or of the customary heir of copyholds (*i*); or the appointment of trustees for the purposes of the Settled Land Acts (*k*); or an objection to the conveyance being made subject to covenants and restrictions, the existence of which did not appear from the particulars or the abstract (*l*). Although the condition does not in terms refer to requisitions as to conveyance, yet, if it is expressed to include objections as to the title, particulars, conditions and any other matter or thing relating to the sale, it is construed to include requisitions as to conveyance (*m*).

Where the condition enables the vendor to rescind upon the purchaser "insisting upon" (*n*) or "persisting in" any requisition,

When right
of rescission
arises.

(*u*) A notice to rescind signed "without prejudice" seems to be void (*Re Weston and Thomas's Contract*, [1907] 1 Ch. 244, 248).

(*v*) See *Encyclopædia of Forms and Precedents*, Vol. XII., p. 281; *M'Culloch v. Gregory* (1855), 1 K. & J. 286. This condition is not unduly depreciatory (*Falkner v. Equitable Reversionary Society* (1858), 4 Drew. 352), though it is unreasonable from the purchaser's point of view (*Moeser v. Wisker* (1871), L. R. 6 C. P. 120, 124). As to rescission apart from condition and as to forfeiture of the deposit, see pp. 397 *et seq.*, *post*.

(*a*) For the distinction, see, further, pp. 355, 356, *post*.

(*b*) *Ashburner v. Sewell*, [1891] 3 Ch. 405, 410. But it does not cover an objection to a misdescription (*Price v. Macaulay* (1852), 2 De G. M. & G. 339, C. A.).

(*c*) *Mawson v. Fletcher* (1870), 6 Ch. App. 91.

(*d*) *Re Great Northern Rail. Co. and Sanderson* (1884), 25 Ch. D. 788 (where the court refused to compel the vendor to apply for a discharge of the incumbrance under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 5, on the ground of hardship).

(*e*) *Page v. Adam* (1841), 4 Beav. 269. As to the concurrence of necessary parties, see pp. 415 *et seq.*, *post*.

(*f*) *Kitchen v. Palmer* (1877), 46 L. J. (CH.) 611; and see *Jumpson v. Pitchers* (1844), 1 Coll. 13.

(*g*) *Re Scott and Eave's Contract* (1902), 86 L. T. 617.

(*h*) *Greaves v. Wilson* (1858), 25 Beav. 290; and see *Re Jackson and Oakshott* (1880), 14 Ch. D. 851.

(*i*) *Minton v. Kirwood* (1868), 3 Ch. App. 614; see also p. 380, *post*.

(*k*) *Hatten v. Russell* (1888), 38 Ch. D. 334. As to the Settled Land Acts, see title SETTLEMENTS, p. 624, note (*e*), *post*.

(*l*) *Re Monckton and Gilzean* (1884), 27 Ch. D. 555.

(*m*) *Re Deighton and Harris's Contract*, [1898] 1 Ch. 458, 463, C. A. As to the propriety of a rescission clause applying to requisitions both as to title and as to conveyance, see *Hardman v. Child* (1885), 28 Ch. D. 712, *per* PEARSON, J., at p. 718.

(*n*) "This reply is unsatisfactory and the purchasers reserve their right to insist" is a sufficient insistence; see *Re Dames and Wood* (1885), 29 Ch. D. 626, 631, C. A.

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there must be (1) an objection by the purchaser, (2) an unwillingness or inability on the part of the vendor to remove the objection, (3) communication to the purchaser of the existence of this unwillingness or inability, and (4) insistence by the purchaser upon his objection notwithstanding this communication (*o*). But when in the condition the words "make an objection" or "make or take an objection" are substituted for "insist upon an objection," the vendor's right to rescind arises directly the requisitions are sent in, nor need he attempt any answer (*p*).

**Exercise of
right of
rescission.**

548. The vendor must exercise the right of rescission reasonably and in good faith, and not arbitrarily or capriciously (*q*); but, provided he has a good reason for rescinding, he is not bound to state it to the purchaser (*r*). If the requisition is one which the vendor may reasonably be expected to comply with, he cannot resort to his power to rescind (*s*). Even if the vendor has a sufficient reason for rescinding under the condition, but has knowingly or recklessly made a material misrepresentation concerning the property, he cannot rescind so as to deprive the purchaser of his option either to rescind or to enforce the contract with compensation (*t*).

The right to rescind should be exercised in reasonable time (*u*), and if the vendor seeks to take any unfair advantage of it, as by delaying to exercise it whilst negotiating for a sale to a third party, he loses his election to affirm the contract and the purchaser may treat it as rescinded (*a*). Where the vendor fails to show any title

(*o*) *Duddell v. Simpson* (1866), 2 Ch. App. 102, 109. The vendor must attempt to answer the requisition so as to give the purchaser the opportunity either of waiving it or insisting upon it (*Turpin v. Chambers* (1861), 29 Beav. 104; *Greaves v. Wilson* (1858), 25 Beav. 290).

(*p*) *Re Starr-Bowkett Building Society and Sibun's Contract* (1889), 42 Ch. D. 375, C. A.

(*q*) *Re Dames and Wood*, *supra*, at p. 630; *Re Glenton and Saunders to Haden* (1885), 53 L. T. 434, C. A.; *Re Simson and Moy's (Thomas), Ltd. Contract* (1909), 53 Sol. Jo. 376. The burden of proof seems to lie on the purchaser. Where the vendor states the reasons in his notice, and is not cross-examined as to his *bona fides*, to which he has sworn, and there is no evidence imputing bad faith or caprice, the court does not infer against him an unreasonable or capricious use of the power; see *Re Starr-Bowkett Building Society and Sibun's Contract*, *supra*, at pp. 383, 384.

(*r*) *Re Glenton and Saunders to Haden*, *supra*; see *Woolcott v. Peggie* (1889), 15 App. Cas. 42, P. C. Any difficulty in which this may place the purchaser is due to his own fault in entering into a contract in that form (*Re Glenton and Saunders to Haden*, *supra*; *Re Starr-Bowkett Building Society and Sibun's Contract*, *supra*).

(*s*) *Re Weston and Thomas's Contract*, [1907] 1 Ch. 244 (requisition for commutation of succession duty); *Quinion v. Horne*, [1906] 1 Ch. 596 (requisition as to date of birth of a child).

(*t*) *Re Jackson and Haden's Contract*, [1906] 1 Ch. 412, C. A. "The purchaser is not bound to come in and say 'I will avoid on the terms of the condition and will only take what the condition gives me,' but is entitled to say 'I will avoid the contract, condition and all, and will have what the law gives me apart from the condition'" (*Holliswell v. Seacombe*, [1906] 1 Ch. 426, *per* KEKEWICH, J., at p. 434); but this latter case was a sale under the direction of the court; see also title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 545.

(*u*) *St. Leonard's, Shoreditch, Vestry v. Hughes* (1864), 17 C. B. (N. S.) 137; *Ker v. Crowe* (1873), 7 I. R. C. L. 181; *Bowman v. Hyland* (1878), 8 Ch. D. 588.

(*a*) *Smith v. Wallace*, [1895] 1 Ch. 385 (where the court ordered the return of the deposit with interest). "In fact, such a condition is only

whatever, he cannot rescind under the condition so as to avoid paying the expenses to which the purchaser has been put (b).

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Waiver of
right of
rescission.

549. If the condition allows rescission notwithstanding any intermediate negotiation or litigation with respect to the requisition, an attempt by the vendor to comply with the same is no waiver of the right to rescind (c); but in the absence of such words a vendor who attempts to answer the unwelcome requisition may lose his right to rescind unless he answers "without prejudice" (d), or unless the right to rescind only arises on "insistence," for that implies the necessity for an answer (e). Where the condition is so framed, the vendor can rescind at any time before final judgment (f), but after judgment has been given against him he cannot do so (g). Where, however, the vendor rescinds pending litigation, and the conduct of the purchaser has been reasonable, the court may order the vendor to pay the costs of the litigation till rescission, in addition to the costs of investigation of the title and the return of the deposit (h). If the vendor himself seeks to enforce the contract, he may be deemed to have waived his right to rescind under the condition; but he may, perhaps, revert to it, if he afterwards discontinues the proceedings, on paying the costs (i).

550. Where the contract contains a condition for rescission, and also a condition for compensation in case of error in the description of the property, and the matter objected to falls within the latter condition, the purchaser cannot insist upon compensation if the vendor chooses to rescind under the former condition (k).

Rescission
or compensa-
tion.

applicable to an honest case" (*Re Deighton and Harris's Contract*, [1898] 1 Ch. 458, C. A., per LINDLEY, M.R., at p. 463).

(b) *Bowman v. Hyland* (1878), 8 Ch. D. 588, distinguished in *Re Deighton and Harris's Contract*, *supra*.

(c) *Duddell v. Simpson* (1866), 2 Ch. App. 102.

(d) *Morley v. Cook* (1842), 2 Hare, 106, 115; *Tanner v. Smith* (1840), 10 Sim. 410. An argumentative answer is no waiver of the right to rescind (*Morley v. Cook*, *supra*). In *Gardom v. Lee* (1865), 3 H. & C. 651, the condition entitled the vendor either to answer or to rescind, and negotiation was not to affect the latter right; on the ground that he had disputed, not negotiated, the vendor was not allowed to rescind; and see *M'Culloch v. Gregory* (1855), 1 K. & J. 286.

(e) See note (o), p. 326, *ante*.

(f) "You cannot lay down a general rule as to the period at which, after litigation, the vendor can be held disentitled to rely upon this condition" (*Isaacs v. Towell*, [1898] 2 Ch. 285, 290). It appears that though the words "notwithstanding litigation" are absent, the vendor may still rescind after action brought by the purchaser (*Isaacs v. Towell*, *supra*); see also *Hoy v. Smithies* (1856), 22 Beav. 510.

(g) *Re Arbib and Glass's Contract*, [1891] 1 Ch. 601, C. A. For the court will not read "litigation" as "judicial decision" (*ibid.*, at p. 612).

(h) *Re Higgins and Hitchman's Contract* (1882), 21 Ch. D. 95, 99; *Re Spindler and Mear's Contract*, [1901] 1 Ch. 908 (although the condition stipulated for the return of the deposit "without any interest, costs of investigating the title or other compensation or payment whatsoever"); see *Duddell v. Simpson* (1866), 2 Ch. App. 102, 108; *Sheard v. Venables* (1867), 36 L. J. (CH.) 922, 924.

(i) *Warde v. Dickson* (1858), 5 Jur. (N. S.) 698; *Gray v. Fowler* (1873), L. R. 8 Exch. 249, Ex. Ch.; compare *Motor Carriage Supply Co. v. British and Colonial Motor Co.* (1901), 45 Sol. Jo. 672; and see *Isaacs v. Towell*, *supra*, at p. 292.

(k) *Mawson v. Fletcher* (1870), 6 Ch. App. 91; *Ashburner v. Sewell*,

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Identity.SUB-SECT. 6.—*Identity.*

551. It is usually provided that the purchaser shall admit the identity of the property purchased by him with that comprised in the title deeds upon the evidence afforded by comparison of the descriptions in the particulars and in the title deeds, and that no further evidence of identity shall be required (*l*). If the comparison affords no evidence that the property sold corresponds with that described in the abstracted documents (*m*), or if the descriptions in the abstracted documents differ from one another and from those in the particulars (*n*), even though the purchaser is precluded by this condition from calling for further evidence, yet, in the absence of satisfactory evidence of identity, the vendor's title is not established, and he cannot require the purchaser to complete; and the vendor is not relieved by the condition from pointing out the entire property sold (*o*).

Mixed lands
of different
tenures.

552. Where the lands sold are of different tenures, or are copyholds held of different manors, it is usual to provide that the vendor shall not be required to distinguish the particular lands held on each tenure or of each manor (*p*): in the absence of such condition the lands of each tenure or manor would have to be identified (*q*).

SUB-SECT. 7.—*Misdescription.*Misdescrip-
tion.

553. The conditions usually provide for the case of error in the description of the property, and either allow or exclude the right to compensation (*r*). Such a provision is intended to guard against unintentional errors, and does not therefore apply to cases of actual fraud or of misrepresentation calculated materially to mislead the purchaser (*s*).

[1891] 3 Ch. 405; *Vowles v. Bristol etc. Building Society* (1900), 44 Sol. Jo. 592. In *Re Terry and White's Contract* (1886), 32 Ch. D. 14, C. A., there was a condition excluding compensation, and the vendor was held entitled to rescind under a condition in that behalf against a purchaser seeking to enforce the contract with compensation. As to compensation generally, see pp. 328 *et seq.*, *post*.

(*l*) See *Encyclopædia of Forms and Precedents*, Vol. XII., p. 279; *Bird v. Fox* (1853), 11 Hare, 40, 48. A statutory declaration of possession or receipt of rents and profits for twelve years or other period is usually offered. The condition will require the purchaser to bear the expense of the declaration, unless it is really wanted for the establishment of the title, and then the expense should be borne by the vendor.

(*m*) *Curling v. Austin* (1862), 2 Drew. & Sm. 129.

(*n*) *Flower v. Harlopp* (1843), 6 Beav. 476.

(*o*) *Robinson v. Musgrove* (1838), 2 Mood. & R. 92.

(*p*) See *Encyclopædia of Forms and Precedents*, Vol. XII., p. 279.

(*q*) *Monro v. Taylor* (1850), 8 Hare, 51, 66; *Dawson v. Brinckman* (1850), 3 Mac. & G. 53; *Crosse v. Lawrence* (1852), 9 Hare, 462; and compare *Searle v. Cooke* (1890), 43 Ch. D. 519, C. A. As to description of copyholds on the court rolls, see *Long v. Collier* (1828), 4 Russ. 267.

(*r*) As to the vendor's rights where the contract contains conditions both for rescission and for compensation, see p. 327, *ante*. As to compensation under an open contract, see pp. 408 *et seq.*, *post*.

(*s*) *Clermont v. Tasburgh* (1819), 1 Jac. & W. 112, 120; *Stewart v. Alliston* (1815), 1 Mer. 26; *Dimmock v. Hallett* (1866), 2 Ch. App. 21, 29, 31; *Norfolk (Duke) v. Worthy* (1808), 1 Camp. 337. The jurisdiction of the court is not exercised in favour of a vendor who fails to satisfy

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Compensation.

Rescission
in lieu of
compensation.

554. In the first form of condition it is stipulated that any error or omission in the description of the property shall not annul the sale, but shall be the subject of compensation on either side, and provision is made for settling the amount of the compensation by arbitration or otherwise (*z*). Under such a condition the vendor cannot insist on the purchaser taking, with compensation, a property substantially different from that which he agreed to buy (*u*); but, if there is no substantial difference, the purchaser must complete the purchase and accept compensation for any deficiency notwithstanding that the deficiency is considerable (*v*).

On this principle the purchaser is entitled to be relieved from the contract, without resorting to the condition for compensation, if the legal character or incidents of the property sold differ materially from those set out in the particulars (*a*), or if it is subject to rights

the court that he has done all he can to avoid misunderstanding and mistake (*Turquand v. Rhodes* (1868), 37 L. J. (CH.) 830).

(*t*) See *Encyclopædia of Forms and Precedents*, Vol. XII., p. 280; *Leslie v. Thompson* (1851) 9 Hare, 268, 273; see also title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 545. As to the other form of condition, see p. 332, *post*. Fiduciary vendors may make use of a condition in this form; see *Hobson v. Bell* (1839), 2 Beav. 17; *Dunn v. Flood* (1885), 28 Ch. D. 586, 591, C. A.; *Re Chifferiel*, *Chifferiel v. Watson* (1888), 40 Ch. D. 45. The court does not decree specific performance with compensation against trustee-vendors who have been grossly negligent, but leaves the purchaser to his remedy at law against the trustees (*White v. Cuddon* (1842), 8 Cl. & Fin. 766, 787, H. L.).

(*u*) "Where the misdescription, although not proceeding from fraud, is in a material and substantial point so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing that was really the subject of sale" (*Flight v. Booth* (1834), 1 Bing. (N. C.) 370, *per* TINDAL, C.J., at p. 377; see *Jacobs v. Revell*, [1900] 2 Ch. 858, 864; *Jones v. Edney* (1812), 3 Camp. 285 (sale of a public-house described as "free," but in fact tied)).

(*v*) *Re Fawcett and Holmes' Contract* (1889), 42 Ch. D. 150, C. A.; compare *Calcraft v. Roebuck* (1790), 1 Ves. 221; *Drewe v. Hanson* (1802), 6 Ves. 675, 679; *Binks v. Rokeby* (Lord) (1818), 2 Swan. 222; *McKenzie v. Hesketh* (1877), 7 Ch. D. 675; *English v. Murray* (1883), 32 W. R. 84. As to the case where the property is greater than was supposed, see note (*e*), p. 330, *post*.

(*a*) *E.g.*, where land is sold as copyhold, being in part freehold (*Ayles v. Cox* (1852), 16 Beav. 23), or as freehold, but, owing to its having formerly been copyhold, the minerals are reserved to the lord of the manor (*Upperton v. Nickolson* (1871), 6 Ch. App. 436; *Kerr v. Pawson* (1858), 25 Beav. 394; see *Bellamy v. Debenham*, [1891] 1 Ch. 412, C. A.; but *contra*, if, in virtue of a composition with the lord, the copyhold tenure is hardly distinguishable from freehold (*Price v. Macaulay* (1852), 2 De G. M. & G. 339, C. A.), and a customary freehold descendible under the custom of borough-English (see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 155) may be rightly described as freehold (*Wadmore v. Toller* (1889), 6 T. L. R. 58); or again, where leaseholds, though held for a long term, are sold as freehold (*Drew v. Corpe* (1804), 9 Ves. 368), or the length of a term is greatly overstated (*Nash v. Wooderson* (1884), 52 L. T. 49), or an underlease as a lease (*Madsley v. Booth* (1848), 2 De G. & Sm. 718; *Broom v. Phillips* (1896), 74 L. T. 459), or land is sold as building land, when subject in fact to a right of way (*Dykes v. Blake* (1838), 4 Bing. (N. C.) 463), or there is a mistake as to identity (*Leach v. Mullett* (1827), 3 C. & P. 115).

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Vendor's
 interest
 different
 from that
 offered for
 sale.

of third parties which materially interfere with its enjoyment (b) or value (c), or if a part of the property material to its enjoyment is missing (d), or where an error in quantity is so great as not to be a proper subject for compensation (e); and the condition does not apply to cases where it is impossible to assess the compensation (f).

555. Where the vendor has not got the interest which he has agreed to sell, the purchaser is in general entitled to take such interest as he has, subject to an abatement of the price, notwithstanding that he thus obtains an interest materially different from that which he agreed to buy. Thus the court has assessed compensation in the case of a sale in fee by a vendor who was entitled in remainder and could not get in the life estate (g), or who had only an estate *pur autre vie* (h); on a sale of leaseholds

(b) Such as undisclosed easements (*Shackleton v. Sutcliffe* (1847), 1 De G. & Sm. 609), or undisclosed restrictive covenants (*Flight v. Booth* (1834), 1 Bing. (n. c.) 370; *Rudd v. Lascelles*, [1900] 1 Ch. 815; see *Cato v. Thompson* (1882), 9 Q. B. D. 616, 618, C. A.; *Pemsel and Wilson v. Tucker*, [1907] 2 Ch. 191). A public body buying under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), takes free from the covenant, and pays compensation to the covenantee (*Kirby v. Harrogate School Board*, [1896] 1 Ch. 437, C. A.). The existence of a sewer under the garden attached to a house may be a subject for compensation (*Re Brewer and Hankins's Contract* (1899), 80 L. T. 127, C. A.; and see *Shepherd v. Croft*, [1911] 1 Ch. 521).

(c) Where, for instance, it is subject to a lease for lives at a low rent (*Hughes v. Jones* (1861), 3 De G. F. & J. 307, C. A.).

(d) See, e.g., *Dobell v. Hutchinson* (1835), 3 Ad. & El. 355 (yard described as part of the property sold, but in fact held by the vendor at a yearly rent); *Brewer v. Brown* (1884), 28 Ch. D. 309 (house and garden described as enclosed by rustic wall with tradesmen's entrance, though the wall did not in fact belong to the property, and the entrance was used on sufferance); *Stanton v. Tattersall* (1853), 1 Sm. & G. 529 (situation of house misdescribed through the particulars failing to indicate the peculiar nature of the access to the house); *Peers v. Lambert* (1844), 7 Beav. 546 (sale of a wharf with jetty, but the latter in fact removable at will by a third party).

(e) *Durham (Earl) v. Legard* (1865), 34 Beav. 611. Where there is a large error to the prejudice of the vendor, the purchaser may be able to rescind instead of paying an increased price as compensation (*Price v. North* (1837), 2 Y. & C. (ex.) 620); if not he must give compensation under the condition (*Leslie v. Thompson* (1851), 9 Hare, 268). In *Orange to Wright* (1885), 54 L. J. (Ch.) 590, compensation was refused to the vendor; and see *Bourne v. London and County Land and Building Co.*, [1885] W. N. 109; but the condition is intended for the benefit of each party.

(f) *Sherwood v. Robins* (1828), Mood. & M. 194 (contingency of not having children). This was the case where, on the sale of a timber estate, the average size of the trees was erroneously stated, but the number was not given (*Brooke (Lord) v. Rounthwaite* (1846), 5 Hare, 298); and where the minerals were found to belong to third parties, and the value could not be ascertained (*Smithson v. Powell, Powell v. Simpson* (1852), 20 L. T. (o. s.) 105); and a misstatement as to the occupation under a lease of the property may be of this description (*Ridgway v. Gray* (1849), 1 Mac. & G. 109); but a clerical error as to property comprised in an underlease (*Grissell v. Peto* (1854), 2 Sm. & G. 39), or an error in the particulars as to occupation which is corrected by information given to the purchaser (*Farebrother v. Gibson* (1857), 1 De G. & J. 602, C. A.), is not an objection to the title. The case of undisclosed restrictive covenants has also been referred to the difficulty of assessing compensation (*Cato v. Thompson* (1882), 9 Q. B. D. 616, 618, C. A.); see note (b), *supra*.

(g) *Nethorpe v. Holgate* (1844), 1 Coll. 203; but see *Thomas v. Dering* (1837), 1 Keen, 729, 743.

(h) *Barnes v. Wood* (1869), L. R. 8 Eq. 424; and see *Horner v. Williams* (1839), Jo. & Car. 274.

held for a term of years, but misdescribed as carrying a right of renewal (i); and on the grant of a lease for a term beyond that for which the lessor had power to grant it (k).

556. Unless the condition for compensation is expressly limited to errors pointed out before completion, the purchaser can recover compensation for errors even after completion; and in the absence of such express limitation the court does not import into the condition a distinction between errors discovered before, and errors discovered after, execution of the conveyance (l).

A purchaser is not necessarily debarred from claiming compensation under the condition because he knew of the error before he entered into the contract (m).

557. Where the condition is framed to cover "errors in the description" of the property, it does not extend to defects in title, but only applies to misdescriptions of the corporeal property (n); and the same principle seems to apply where it provides for "any error, misstatement, or omission in the particulars" (o). The innocent omission by the vendor to disclose the service upon him of a notice by a local authority requiring him to execute certain works in respect of his property is not such an "omission in the particulars" as would entitle the purchaser to compensation under the usual condition where the expenses of the works do not become a charge on the property until after completion of the sale (p).

It is a general rule with regard to defects in title that the vendor will not be compelled to give, nor the purchaser to take, an indemnity against the defect (q).

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Rights
under
Particular
Conditions.

Recovery
of compensa-
tion.

Defects of
title.

(i) *Painter v. Newby* (1853), 11 Hare, 26.

(k) *Leslie v. Crommelin* (1867), 2 I. R. Eq. 134.

(l) *Cann v. Cann* (1830), 3 Sim. 447; *Bos v. Helsham* (1866), L. R. 2 Exch. 72; *Re Turner and Skellon* (1879), 13 Ch. D. 130; *Palmer v. Johnson* (1883), 12 Q. B. D. 32 (distinguishing *Joliffe v. Baker* (1883), 11 Q. B. D. 255, on the ground that in that case there was no contract for compensation); *Phelps v. White* (1881), 7 L. R. Ir. 160, C. A.; *contra*, *Manson v. Thacker* (1878), 7 Ch. D. 620; see also *Eastwood v. Ashton*, [1913] W. N. 129. But where there is no condition for the allowance of compensation, the purchaser cannot claim compensation after conveyance (*Besley v. Besley* (1878), 9 Ch. D. 103; *Allen v. Richardson* (1879), 13 Ch. D. 524; *Clayton v. Leach* (1889), 41 Ch. D. 103, C. A.); and see p. 406, *post*.

(m) *Lett v. Randall* (1883), 49 L. T. 71; but see *Cobbett v. Locke-King* (1900), 16 T. L. R. 379. Evidence, however, is admissible to show that the purchaser heard the auctioneer correct the misdescription before the sale, and in this case he will not be entitled to compensation under the condition (*Re Edwards to Sykes (Daniel) & Co., Ltd.* (1890), 62 L. T. 445; and compare *Henderson v. Hudson* (1867), 15 W. R. 860).

(n) *Debenham v. Sawbridge*, [1901] 2 Ch. 98; *Re Beyfus and Masters's Contract* (1888), 39 Ch. D. 110, C. A. A defect in title which the purchaser is precluded from objecting to is not a ground for compensation (*Re Neale and Drew's Contract* (1897), 41 Sol. Jo. 274).

(o) "It is not the function of the particulars to deal with title" (*Blaiberg v. Reeves*, [1906] 2 Ch. 175, 184).

(p) *Re Leyland and Taylor's Contract*, [1900] 2 Ch. 625, C. A.; and *quære*, whether the omission would enable the purchaser to resist specific performance or obtain rescission (*ibid.*, at p. 632).

(q) *Balmanno v. Lumley* (1813), 1 Ves. & B. 224; *Fildes v. Hooker* (1818), 3 Madd. 193; *Nouaille v. Flight* (1844), 7 Beav. 521; *Ridgway v. Gray* (1849), 1 Mac. & G. 109; but see *Halsey v. Grant* (1806), 13 Ves. 73; *Hornblow v. Shirley* (1806), 13 Ves. 81. *Secus*, where conditions disclose an incumbrance; see note (b), p. 336, *post*.

SECT. 2.
Rights
under
Particular
Conditions.

Misdescription : no compensation allowed.

Latent defects of property.

558. In the second form (r) of condition relating to misdescription it is provided that any error, misstatement, or omission shall not annul the sale, nor shall any compensation or abatement be allowed in respect thereof (s). Notwithstanding such a condition, the vendor cannot enforce specific performance of the contract with or without abatement, if the misdescription or omission is material and substantial, that is, such that the purchaser cannot get what he agreed to buy (a); and in such circumstances the purchaser is entitled to rescind and recover his deposit (b). On the other hand, the purchaser cannot enforce the contract against the vendor with compensation, though he may, of course, take the property without compensation (c).

The condition in the second form does not apply to latent defects in the property, but only to such matters as might be discovered by an inspection of the property with reasonable care (d).

SUB-SECT. 8.—Completion.

Date for completion.

559. A date is usually fixed by the conditions for the completion of the purchase (e), but, in the absence of express stipulation to that effect, or unless an intention that it should be so can be implied from the circumstances, such date is not of the essence of the contract (f).

(r) As to the effect of the first form, see pp. 329 *et seq.*, *ante*.

(s) See Encyclopædia of Forms and Precedents, Vol. XII., p. 280.

(a) *Jacobs v. Revell*, [1900] 2 Ch. 858, whence it would appear that a condition excluding compensation applies to all errors, whether great or small, but only within the limit laid down in *Flight v. Booth* (1834), 1 Bing. (N. C.) 370, 377; *Portman v. Hill* (1826), 2 Russ. 570; *Whittemore v. Whittemore* (1869), 1 L. R. 8 Eq. 603 (large deficiency of acreage not covered by "more or less"; see note (g), p. 307, *ante*); *Re Arnold, Arnold v. Arnold* (1880), 14 Ch. D. 270, C. A. (sale of a close described as a four-acre field, but in fact four-sevenths of a seven-acre field); *Cordingley v. Chaceborough* (1862), 4 De G. F. & J. 379 (deficiency in quantity of nearly one-half). "Notwithstanding such a condition, the court will not decree specific performance at the instance of the vendor, if he has materially misled the purchaser, and it is well known that a less serious misleading is sufficient to enable a purchaser to resist specific performance than is required to enable him to rescind the contract" (*Re Terry and White's Contract* (1886), 32 Ch. D. 14, C. A., *per* LINDLEY, L.J., at p. 29).

(b) *Nottingham Patent Brick and Tile Co. v. Butler* (1886), 16 Q. B. D. 778, 786, C. A.; *Heywood v. Mallalieu* (1883), 25 Ch. D. 357; see, further, as to recovery of the deposit, pp. 401, 402, *post*.

(c) *Cordingley v. Chaceborough*, *supra*; *Re Terry and White's Contract*, *supra*; see *Nicoll v. Chambers* (1852), 11 C. B. 996.

(d) *Re Puckett and Smith's Contract*, [1902] 2 Ch. 258, C. A.; but see *Re Brewer and Hankins's Contract* (1899), 80 L. T. 127, C. A.; and *Shepherd v. Croft*, [1911] 1 Ch. 521.

(e) See Encyclopædia of Forms and Precedents, Vol. XII., p. 281. The "28th day of December next" in a contract made on the 15th December refers to that December (*Daves v. Charsley*, [1886] W. N. 37, 38, C. A.). The date cannot be waived and another day substituted verbally (*Stowell v. Robinson* (1837), 3 Bing. (N. C.) 928). Although no time is fixed, the contract is none the less enforceable (*Gray v. Smith* (1889), 43 Ch. D. 208, 214, C. A.), and the vendor must make out his title within a reasonable time (*Simpson v. Hughes and Armstrong* (1897), 76 L. T. 237, C. A.; and see *Green v. Sevin* (1879), 13 Ch. D. 589, 599). As to completion generally, see, further, pp. 435 *et seq.*, *post*.

(f) It was otherwise at common law (*Hanslip v. Padwick* (1850), 5 Exch. 615; see *Berry v. Young* (1788), 2 Esp. 640, n.; *Wilde v. Fort*

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Although, however, time is not originally of the essence of the contract in this respect, it may be made so by either party giving proper notice to the other to complete within a reasonable time (*g*), provided that at the time of the notice there has been some default or unreasonable delay by that other (*h*).

560. The conditions or contract usually provide for payment of interest on the balance of the purchase-money from the date fixed for completion until the actual date of payment, if the purchase is not completed at the date fixed (*i*). According to the form of the condition, interest is payable if the delay arises (1) from any cause whatever (*k*); (2) from any cause whatever other than the wilful default of the vendor; or (3) from the default of the purchaser.

Interest on
purchase-
money.

Whether the agreement for payment of interest makes it payable in case of delay from any cause whatever (*l*), or from any cause other than the wilful default of the vendor (*m*), the effect, in either case, is the same, since even under the former words the purchaser is not bound to pay interest during delay due to the vendor's wilful default (*n*); and such conditions are binding and compel the purchaser to pay interest unless he can bring the delay within the exception (*o*). If it is framed in the third mode, the purchaser is only liable to pay

(1812), 4 Taunt. 334; *Marshall v. Powell* (1846), 9 Q. B. 779). The rule in equity is stated by Lord CAIRNS, L.J., in *Tilley v. Thomas* (1867), 3 Ch. App. 61, 67, approving the language of TURNER, L.J., in *Roberts v. Berry* (1853), 3 De G. M. & G. 284, 291, C. A.; and this rule now prevails; see Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (7); and see title EQUITY, Vol. XIII., p. 154. As to a public-house, see *Coolake v. Till* (1826), 1 Russ. 376; and see, generally, title CONTRACT, Vol. VII., pp. 412 *et seq.*; as to waiver of time, see *ibid.*, p. 415; *Dyas v. Rooney* (1890), 25 L. R. Ir. 342.

(*g*) *King v. Wilson* (1843), 6 Beav. 124, 126; p. 404, *post*. As to what is a reasonable time, see *Wells v. Maxwell* (No. 1) (1863), 32 Beav. 408; affirmed, 9 Jur. (N. S.) 1021, C. A.; *Crawford v. Toogood* (1879), 13 Ch. D. 153; *Smith v. Balsford* (1897), 76 L. T. 179; *Stickney v. Keeble* (1913), 57 Sol. Jo. 389, C. A.

(*h*) *Green v. Sevin* (1879), 13 Ch. D. 589.

(*i*) See Encyclopædia of Forms and Precedents, Vol. XII., p. 281. Interest may be reserved at an increasing rate (*Herbert v. Salisbury and Yeovil Rail. Co.* (1866), L. R. 2 Eq. 221). This condition will not necessarily be read into a contract for sub-purchase in the same terms (*Re Kerble and Stillwell's Fletton Brick Co.* (1898), 78 L. T. 383). As to the payment of interest where it is not expressly provided for, see p. 374 *et seq.*, *post*. Where there was a mere agreement to pay interest from the day fixed for completion without adding "in case of delay from any cause whatever" the purchaser was allowed to avoid payment of interest by appropriating money to meet the purchase-money (*Kershaw v. Kershaw* (1869), L. R. 9 Eq. 56); but see *Re Riley to Streafeld* (1886), 34 Ch. D. 386; pp. 334, 376, *post*.

(*k*) Formerly the condition seems to have been regarded as fixing only the rate of interest and leaving the actual payment to begin when the title is made out (*Monk v. Huskisson* (1827), 4 Russ. 121, n.).

(*l*) *Vickers v. Hand* (1859), 26 Beav. 630; *Williams v. Glenton* (1866), 1 Ch. App. 200.

(*m*) *Re Riley to Streafeld*, *supra*.

(*n*) *Williams v. Glenton*, *supra*, at p. 210; *Re Woods and Lewis' Contract*, [1898] 1 Ch. 433, 436 (where, the word "wilful" being omitted, the court held nevertheless that "default" must be construed as "wilful default" and not in the sense of mere failure to perform); see also *Bennett v. Stone*, [1903] 1 Ch. 509 525, C. A.

(*o*) See the cases cited in notes (*l*), (*m*), *supra*.

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Rights
under
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Conditions.

Wilful
default.

Effect of
deposit of
purchase-
money.

Entry into
possession
or receipt
of rents.

interest if the delay is attributable to him, and not if it is due to the state of the vendor's title (*p*).

It is for the purchaser to show that the vendor was guilty of wilful default, and that this wilful default was the cause of the non-completion of the contract on the date fixed (*q*). If the vendor goes abroad for a holiday two days before the date fixed for completion (*r*), or neglects to obtain the concurrence of necessary parties (*s*), or to procure admittances to certain copyholds (*t*), or where, owing to his misinterpretation of the conditions of sale, he refuses to deliver an abstract of title (*u*), or under a mistake of law omits to obtain a conveyance from one of two trustee mortgagees (*v*), in each of these cases he is guilty of wilful default. On the other hand, an oversight or an honest mistake of fact is not wilful default, at least, if it is not persisted in by the vendor (*a*); and the vendor's repudiation of the contract, and unsuccessful resistance to the purchaser's action for specific performance, has been held not to constitute wilful default, so as to disentitle him to interest (*b*). Nor does delay occasioned merely by the state of the title, and not wilful on the part of the vendor, relieve the purchaser from paying interest (*c*).

561. A purchaser cannot evade payment of interest under the condition by depositing the purchase-money at a bank and giving notice to the vendor that he will only be liable for deposit interest (*d*).

562. It is usual to provide that upon completion of the purchase the purchaser shall be entitled to possession or receipt of the rents

(*p*) *Jones v. Gardiner*, [1902] 1 Ch. 191; see *Perry v. Smith* (1842), Car. & M. 554; *Denning v. Henderson* (1847), 1 De G. & Sm. 689.

(*q*) *Re London Corporation and Tubbs' Contract*, [1894] 2 Ch. 524, 529, C. A.; the default must be the *causa causans* of the delay (*Bennett v. Stone*, [1902] 1 Ch. 226, 236).

(*r*) *Re Young and Harston's Contract* (1885), 31 Ch. D. 168, C. A.; and see definitions of "wilful" and "default," per BOWEN, L.J., *ibid.*, at p. 175.

(*s*) *Re Strafford (Earl) and Maples*, [1896] 1 Ch. 235, 240, C. A.

(*t*) *Re Wilsons and Stevens' Contract*, [1894] 3 Ch. 546.

(*u*) *Re Pelly and Jacob's Contract* (1899), 80 L. T. 45.

(*v*) *Re Hetling and Merton's Contract*, [1893] 3 Ch. 269, 281, C. A. As to delay owing to the vendor's mistake as to the length of a tenancy, see *Re Postmaster-General and Colgan's Contract*, [1906] 1 I. R. 287, 477, C. A.

(*a*) *Bennett v. Stone*, [1902] 1 Ch. 226, 232; [1903] 1 Ch. 509, 520, 526, C. A. "The honest belief of either party in the validity of his own view will not prevent such party being in default, though it may prevent such default being a wilful default within the meaning of the contract" (*Re Bayley-Worthington and Cohen's Contract*, [1909] 1 Ch. 648, per PARKER, J., at p. 657, where all the cases are considered).

(*b*) *North v. Percival*, [1898] 2 Ch. 128; "wilful default" means "obstruction in the completion of the contract" (*ibid.*, per KEKEWICH, J., at p. 135).

(*c*) *Sherwin v. Shakespear* (1854), 5 De G. M. & G. 517, C. A. (where the condition was in the form "from any cause whatever"); *Williams v. Glenton* (1865), 34 Beav. 528, 531; affirmed (1866), 1 Ch. App. 200, 206; *Vickers v. Hand* (1859), 26 Beav. 630; *Palmerston (Lord) v. Turner* (1864), 33 Beav. 524. *De Visme v. De Visme* (1849), 1 Mac. & G. 336, is overruled; see *Vickers v. Hand*, *supra*.

(*d*) *Re Riley to Streetfield* (1886), 34 Ch. D. 386; not following *Re Golds' and Norton's Contract* (1885), 52 L. T. 321, and distinguishing *Re Monckton and Gilzean* (1884), 27 Ch. D. 555; and see *Vickers v. Hand*, *supra*; see, further, p. 376, *post*. As to the position of parties pending completion, see pp. 364 *et seq.*, *post*; and as to completion generally, see pp. 412, 435 *et seq.*, *post*.

and profits as from the day fixed for completion, and shall be liable to all outgoings as from that date, such rents, profits, and outgoings to be apportioned if necessary (e). In the absence of stipulation the time fixed for completion is not the crucial date, and if a title has not been shown by that date, then the purchaser does not become entitled to the rents and profits and bound to discharge the outgoings until a good title is shown (f).

563. The term "outgoings" is of very wide import (g), and includes not merely rates, taxes, repairs, and the ordinary expenses of cultivating or managing the property (h), but also expenses, though of a capital nature, of works executed by local authorities under their sanitary and other powers which are recoverable from the owner, and are also, in general, charged on the property (i).

Expenses incurred by and payable to a local authority in respect of work done are not apportionable, and the liability for them as between vendor and purchaser depends on whether or not they are charged on the property, and if so charged, when the charge was created. Where a charge is created (k) it usually attaches to the premises on the execution of the works, and not at the time when the apportionment is made by the local authority among the various premises affected, and the expenses must be borne by the vendor or purchaser according as the works are completed before or after the date fixed for completion (l). If the expenses are not a

(e) See *Encyclopædia of Forms and Precedents*, Vol. XII., p. 281. "Possession" does not mean personal occupation if the purchaser has notice of a tenancy (*Lake v. Dean* (1860), 28 Beav. 607). As to the right to possession, see, further, p. 367, *post*. Without a stipulation for apportionment, such outgoings only can be apportioned as are apportionable at law (*Midgley v. Coppock* (1879), 4 Ex. D. 309, 313, C. A.). But as to rents and other periodical payments, see Apportionment Act, 1870 (33 & 34 Vict. c. 35), ss. 3, 4; title LANDLORD AND TENANT, Vol. XVIII., p. 482. As to apportionment of tithe, see note (p), p. 354, *post*.

(f) *Carrodus v. Sharp* (1855), 20 Beav. 56; *Barsht v. Tagg*, [1900] 1 Ch. 231, 234, 235; *Re Highell and Bird's Contract*, [1902] 2 Ch. 214, 217; *Bennett v. Stone*, [1903] 1 Ch. 509, 524, C. A.; and see p. 371, *post*. As to completion, see, further, pp. 435 *et seq.*, *post*.

(g) See title LANDLORD AND TENANT, Vol. XVIII., p. 493.

(h) *Carrodus v. Sharp*, *supra*; see also *Belfast Bank v. Callan*, [1910] 1 I. R. 38.

(i) Such, for instance, as expenses incurred by local authorities under the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150, 257 (see *Re Bettlesworth and Richer* (1888), 37 Ch. D. 535; *East Ham Urban Council v. Aylett*, [1905] 2 K. B. 22; *Millard v. Balby-with-Herthorpe Urban Council*, [1905] 1 K. B. 60, C. A.); under the Private Street Works Act, 1892 (55 & 56 Vict. c. 57) (see *Stock v. Meakin*, [1900] 1 Ch. 683, C. A.; followed in *Surtees v. Woodhouse*, [1903] 1 K. B. 306, C. A.); and under local improvement Acts (see *Midgley v. Coppock* (1879), 4 Ex. D. 309, C. A.); the expenses of abating a nuisance under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76) (see *Barsht v. Tagg*, [1900] 1 Ch. 231), and of pulling down dangerous structures under the London Building Acts, 1894 (57 & 58 Vict. c. cxxiii.), ss. 102—114, and 1898 (61 & 62 Vict. c. cxxxvii.); see *Tubbs v. Wynne*, [1897] 1 Q. B. 74 (decided under the earlier Acts, repealed but re-enacted in these Acts). It is doubtful whether expenses of the last-mentioned kind can be charged on the premises (*Re Highell and Bird's Contract*, [1903] 1 Ch. 287, 291, 294, C. A.).

(k) See title LANDLORD AND TENANT, Vol. XVIII., p. 494.

(l) *Stock v. Meakin*, *supra*; *Re Waterhouse's Contract* (1900), 44 Sol. Jo.

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charge upon the premises, they fall, under the condition, upon the vendor or the purchaser according as they become payable before or after the date for completion (*m*). But in the absence of the condition, a purchaser who pays by reason of his liability as owner for the time being cannot recover the amount from the vendor (*n*), though in the case of expenses which become a charge on the property before conveyance, he can recover on the vendor's covenants for title in the conveyance (*o*). Frequently, however, a condition is inserted throwing upon the purchaser the expense of complying with any notices served by the local authority between the date of sale and completion (*p*).

SUB-SECT. 9.—Conveyance.

Conveyance.

564. Conditions of sale usually throw the cost of conveyance as far as possible on the purchaser. In the absence of conditions, the purchaser prepares the draft conveyance at his own expense, but the expense of perusal and execution by the vendor and all other necessary parties falls on the vendor (*a*), and the vendor bears the expense of getting in any outstanding legal estate, or of any act necessary for completing his own title (*b*). The conditions do not in general vary this practice as regards preparation of the draft conveyance and perusal and execution by the vendor, but they provide that the purchaser shall bear the expense of perusal on behalf of and execution by all conveying parties other than the vendor, and the expense of any assurance or act necessary for getting in an outstanding legal estate or completing the vendor's title (*c*).

A condition aimed merely at the getting in of an outstanding legal estate does not apply to an unsatisfied mortgage estate or term (*d*); but if the purchaser stipulates to bear the expense of "preparing, obtaining, making and doing every assurance and every act and thing necessary for perfecting or completing the vendor's title," he must bear the whole expense of procuring the concurrence of the vendor's mortgagees (*e*), or of the execution of a deed to confirm an

645; *Re Allen and Driscoll's Contract*, [1904] 2 Ch. 226, 230, C. A.; *Millard v. Balby-with-Hexthorpe Urban Council*, [1905] 1 K. B. 60, C. A.

(*m*) *Midgley v. Coppock* (1879), 4 Ex. D. 309, C. A.; *Trubbs v. Wynne*, [1897] 1 Q. B. 74; see *Barshi v. Tagg*, [1900] 1 Ch. 231.

(*n*) *Egg v. Blayney* (1888), 21 Q. B. D. 107 (expenses arising under the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), s. 77).

(*o*) See pp. 461 *et seq.*, *post*.

(*p*) See *Encyclopædia of Forms and Precedents*, Vol. XII., p. 282; *Re Leyland and Taylor's Contract*, [1900] 2 Ch. 625, C. A.

(*a*) *Poole v. Hill* (1840), 6 M. & W. 835; p. 433, *post*.

(*b*) See *Reeves v. Gill* (1838), 1 Beav. 375. On a sale of an estate in lots under conditions which throw a common incumbrance on one lot exclusively, the other purchasers are entitled to an indemnity from the purchaser of that lot (*Casamajor v. Strobe* (1818), 2 Swan. 347).

(*c*) See *Encyclopædia of Forms and Precedents*, Vol. XII., p. 283. Under a condition that the conveyance shall be made at the expense of the purchaser, he is not liable for the expense of procuring the concurrence of necessary parties other than the vendor (*Paramore v. Greenslade* (1853), 1 Sm. & G. 541, 544).

(*d*) *Strong v. Hawkes* (1856), 2 Jur. (N. S.) 388; compare *Hopkinson v. Chamberlain*, [1908] 1 Ch. 853.

(*e*) *Re Willett and Argenti* (1889), 60 L. T. 735. But where the words were "the assurance and every instrument required for completing the vendor's title or for any other purpose to be prepared by and at the expense

imperfectly executed conveyance to the vendor himself (*f*). Such a condition, however, does not absolve the vendor from his duty of deducing, at his own expense, a title to any outstanding legal estate (*g*).

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—
Title deeds.

SUB-SECT. 10.—*Title Deeds.*

565. Since the owner of the land is entitled to possession of the title deeds (*h*), the vendor must hand over all documents of title which are in his possession and relate exclusively to the property sold, and in the absence of stipulation to the contrary he must bear the cost of obtaining them if they are not in his possession (*i*), but, where he retains part of the land to which any documents of title relate, he is entitled to retain such documents (*k*). Where land is sold in lots, the purchaser whose purchase-money is the largest is entitled to the deeds relating to the several lots (*l*). It is the practice to provide expressly to the same effect. Thus a usual condition of sale stipulates, with respect to common title deeds, that the vendor shall retain them if any lots are unsold, and that as between different purchasers they shall go to the purchaser who pays in the aggregate the largest purchase-money, and that he shall give an acknowledgment of right to production and undertaking for safe custody to each of the other purchasers at their expense (*m*).

566. Where documents of title are retained by the vendor, the purchaser is, in the absence of stipulation to the contrary, entitled at

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duction of
deeds.

of the purchaser," they were held insufficient to throw on him the costs of perusal and execution of the conveyance on behalf of a mortgagee (*Re Sander and Walford's Contract* (1900), 83 L. T. 316).

(*f*) *Re Woods and Lewis' Contract*, [1898] 1 Ch. 433, 437.

(*g*) *Re Adams' Trustees' and Frost's Contract*, [1907] 1 Ch. 695, 703; compare *Sheerness Waterworks Co. (Official Manager) v. Polson* (1861), 3 De G. F. & J. 36.

(*h*) *Austin v. Croome* (1842), Car. & M. 653; *Re Williams and Newcastle's (Duchess) Contract*, [1897] 2 Ch. 144, 148; see titles MORTGAGE, Vol. XXI., p. 204; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 176, 239, 240.

(*i*) *Re Duthy and Jesson's Contract*, [1898] 1 Ch. 419. An agreement to give "real security" against loss of title deeds will be specifically enforced (*Walker v. Barnes* (1818), 3 Madd. 247). The fact that the consideration is a rentcharge does not, apparently, entitle the vendor to retain the deeds (Dart, *Vendors and Purchasers*, 7th ed., p. 694).

(*k*) Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, r. 5. The rule refers to an "estate," but this means an estate in land, including leaseholds, so that, on a sale of land by a mortgagee whose security also includes personal property, the purchaser is, in the absence of a special condition, entitled to the mortgage deed, notwithstanding that the mortgagee retains the personal property (*Re Williams and Newcastle's (Duchess) Contract*, [1897] 2 Ch. 144, 148). Documents showing the extinguishment of an easement in regard to which land retained by the vendor was the servient tenement and land sold was the dominant tenement are properly retained by the vendor (*Re Lehmann and Walker's Contract*, [1906] 2 Ch. 640).

(*l*) *Griffiths v. Hatchard* (1854), 1 K. & J. 17.

(*m*) See *Encyclopædia of Forms and Precedents*, Vol. XII., p. 422; *Strong v. Strong* (1858), 6 W. R. 455. Under a condition that the deeds are to go to the purchaser of "the largest lot," the purchaser of the largest single lot in extent takes them, although the purchase-money paid by another purchaser may be greater (*Griffiths v. Hatchard*, *supra*), and, *a fortiori*, the purchaser of the largest single lot both in extent and value (*Scott v. Jackman* (1855), 21 Beav. 110; see *Cunyngham v. Hume* (1839), 1 I. Eq. R. 150). As to successive sales, see *Re Lowe. Capel v. Lowe* (1901), 36 L. J. 73.^f

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his own expense to have attested copies of them (*n*).; and he is also entitled at his own expense (*o*) to a covenant for, or an acknowledgment of his right to, production, and, unless the vendor is a trustee or mortgagee, an undertaking for the safe custody of them (*p*). But the inability of the vendor to furnish the purchaser with a legal covenant or acknowledgment for production is not an objection to his title if the purchaser will, on completion, have an equitable right to production (*q*).

Stamps.

567. In the absence of express stipulation, a purchaser is entitled to have all documents forming the vendor's title properly stamped at the expense of the vendor (*r*), and, as regards documents executed since the 16th May, 1888, any condition excluding this right on the part of the purchaser is void (*s*). It is usual, however, to insert a condition throwing on the purchaser the expense of stamping any unstamped or insufficiently stamped documents executed before that date (*t*). A stipulation that any unstamped or insufficiently stamped document shall not be stamped at once, but that the vendor will undertake to pay the penalty if it ever becomes necessary to stamp it, seems not to be enforceable (*u*).

Registration

The conditions also usually require the purchaser to bear the expense of the registration of any unregistered documents which he requires to be registered (*a*).

SUB-SECT. 11.—Covenants for Title.

Covenants
for title.

568. Where the vendor is a trustee or mortgagee and is acting in such a capacity, it is usual to insert a condition stating the

(*n*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3 (6); see *Dare v. Tucker* (1801), 6 Ves. 460; *Boughton v. Jewell* (1808), 15 Ves. 176. The purchaser is not entitled to copies of deeds which are produced as negative evidence that the property was not comprised in them (Sugden, Vendors and Purchasers, 14th ed., p. 436).

(*o*) See Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, r. 4.

(*p*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 9; see p. 429, *post*; and compare *Yates v. Plumb* (1854), 2 Sm. & G. 174. The right to an acknowledgment replaces in practice the former right to a covenant for production (*Cooper v. Emery* (1844), 1 Ph. 388, 390; Sugden, Vendors and Purchasers, 14th ed., pp. 446 *et seq.*

(*q*) Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, r. 3; see p. 429, *post*.

(*r*) *Whiting to Loomes* (1880), 14 Ch. D. 822; affirmed (1881), 17 Ch. D. 10, C. A.; distinguished in *Ex parte Birkbeck Freehold Land Society* (1883), 24 Ch. D. 119, 124; and the right extends to a lease or tenancy agreement, subject to which the property is sold (*Coleman v. Coleman* (1898), 79 L. T. 66).

(*s*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 117; and see title REVENUE, Vol. XXIV., p. 712.

(*t*) See Encyclopædia of Forms and Precedents, Vol. XII., p. 280. If such a condition is inserted the contract should be stamped with an adhesive stamp cancelled at the time of execution, as the Inland Revenue Commissioners refuse to stamp a contract containing such a condition with an impressed stamp unless the penalty is paid; see 44 Sol. Jo. 657.

(*u*) See *Smith v. Mawhood* (1845), 14 M. & W. 452; *Nixon v. Albion Marine Insurance Co.* (1867), L. R. 2 Exch. 338; *Abbott v. Stratten* (1846), 3 Jo. & Lat. 603, 616; compare title REVENUE, Vol. XXIV., p. 612.

(*a*) See Encyclopædia of Forms and Precedents, Vol. XII., p. 280; *Girling v. Girling*, [1886] W. N. 18; *Re Furling and Bogan's Contract* (1893), 31 L. R. Ir. 191.

PART III.—CONDITIONS OF SALE AND SPECIAL STIPULATIONS.

SECT. 2. Rights under Particular Conditions.

character in which he sells, and providing that he will not give any covenant for title except an express covenant or the implied statutory covenant that he has not incumbered; and, in the case of trustees, that the concurrence of the persons beneficially interested shall not be required (b). But such a condition does not absolve the vendor from showing that he has power to sell as trustee, and it only expresses the rights of the parties apart from condition, since a vendor-trustee need covenant against his own acts only, provided notice of the vendor's character is given (c). If the vendor is in fact a trustee, but notice of the trust has been kept off the title, he should not disclose his character, but should stipulate that no covenant for title shall be given except an express covenant that he has not incumbered. This is not notice of a trust (d).

SUB-SECT. 12.—Leases and Easements.

569. It is usual to provide that the property is sold subject to the existing tenancies and to the claims of tenants (e), to rights of way and water and other easements affecting it, to rights of adjoining owners, and to all chief rents and outgoings and incidents of tenure (f). This condition does not absolve the owner from his duty to disclose to the purchaser all matters affecting the property which are within his knowledge (g), and matters of the nature in question should, as far as practicable, be stated in the particulars; but it operates as a protection to the vendor if it subsequently appears that there is some right in favour of a third party of which he was ignorant at the date of the contract (h).

Tenancies and easements.

SUB-SECT. 13.—Insurance.

570. It is usually provided that, as regards damage by fire, tempest, or other accident arising after the sale, the property shall as from the date of sale be at the risk of the purchaser (i). But this

Insurance.

(b) See *Encyclopædia of Forms and Precedents*, Vol. XII., p. 283; *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), s. 7 (F); see further pp. 347, 416, *post*.

(c) See *Worley v. Frampton* (1846), 5 Hare, 560; *Onslow v. Londonborough (Lord)* (1852), 10 Hare, 67; p. 427, *post*. But the condition does not preclude the purchaser from insisting on a covenant as beneficial owner from the equitable tenant for life (*Re Sawyer and Baring's Contract* (1884), 51 L. T. 356); see p. 427, *post*.

(d) See p. 346, *post*, and *Compare Conveyancing Act*, 1911 (1 & 2 Geo. 5, c. 37), s. 13.

(e) See *Re Derby (Earl) and Fergusson's Contract*, [1912] 1 Ch. 479.

(f) See *Encyclopædia of Forms and Precedents*, Vol. XII., p. 279.

(g) *Heywood v. Mallalieu* (1883), 25 Ch. D. 357; *Nottingham Patent Brick and Tile Co. v. Butler* (1886), 16 Q. B. D. 778, 786, C. A. As to such duty of disclosure, see *Dougherty v. Oates* (1900), 45 Sol. Jo. 119; pp. 297, 302, *ante*.

(h) *Russell v. Harford* (1866), L. R. 2 Eq. 507, 512; and as to this condition, see 54 Sol. Jo. 265. But the condition only applies to rights available against the vendor; hence, where two lots are sold subject to the condition, a right of way acquired by the tenant of one lot against the tenant of the other is not by virtue of the condition perpetuated in favour of the purchaser of the former lot (*Daniel v. Anderson* (1862), 8 Jur. (N. S.) 328; and see *Fahey v. Dwyer* (1879), 4 L. R. Ir. 271; *Delaparelle v. St. Martin's-in-the-Fields Vestry* (1890), 34 Sol. Jo. 545).

(i) See *Encyclopædia of Forms and Precedents*, Vol. XII., p. 282. If such provision is not made, it is not unusual to inquire, when sending in requisitions on title, if the vendor will hold the insurance on behalf of the purchaser; see *Newman v. Maxwell* (1899), 80 L. T. 681.

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only expresses the rule of law applicable in the case of deterioration of the property after the sale from any cause other than the vendor's wilful neglect or default (*k*). It is usually also provided that, subject to the consent of the office being obtained, and to payment by the purchaser of a proportionate part of the premium for the current year, the benefit of the insurance policies shall, if the contract is completed, belong to the purchaser (*l*). This gives the purchaser an additional right, since, in the absence of such a condition, he must pay the purchase-money notwithstanding destruction of the property by fire, and has no claim on the policy moneys (*k*). A purchaser should however, in general, effect his own insurance directly the contract is made (*n*).

SUB-SECT. 14.—Performance of Covenants in Lease.

Leaseholds.

571. It is provided by statute (*n*) that on a sale of leaseholds the purchaser shall, on production of the receipt for the last payment due for rent under the lease before the date of actual completion, assume, unless the contrary appears, that all the covenants of the lease have been performed and observed up to the date of actual completion (*o*); but it is usual to insert a condition making the receipt conclusive evidence of the performance of covenants or the effectual waiver of any breach of covenant up to completion (*p*).

SUB-SECT. 15.—Forfeiture of Deposit.

**Forfeiture of
deposit.**

572. The conditions of sale usually provide that, in case the purchaser fails to comply with the conditions, his deposit shall be forfeited, and the vendor shall be at liberty to resell the property and to recover any deficiency in price on a resale from the original purchaser, and also the costs of the resale or any attempted

(*k*) See p. 369, *post*; and see title **INSURANCE**, Vol. XVII., pp. 520, 521.

(*l*) See note (*i*), p. 330, *ante*.

(*m*) The chief reason for doing this is the delay and uncertainty in procuring the consent of the office; occasionally fire policies contain a clause making the policy available for purchasers (see 48 Sol. Jo. 751), and then, if the contract contains the provision in question, a separate insurance need not be effected.

(*n*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3 (4). A vendor who has expressly agreed to make a good title cannot give verbal evidence that the purchaser was aware of breaches of covenant existing at the time of the contract (*Barnett v. Wheeler* (1841), 7 M. & W. 364; see *Re Allen and Driscoll's Contract*, [1904] 2 Ch. 226, C. A., explaining *Re Highett and Bird's Contract*, [1903] 1 Ch. 287, C. A.); but in the absence of such express agreement the vendor can give evidence of the purchaser's knowledge, and then the breaches are not an objection to the title (*Clarke v. Colman*, [1895] W. N. 114, C. A.).

(*o*) Formerly the burden of proof that the covenants had been performed was on the vendor; see *Ringer to Thompson* (1881), 51 L. J. (CH.) 42. The statute shifts the burden of proof (*Re Highett and Bird's Contract*, *supra*), but does not preclude the purchaser from setting up breaches (*Re Taunton and West of England Perpetual Benefit Building Society and Roberts' Contract*, [1912] 2 Ch. 381). As to a continuing breach, see *Re Martin, Ex parte Dixon v. Tucker* (1912), 106 L. T. 381).

(*p*) See *Encyclopædia of Forms and Precedents*, Vol. XII., p. 289; *Bull v. Hutchens* (1863), 32 Beav. 615; *Lawrie v. Lees* (1881), 7 App. Cas. 19, 32; but the condition does not cover breaches committed by the vendor after the contract (*Howell v. Kightley* (1856), 21 Beav. 331).

resale (*q*). Under such a condition the purchaser cannot call for an account of the surplus if a larger price is obtained on the resale (*r*); and the vendor, even though he does not succeed in reselling the property, can still forfeit the deposit and recover the expenses of the abortive sale (*s*). If the vendor seeks to recover the deficiency on the resale, he must bring into account the forfeited deposit (*a*).

Part IV.—Proof and Investigation of Vendor's Title.

SECT. 1.—Vendor's Obligation as to Title.

SUB-SECT. 1.—Extent of the Obligation.

573. In the absence of any express stipulation as to title (*b*), a contract for sale of land implies an agreement on the part of the vendor to make a good, that is, a marketable (*c*), title to the property sold (*d*). He discharges this obligation when he shows that he, or

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to title.

(*q*) See *Encyclopædia of Forms and Precedents*, Vol. XII., p. 284. It has been held that the vendor has a right of resale in the absence of express stipulation (*Noble v. Edwardes*, *Edwardes v. Noble* (1877), 5 Ch. D. 378, 388, C. A.); but this has been questioned; see *Williams, Vendor and Purchaser*, 2nd ed., p. 51. The omission by a trustee to resell is not necessarily a breach of trust (*Thomson v. Christie* (1852), 1 Macq. 236, 240, H. L.). As to resale where there is default in payment of an instalment of purchase-money, see *Kilmer v. British Columbia Orchard Lands, Ltd.*, [1913] A. C. 319, P. C.

(*r*) *Ex parte Hunter* (1801), 6 Ves. 94, 97; and words are usually added to the condition expressly providing that any increase in price shall belong to the vendor; see the form referred to in note (*g*), *supra*.

(*s*) *Essex v. Daniell*, *Daniell v. Essex* (1875), L. R. 10 C. P. 538, 548.

(*a*) See p. 400, *post*. After the resale he cannot sue the purchaser for the original purchase-money (*Lamond v. Davall* (1847), 9 Q. B. 1030). As to forfeiting the deposit apart from the condition, see p. 399, *post*.

(*b*) A contract containing no stipulation restricting the title to be shewn by the vendor is called an open contract; but usually the vendor protects himself by inserting special stipulations as to title; see pp. 318, 321, *ante*; and also by reserving a right of rescission; see pp. 324, 325, *ante*; *Page v. Adam* (1841), 4 Beav. 269, 286.

(*c*) A marketable title is one which at all times and under all circumstances can be forced on an unwilling purchaser (*Pyrke v. Waddingham* (1852), 10 Hare, 1, 8); see *Maconchy v. Clayton*, [1898] 1 I. R. 291, C. A. A title, though not marketable, may be a good holding title, *i.e.*, one which presents no probability of an adverse claim being made, and can usually be sold under suitable conditions as to title; see also note (*s*), p. 461, *post*.

(*d*) In *Ogilvie v. Foljambe* (1817), 3 Mer. 53, 64, the right of the purchaser to a good title was spoken of as "a right not growing out of the agreement between the parties, but which is given by law"; and in this view it is collateral to and not an implied term of the contract (*Ellis v. Rogers* (1885), 29 Ch. D. 661, 670, C. A.); but usually it is treated as an implied term of the contract (*Flureau v. Thornhill* (1776), 2 Wm. Bl. 1078; *St. Albans (Duke) v. Shore* (1789), 1 Hy. Bl. 270, 280; *Doe d. Gray v. Stanion* (1836), 1 M. & W. 695, 701); and see note (*t*), p. 462, *post*. The vendor's obligation is the same whether the question arises in an action for specific performance or for damages for breach of contract; see *Purvis v. Rayer* (1821), 9 Price, 488; *Souter v. Drake* (1834), 5 B. & Ad. 992, 1002. But the vendor's obligation to show a title may be excluded by the circumstances as well as by special stipulation (see *Turner v. Turner* (1852), 2 De G. M. & G.

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as to
Title.

Abstract of
title.

Length of
title.

some person or persons whose concurrence he can require, can convey to the purchaser the whole legal and equitable interest in the land sold (e).

In general, it is sufficient if the vendor shows that he has a good title by the time fixed for completion (f), but, if it appears before that time that he has not a title, and is not in a position to obtain one, the purchaser can repudiate the contract (g).

The vendor shows his title by delivering an abstract of it to the purchaser and makes his title by proving the contents of the abstract by proper evidence (h).

574. On a sale of freehold or copyhold land, the vendor must deduce a title for a period of at least forty years preceding the sale. This has been substituted by statute (i) for the period of sixty years formerly required (k). But forty years is only the minimum period, and in fact the title must be deduced for forty years and so much longer as it is necessary to go back in order to arrive at a proper root of title (l).

A longer title than forty years can be required in cases where before the statute a title longer than sixty years could be required,

28, 46, C. A.; *Richardson v. Eytton* (1852), 7 De G. M. & G. 79, C. A.; and if the vendor's interest is limited and the contract shows this he need not make a title except to the limited interest (*Worthington v. Warrington* (1848), 5 C. B. 635); see also *Re Judge and Sheridan's Contract* (1907), 96 L. T. 451; *Hall v. Betty* (1842), 4 Man. & G. 410.

(e) See *Braybroke (Lord) v. Inskip* (1803), 8 Ves. 417, 436. It is sufficient if the vendor shows that he has a good equitable title and power to get in the legal estate (*Camberwell and South London Building Society v. Holloway* (1879), 13 Ch. D. 754, 763); the getting in of the legal estate is a matter of conveyance, and not of title (*Avarne v. Brown* (1844), 14 Sim. 303; *Kitchen v. Palmer* (1877), 46 L. J. (Ch.) 611; see *Smith v. Ellis* (1850), 14 Jur. 682); *contra*, if it is uncertain in whom the legal estate is vested (*Wynne v. Griffith* (1826), 1 Russ. 283). Formerly a sale was illegal unless the vendor had been in possession within a year (stat. (1540) 32 Hen. 8, c. 9, repealed by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 11); and as to "proterced titles" see Dart, *Vendors and Purchasers*, 7th ed., p. 265.

(f) *Boehm v. Wood* (1820), 1 Jac. & W. 419, 421.

(g) *Forrer v. Nash* (1865), 35 Beav. 167; compare *Re Head's Trustees and Macdonald* (1890), 45 Ch. D. 310, C. A.; *Re Cooke and Holland's Contract* (1898), 78 L. T. 106; *Re Bryant and Barningham's Contract* (1890), 44 Ch. D. 218, C. A.; *Re Baker and Selmon's Contract*, [1907] 1 Ch. 238; *Re Hucklesby and Atkinson's Contract* (1910), 102 L. T. 214; see p. 403, *post*.

(h) *Parr v. Lovegrove* (1857), 4 Drew. 170, 181; *Games v. Bonnor*, 33 W. R. 64; compare *Mullings v. Trinder* (1870), L. R. 10 Eq. 449, 455. See *Horne v. Wingfield* (1841), 3 Scott (N. R.), 340; Sugden, *Vendors and Purchasers*, 14th ed., p. 406.

(i) Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 1, which applies to contracts of sale of land made after the 31st December, 1874.

(k) *Barnwell v. Harris* (1809), 1 Taunt. 430, 432; *Cooper v. Emery* (1844), 1 Ph. 388; *Finch v. Shaw, Colyer v. Finch* (1854), 19 Beav. 500, 512; *Parr v. Lovegrove* (1857), 4 Drew. 170, 183, n.; *Moullon v. Edmonds* (1859), 1 De G. F. & J. 246. An earlier title than forty years may still be required in any case where, at the time of the passing of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), a purchaser might have required more than a sixty years' title; see the text, *infra*.

(l) *Re Cox and Neve's Contract*, [1891] 2 Ch. 109, 118. As to "root of title," see p. 345, *post*. So, under the former law, it might be necessary to carry back the title beyond sixty years; see *Phillips v. Caldwell* (1868), L. R. 4 Q. B. 159.

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and as to such cases the former practice still prevails. Thus, in the case of an advowson the period is one hundred years(*a*); in the case of a reversionary interest the title must be carried back at least as far as the instrument creating it(*b*); and on the sale of a term of years more than forty years old, the creation of the term must be shown. But it is sufficient both in the case of reversions and terms of years if the immediate title is carried back for forty years(*c*); and it seems that the same rule applies in other cases where the title to the property depends on an original grant, such as tithe rentcharge in the hands of a lay proprietor, or property held under grant from the Crown. The original grant must be shown, but the subsequent title only for the last forty years(*d*).

On a contract to sell a term of years, whether derived out of a freehold or leasehold estate, the purchaser cannot, in the absence of express stipulation to the contrary, call for the title to the freehold(*e*); and, if the lease is derived out of a leasehold estate, he cannot call for the title to the leasehold reversion(*f*); it is sufficient if the vendor produces the lease under which he holds and shows a title to it for at least forty years(*g*); and, on a sale of

Statutory
 restrictions
 on title.

(*a*) This is in accordance with the maximum length of the period in which the title to an advowson can be extinguished under the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 33; see titles ECCLESIASTICAL LAW, Vol. XI., p. 589; LIMITATION OF ACTIONS, Vol. XIX., p. 153.

(*b*) See Dart, Vendors and Purchasers, 7th ed., p. 329. In order to avoid any question as to possession of the land when the interest falls into possession, it must be shown that it is being enjoyed at the time of the sale by the owner of the immediate estate.

(*c*) *Williams v. Spargo*, [1893] W. N. 100. The existence of a long term is frequently only known from recitals of the lease creating it contained in subsequent assignments, and production of the lease is impracticable; but this is a defect of title unless the vendor has protected himself by the contract against production being required (*Frend v. Buckley* (1870), L. R. 5 Q. B. 213, Ex. Ch.).

(*d*) See *Pickering v. Sherborne (Lord)* (1838), 1 Craw. & D. 254; Sugden, Vendors and Purchasers, 14th ed., 367.

(*e*) Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, r. 1; *Jones v. Watts* (1890), 43 Ch. D. 574, C. A.; and as to notice, see p. 344, *post*; Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3 (1). As to assuming that the lease or underlease was duly granted, see *ibid.*, s. 3 (4), (5). Before this enactment, if the term sold had been created within sixty years preceding the date of the contract, the lessor's title had to be deduced for such a period as, with the title to the term from its creation, made up the period of sixty years (*Purvis v. Rayer* (1821), 9 Price, 488; *Souter v. Drake* (1834), 5 B. & Ad. 992; compare *White v. Foljambe* (1805), 11 Ves. 337; *Deverell v. Bolton (Lord)* (1812), 18 Ves. 505); *Fildes v. Hooker* (1817), 2 Mer. 424; unless the lease had been granted by an ecclesiastical corporation; see *Fane v. Spencer* (1815), 2 Mer. 430, n. A similar restriction as to title is imposed in the case of a contract to grant a lease; see title LANDLORD AND TENANT, Vol. XVIII., p. 382. As to the description in particulars of sale, see note (*g*), p. 307, *ante*. A contract to sell a lease is not satisfied by the grant of an underlease; see p. 305, *ante*.

(*f*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3 (1); as to notice, see p. 344, *post*; Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3 (1).

(*g*) *Williams v. Spargo*, *supra*; see *Gosling v. Woolf*, [1893] 1 Q. B. 39; title LANDLORD AND TENANT, Vol. XVIII., p. 382; and, as to showing title to a prior contract for the lease, see *Rhodes v. Ibbetson* (1853), 4 De G. M. & G. 787, C. A.

SECT. 1.
Vendor's
Obligation
as to
Title.

Exclusion of
statutory
restriction.
Proof of title.

land formerly copyhold or customary freehold, which has been enfranchised, the purchaser cannot call for the title to make the enfranchisement (*h*).

But in all these cases the statutory restriction on title can be excluded by express stipulation (*i*), and unless it is so excluded the purchaser takes the risk of being affected by notice of what he would discover if he investigated the earlier title (*k*).

575. The vendor must prove by production of the proper evidence (*l*) the title shown by the abstract. In the absence of a contrary stipulation, recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments (*m*), Acts of Parliament, and statutory declarations twenty years old at the date of the sale, are deemed, except so far as they can be proved to be inaccurate, sufficient evidence of the truth of such facts, matters and descriptions (*n*); and the purchaser must assume that recitals contained in the abstracted instruments of any deed, will, or other document forming part of the title prior to the time prescribed by law or stipulated for the commencement of title, are correct and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed and perfected by any necessary formalities (*o*).

- SUB-SECT. 2.—*The Abstract of Title.*

Abstract
of title.

576. The abstract of title is a summary of all the documents by which any dispositions of the property have been made during the period for which title has to be shown, and of all the facts, such as

(*h*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3 (2).

(*i*) Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2; Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3 (9).

(*k*) See *Patman v. Harland* (1881), 17 Ch. D. 353; title LANDLORD AND TENANT, Vol. XVIII., p. 383; and see note (*s*), p. 355, *post*.

(*l*) As to how far the evidence must be such as would be admissible in litigation, see note (*k*), p. 354, *post*. "I do not entirely assent to the proposition that a vendor is in every case bound to supply evidence which would be admissible in an action for ejectment" (*Halkett v. Dudley (Earl)*, [1907] 1 Ch. 590, *per* PARKER, J., at p. 604); and see pp. 349 *et seq.*, *post*.

(*m*) Copies of entries in court rolls of admittances or surrenders seem not to be instruments, since they are records of operative acts and are not operative themselves; consequently recitals in such documents are, it is believed, not within this statutory rule.

(*n*) Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, r. 2. The decision of MALINS, V.-C., in *Bolton v. London School Board* (1878), 7 Ch. D. 766, that a recital of a seisin in fee contained in a deed twenty years old at the time of the contract was, under this provision, evidence of such seisin, except so far as it was proved inaccurate by the purchaser, and that no prior title could be required, is not law (*Re Wallis and Groul's Contract*, [1906] 2 Ch. 206, *per* SWINFEN EADY, J., at p. 210). As to the effect of conditions making recitals and statements in deeds evidence, see *Gould v. White* (1854), Kay, 683; *Drysdale v. Mace* (1854), 5 De G. M. & G. 103, C. A.; *Poppleton v. Buchanan* (1858), 4 C. B. (N. S.) 20; and, as to the effect of a recital of an earlier deed as evidence of that deed, see *Gillett v. Abbott* (1838), 7 Ad. & El. 783; *Bringloe v. Goodson* (1839), 5 Bing. (N. C.) 738.

(*o*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3 (3); compare *Arran (Earl) and Knowlesden and Creer's Contract*, [1912] 2 Ch. 141; *Re Lloyds Bank, Ltd. and Lillington's Contract*, [1912] 1 Ch. 601.

births, marriages, deaths, or other matters affecting the devolution of the title during the same period (*p*).

SECT. 1.
Vendor's
Obligation
as to
Title.

Root of title.

577. The abstract must commence with a good "root of title," that is, in the absence of contrary stipulation, with some document purporting to deal with the entire legal and equitable estate in the property sold, not depending for its validity upon any previous instrument, and containing nothing to throw any suspicion on the title of the disposing parties (*a*). The best root of title is a conveyance in fee on sale or by way of mortgage. A general devise by will is insufficient, as there is nothing to show that the property passed by it (*b*); there must also be proof of the testator's seisin at his death (*c*); but a specific devise is a proper root of title (*d*). An instrument, the effect of which depends on some earlier instrument, is *primâ facie* an insufficient root of title, and it is necessary to go back to the earlier instrument; for example, a title depending on an appointment under a power or on a disentailing deed must be carried back to the instrument creating the power or the entail (*e*). If, however, it has been expressly agreed that such an instrument shall form the root of title, the purchaser cannot require the production, nor an abstract, of the document creating the power, nor, it seems, the entail, unless the documents as abstracted throw doubt on the earlier title, and

(*p*) As to the vendor's obligation to deliver an abstract, see p. 322, *ante*; *Re Priestley and Davidson's Contract* (1892), 31 L. R. Ir. 122.

(*a*) See *Re Cox and Neve's Contract*, [1891] 2 Ch. 109, 118; *Dart, Vendors and Purchasers*, 7th ed., p. 332. It is not essential that the title should commence with a document (*Parr v. Lovegrove* (1857), 4 Drew. 170). In the absence of documents, such long uninterrupted possession, enjoyment, and dealing with the property must be shown as reasonably raises a presumption of an absolute title in fee simple (*Cottrell v. Watkins* (1839), 1 Beav. 361); and under an open contract there must be forty years' possession (*Jacobs v. Revell*, [1900] 2 Ch. 858, 869); mere proof, however, of forty years' possession will not avail, without showing the origin of the possession, as, *e.g.*, an entry by the heir or by a trespasser (*Ilern v. Mill* (1806), 13 Ves. 114, 122; *Eyton v. Dicken* (1817), 4 Price, 303). Where a known defect has been cured by the Statutes of Limitation, the court compels the purchaser to accept the title; see note (*g*), p. 351, *post*. Under a suitable condition a vendor may sell a mere possession, where, for instance, a railway company sells superfluous land otherwise than in accordance with the statutory provisions (*Rosenberg v. Cook* (1881), 8 Q. B. D. 162, C. A.); and, as to such sales, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 26 *et seq.*

(*b*) Where it is intended that the title shall commence with a general devise, this is always expressly stipulated, and the purchaser is required to assume the seisin of the testator at the time of his death; otherwise the title must commence with the conveyance to the testator, or, if there is no conveyance, with evidence of his seisin at the date of his death.

(*c*) As to a condition requiring seisin to be assumed, see *Re Bunister, Broad v. Munton* (1879), 12 Ch. D. 131, C. A.

(*d*) This is so, it is believed, in practice, but a specific devise has been said not to be an eligible root of title (see *Parr v. Lovegrove* (1857), 4 Drew. 170), and it is better to specify the nature of the document in the contract; see *Williams, Vendor and Purchaser*, 2nd ed., p. 109.

(*e*) But if the deed has been lost, and the possession of the land has been for a considerable time in accordance with the estates purporting to have been created under it, the loss of the deed and the absence of evidence of its contents are not objections to the title; see *Cousmaker v. Sewell* (1791), cited in *Sugden, Vendors and Purchasers*, 14th ed., p. 366; *Nouaille v. Greenwood* (1822), Turn. & R. 26.

SECT. 1.
Vendor's
Obligation
as to
Title.

then the purchaser can resist specific performance unless the vendor abstracts the earlier document so far as is necessary to remove the doubt, and produces it (*f*).

A voluntary conveyance is a proper root of title under an open contract (*g*), but if it is made a root of a good title at a shorter period than forty years the conditions must clearly state its nature (*h*).

Documents to
be abstracted.

578. The document forming the root of title and all subsequent documents (*i*) dealing with the legal estate should be abstracted in chief in order of date (*k*), including mortgages, though satisfied (*l*), but not leases which have expired. Similarly, all material facts, such as births, deaths, intestacies, or other matters, should be stated in their order of date. Receipts and other documents showing that death duties payable within twelve years of the sale (*m*) have been discharged should be abstracted.

Equitable
interests.

With regard to documents affecting the equitable estate only, a purchaser for value taking the legal estate without notice of them is protected (*n*), and therefore they are immaterial to his title and in practice are frequently suppressed. This is always the case where the legal estate has been vested in trustees who are intended to stand towards third parties as absolute owners. In such cases the conveyance to the trustees is framed so as to keep the trusts off the title, and this object would be defeated if dealings with the beneficial interest were disclosed (*o*). Further, the abstract not uncommonly omits documents creating equitable charges, whether they have been paid off, or are still subsisting but are intended to be paid off on completion (*p*).

(*f*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3 (3), (11); see Dart, Vendors and Purchasers, 7th ed., p. 334.

(*g*) *Re Marsh and Granville (Earl)* (1883), 24 Ch. D. 11, C. A., per COTTON, L.J., at p. 24. A voluntary deed as a link in the title is not a defect in title, since a purchaser gets a good title under it (see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 279, *Re Hart, Ex parte Green*, [1912] 3 K. B. 6, C. A.: title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 83), provided the purchaser has no notice of its being impeachable (see *ibid.*, p. 115).

(*h*) *Re Marsh and Granville (Earl)*, *supra*; see *Noyes v. Paterson*, [1894] 3 Ch. 267; and see pp. 302, 318, *ante*.

(*i*) Subject to the exception of leases more than forty years old and other similar cases; see p. 342, *ante*.

(*k*) Notwithstanding their subsequent recital in the abstracted documents (*Re Evesworth and Tidy's Contract* (1889), 42 Ch. D. 23, 34, C. A.; *Re Stamford, Spalding and Boston Banking Co. and Knight's Contract*, [1900] 1 Ch. 287).

(*l*) See *Heath v. Crealock* (1874), 10 Ch. App. 22; and compare *Gray v. Towler* (1873), L. R. 8 Exch. 249, 265, Ex. Ch.

(*m*) After twelve years they are statute-barred as regards purchasers for value; see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 223, 301. It is convenient to abstract official certificates of searches; see p. 362, *post*; Dart, Vendors and Purchasers, 7th ed., p. 1196.

(*n*) As to circumstances in which a purchaser will not be protected, see *Jared v. Clements*, [1902] 2 Ch. 399; affirmed, [1903] 1 Ch. 428, C. A.; title EQUITY, Vol. XIII., p. 81.

(*o*) See *Re Harman and Uxbridge and Rickmansworth Rail. Co.* (1883), 24 Ch. D. 720; *Carritt v. Real and Personal Advance Co.* (1889), 42 Ch. D. 263, 272: in *Re Blaiberg and Abrahams*, [1899] 2 Ch. 340, the trusts were by inadvertence disclosed; see also *Re Pope's Contract*, [1911] 2 Ch. 442.

(*p*) In *Drummond v. Tracy* (1860), John. 608, 612, where a letter creating an equitable charge which was intended to be paid off out of the pur-

Where, however, the abstract shows that the legal estate is in a trustee, and does not also show that he holds on trust for sale, or with a power of sale, the concurrence or consent of the beneficiaries is necessary, and the equitable title must be abstracted.

Second mortgages framed in the same terms as legal mortgages should be abstracted (q).

NOTE 1.
Vendor's
Obligation
as to
Title.

Legal estate
in a trustee.

Second
mortgages.

Form of
abstract.

579. The abstract should set out the contents of every material part of the abstracted documents according to their tenor, and not give merely a statement of the effect thereof (r).

The parcels as described in the first abstracted deed should be set out *verbatim*: in the abstracts of subsequent deeds which repeat the same description they are referred to as the abstracted premises. Tracings of plans indorsed or annexed to the deeds, and referred to in the description of the parcels, should accompany the abstract; and where, as is usually the case, the plans form an essential part of the description of the premises, tracings of them can be insisted on (s).

580. In the case of land registered under the Land Transfer Acts, 1875 and 1897 (t), with an absolute title, the only abstract that the purchaser can require is (1) a copy of the land certificate, or office copies of the entries on the register; (2) copies or abstracts of documents expressly referred to therein; and (3) a statutory declaration as to the existence or otherwise of matters which are declared by statute not to be incumbrances (a). If the land is registered with a qualified title, then, in addition to the foregoing, an abstract must be furnished of all estates and interests excluded from the effect of registration (b). Where only a possessory title has been registered, the purchaser is entitled to the same abstract as

Registered
land.

chase-money had been suppressed, Wood, V.-C., thought that this course was wrong, and would not have been justifiable even if the charge had no longer been subsisting. But in the practice of conveyancers this strict rule is not observed; see Dart, Vendors and Purchasers, 7th ed., p. 337; Williams, Vendor and Purchaser, 2nd ed., p. 112. A vendor or his solicitor or agent who, with intent to defraud, conceals any instrument material to the title or any incumbrance, or falsifies any pedigree on which the title may or does depend, is guilty of a misdemeanour; see Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 24; and, as to concealment of incumbrances prior to the commencement of title, see *Smith v. Robinson* (1879), 13 Ch. D. 148.

(q) Such documents may possibly affect the legal estate; and generally any documents which, although primarily affecting equitable interests, may affect the legal estate should be abstracted; see *Palmer v. Locke* (1881), 18 Ch. D. 381, C. A.; and Dart, Vendors and Purchasers, 7th ed., p. 336. But when a mortgagee is selling under his power of sale, dealings with the equity of redemption are no part of his title, and do not require to be abstracted, even supposing the mortgagee to be aware of them.

(r) For form of abstract, see *Encyclopædia of Forms and Precedents*, Vol. I., p. 10.

(s) See Dart, Vendors and Purchasers, 7th ed., p. 339. As to the right of a purchaser to have the premises conveyed by reference to a plan, see *Re Sansom and Narbeth's Contract*, [1910] 1 Ch. 741, and pp. 423, 424, *post*.

(t) 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65.

(a) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 16; and, as to the matters declared not to be incumbrances, see Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 18; title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 311.

(b) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 16 (iv.).

SECT. 1
Vendor's
Obligation
as to
Title.

Expense of
 making
 abstract.

Expense of
 production of
 deeds.

in the case of unregistered land down to the date of first registration and thereafter the same abstract as of land registered with an absolute title (c).

SUB-SECT. 3.—Expenses.

581. The vendor is bound to make and deliver, at his own expense, a perfect abstract (d), that is, an abstract showing such a title as the purchaser is entitled to obtain under the contract (e). If the documents of title are not in his possession, he must himself bear the cost of procuring them for the purpose of furnishing the abstract (f). Nor is the vendor relieved from the expense of delivering a proper abstract by the mere fact that the purchaser is entitled under his contract to a "free conveyance" (g).

582. On a sale of land under an open contract, the expenses of the production and inspection of all documents of title not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, fall on the purchaser (h).

Where the documents are in the vendor's possession and are produced at the proper place for inspection, that is to say, either at the vendor's residence or near the land sold or in London (i), the purchaser must pay the cost of inspecting them by his own solicitor; but, if they are produced elsewhere, the vendor must defray any extra costs occasioned thereby (k).

(c) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 16 (v.). A possessory title has the effect of an absolute title save that it does not prejudice adverse claims existing or capable of arising at the date of registration; see title **REAL PROPERTY AND CHATELS REAL**, Vol. XXIV., pp. 313, 314.

(d) *Re Johnson and Tustin* (1885), 30 Ch. D. 42, C. A.; *Re Stamford, Spalding and Boston Banking Co. and Knight's Contract*, [1900] 1 Ch. 287. In sales, however, under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 82, the costs of the abstract are, in the absence of agreement, thrown on the purchaser.

(e) See *Morley v. Cook* (1842), 2 Hare, 106, 111; and see pp. 321, 341, *ante*.

(f) The effect of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3 (6), is not in such case to throw the expense on the purchaser. "[The section] assumes that a perfect abstract has been delivered and it deals entirely with matters subsequent to that" (*Re Stamford, Spalding and Boston Banking Co. and Knight's Contract*, *supra*, per NORTH, J., at p. 291).

(g) *Re Pelly and Jacob's Contract* (1899), 80 L. T. 45; but it is usual to stipulate in such cases that there shall be no investigation of title.

(h) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3 (6), (9). Thus, the purchaser must pay the costs of procuring the production even of a deed which is the root of the vendor's title, if it is not in the latter's possession (*Re Stuart and Olivant and Seadon's Contract*, [1896] 2 Ch. 328, C. A.), and of title deeds in the hands of the vendor's mortgagees (*Re Willett and Argenti* (1889), 60 L. T. 735). A contract for the sale of the "fee simple in possession free from incumbrances" is not the expression of a contrary intention within the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) (*Re Willett and Argenti*, *supra*). As to the former practice, compare Sugden, Vendors and Purchasers, 14th ed., p. 431.

(i) Dart, Vendors and Purchasers, 7th ed., p. 481.

(k) *Hughes v. Wynne* (1836), 8 Sim. 85. If the vendor has the option of producing them at any one of several specified places, the purchaser is entitled to reasonable notice of the place selected (*Rippinghall v. Lloyd* (1833), 5 B. & Ad. 742). As a rule, a country solicitor is not allowed the cost of journeys to London for the purpose of examining title deeds.

583. The expenses of searching for, procuring, making, verifying and producing all certificates, declarations, evidences and information not in the vendor's possession must, in the absence of any stipulation, be borne by the purchaser (*l*); and all copies or abstracts of or extracts from documents of title not in the vendor's possession, for whatever purpose required by the purchaser, must, in the absence of any agreement, be made at the expense of the purchaser (*m*).

SECT. 1.
Vendor's
Obligation
as to Title.

Certificates
and other
evidence.

584. On a sale of property in lots, the purchaser of two or more lots held wholly or in part under the same title is not entitled to more than one abstract of the common title, except at his own expense (*n*).

Sale in lots.

SECT. 2.—Proof of Title.

SUB-SECT. 1.—In General.

585. Abstracted documents are proved by production of the originals (*o*). If a document comes from the proper custody (*p*), and there is no cause for suspecting its authenticity, proof of due execution is not required (*q*), and it is presumed to have been executed or signed as appears on its face (*r*).

Abstracted
documents.

except in special circumstances (*Re Tryon* (1844), 7 Beav. 496), and it is immaterial that he makes the journey at the request of his client, unless he has first explained to him the usage of the profession to dispense with such attendance (*Alsop v. Orford* (*Lord*) (1833), 1 My. & K. 564; *Horlock v. Smith* (1837), 2 My. & Cr. 495, 523). A London solicitor is not bound to employ a country agent, but may send his clerk to examine the deeds (*Hughes v. Wynne* (1836), 8 Sim. 85).

(*l*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3 (6), (9). Apart from statute, all the expense of procuring the evidence necessary for verifying the abstract falls on the vendor. Where lessees covenant to finish a house to the satisfaction of the lessor's surveyor, the certificate of the surveyor's approval is neither a "certificate" nor an "evidence" within this provision; it is "not like a certificate of a pre-existing fact such as a birth, a marriage or a death, but it is the fact itself and forms part of the vendors' title, which must be procured at their expense" (*Re Moody and Yates' Contract* (1885), 30 Ch. D. 344, C. A., *per* FRY, L.J., at p. 349); compare *Re Edwards and Rudkin to Green* (1888), 58 L. T. 789.

(*m*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3 (6), (9). Notwithstanding the wide language of this provision, it does not relieve the vendor from making a proper abstract and procuring the necessary documents for making it at his own expense (see case cited in note (*f*), p. 348, *ante*); nor does it affect the ordinary right of the purchaser to have the title deeds handed over on completion, and any expenses incurred in obtaining them for that purpose, if they are not in the vendor's possession, must be borne by the vendor (*Re Duthy and Jesson's Contract*, [1898] 1 Ch. 419).

(*n*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3 (7); and see *Re Simmons' Contract*, [1908] 1 Ch. 452.

(*o*) As to proof of Crown grants, see title CONSTITUTIONAL LAW, Vol. VII., p. 156; note (*g*), p. 351, *post*.

(*p*) I.e., "if it come from a place where it might reasonably be expected to be found" (*Croughton v. Blake* (1843), 12 M. & W. 205, *per* PARKE, B., at p. 208; *Doe d. Jacobs v. Phillips* (1845), 8 Q. B. 158; and see *Meath (Bishop) v. Winchester (Marquis)* (1836), 3 Scott, 561, 577).

(*q*) And probably cannot be required (though the document is less than thirty years old) unless there are circumstances of suspicion see Dart, *Vendors and Purchasers*, 7th ed., p. 348.

(*r*) See title EVIDENCE, Vol. XIII., p. 505. The purchaser is entitled

SECT. 2.

Proof of
Title.

Lost deed.

586. When a deed or other document of title has been lost or destroyed; secondary evidence of its contents and execution may be given upon proof of such loss or destruction, and, if such evidence is clear and cogent, a purchaser cannot object to a title depending on the lost document (s).

Deeds
executed by
attorney.

587. If a deed is executed by attorney, the power of attorney must be abstracted and produced (t), and, if this was executed before the 1st January, 1888, evidence must be given that the power had not been revoked by the donor or by his death, insanity, or bankruptcy before it was acted upon (u). But a power of attorney executed on or since the 1st January, 1888, and either given for valuable consideration and expressed to be irrevocable, or, although not given for valuable consideration, yet expressed to be irrevocable for a fixed time not exceeding one year, is, in favour of a purchaser, not revocable by death, insanity, or bankruptcy (v). Hence, in the case of a deed executed under such a power of attorney, proof of non-revocation, either generally or within the fixed time, is not necessary.

Acknowledg-
ments.

588. In the case of acknowledgments of deeds by married women made since the 31st December, 1882, the memorandum of acknowledgment indorsed on the deed is sufficient evidence. An acknowledgment prior to that date must be proved by an office copy of the certificate filed in the proper office of the High Court (a).

Enrolments.

589. Where deeds are required to be enrolled (b), the enrolment is usually proved by the memorandum of enrolment indorsed thereon by the proper officer, without proof of his signature or official

to an explanation of any erasures which cause suspicion (*Hobson v. Bell* (1839), 3 Jur. 190).

(s) *Re Halifax Commercial Banking Co. and Wood* (1898), 79 L. T. 536, C. A.; see *Bryant v. Busk* (1827), 4 Russ. 1; *Hart v. Hart* (1841), 1 Hare, 1; *Moulton v. Edmonds* (1859), 1 De G. F. & J. 246, 251; and if due execution is proved its due stamping will be presumed (*ibid.*; see title EVIDENCE, Vol. XIII., p. 506); but this presumption is rebutted by evidence showing that at a particular time the document was unstamped (*Marine Investment Co. v. Haviside* (1872), L. R. 5 H. L. 624); see title EVIDENCE, Vol. XIII., p. 506, note (f). As to what constitutes secondary evidence of a document, see title EVIDENCE, Vol. XIII., pp. 422, 518 *et seq.*; and as to enrolled deeds, see *Harvey v. Philips* (1743), 2 Atk. 541.

(t) See *Danby v. Coutts & Co.* (1885), 29 Ch. D. 500; *Re Airey, Airey v. Stapleton*, [1897] 1 Ch. 164. In *Eaton v. Sanzter* (1834), 6 Sim. 517, the purchaser's objection to the title on the ground of non-production of a power of attorney was removed by the obtaining of a conveyance from the devisee of the donor of the power.

(u) See *Smart v. Sandars* (1848), 5 C. B. 895, 917, n.; and as to revocation of powers of attorney, see title AGENCY, Vol. I., p. 228.

(v) Conveyancing Act, 1882 (45 & 46 Vict. c. 39), ss. 8, 9, and, see Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 48, under which, if the instrument creating the power is deposited in the Central Office, an office copy of such instrument is sufficient proof of its contents.

(a) Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 7 (8); and see Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 84—88; *Jolly v. Handcock* (1852), 7 Exch. 820; and see title HUSBAND AND WIFE, Vol. XVI., p. 383.

(b) *E.g.*, conveyances to charitable uses (Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 4 (9); see title CHARITIES, Vol. IV., p. 131); disentailing assurances (Fines and Recoveries Act, 1833 (3 & 4

character (c); but all deeds directed by any statute to be enrolled in any court the jurisdiction of which has been transferred to the High Court may be enrolled in the Central Office, and certificates purporting to be sealed with the seal of the Central Office may be received in evidence without further proof of authenticity (d).

SECT. 2.
Proof of
Title.

590. Registration of assurances in Middlesex and Yorkshire is proved by the certificate indorsed thereon by the registrar (e).

Registration
of assurances.

SUB-SECT. 2.—Particular Matters.

591. Seisin may be proved by showing acts of ownership done with respect to the land, such as the grant of a lease under which possession has been taken by the lessee and rent paid (f); but mere possession, although sufficient to give a *prima facie* title in ejectment, raises no presumption of seisin as between vendor and purchaser (g).

Seisin.

592. Awards of enfranchisement of copyholds and voluntary enfranchisements, are proved by production of the award or deed of enfranchisement respectively, duly confirmed in case of an award, or executed in case of a deed, by the Board of Agriculture and Fisheries or its predecessors (h). Confirmation or execution by the

Enfranchise-
ment award.

Will. 4, c. 74), s. 41; see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 256, 257).

(c) *Doe d. Williams v. Lloyd* (1840), 1 Man. & G. 671, 684 *et seq.* (a case under the Charitable Uses Act, 1735 (9 Geo. 2, c. 36)).

(d) R. S. C., Ord. 61, rr. 7, 9.

(e) Middlesex Registry Act, 1708 (7 Anne, c. 20), s. 6; Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 9. Under the latter Act the registrar must also seal the certificate with the seal of the registry. As to registration in county registries, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 301 *et seq.*

(f) *Welcome v. Upton* (1840), 6 M. & W. 536; *Clarkson v. Woodhouse* (1782), 5 Term Rep. 412, n.; compare *Foljambe v. Smith's Tadcaster Brewery Co.* (1904), 73 L. J. (CH.) 722. As to seisin, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 214 *et seq.*; and, as to admissions as to the legal estate, see *Doe d. Daniel v. Ooulthred* (1837), 7 Ad. & El. 235, 239. Compare, as to possession, title PERSONAL PROPERTY, Vol. XXII., pp. 391 *et seq.*

(g) *Doe d. Graham v. Penfold* (1838), 8 C. & P. 536; and see *Hiern v. Mill* (1806), 13 Ves. 114, 122. Defects in the early title, or in the evidence thereof, may sometimes be rendered immaterial by the provisions of the Real Property Limitation Acts, 1833 (3 & 4 Will. 4, c. 27) and 1874 (37 & 38 Vict. c. 57); see title LIMITATION OF ACTIONS, Vol. XIX., pp. 104 *et seq.* But these provisions do not affect the right of a purchaser under an open contract to have a forty years' title deduced (*Jacobs v. Revell*, [1900] 2 Ch. 858, 869); if, however, such title is deduced, it will be forced on a purchaser, although it depends wholly or in part on the Acts mentioned (*Games v. Bonnor* (1884), 54 L. J. (CH.) 517, C. A.; *Scott v. Nixon* (1843), 3 Dr. & War. 388), provided the defect is a known defect capable of being cured in this manner: a purchaser is not required to take a leap in the dark (*Re Nisbet and Potts Contract*, [1905] 1 Ch. 391, per FARWELL, J., at p. 402; *Re Atkinson and Horsell's Contract*, [1912] 2 Ch. 1, C. A.); title LIMITATION OF ACTIONS, Vol. XIX., p. 156. As to presumption of Crown grants, see Dart, Vendors and Purchasers, 7th ed., p. 360.

(h) Up to 1882 such predecessors were styled Copyhold Commissioners; after that date, Land Commissioners (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 48); and since 1889 their powers and duties have been transferred to the Board of Agriculture, since 1903 styled the Board of Agriculture and Fisheries; see titles AGRICULTURE, Vol. I., p. 297; COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 536; CONSTITUTIONAL LAW, Vol. VII., p. 104; COPYHOLDS, Vol. VIII., p. 128.

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Title.

Board is conclusive evidence of all necessary formalities having been complied with (*i*). An award made under the Copyhold Act, 1852 (*j*), or the Copyhold Act, 1887 (*k*), may be proved by a copy under the seal of the Commissioners appointed under those Acts (*l*).

Inclosure
award.

593. An award of inclosure under any Act incorporating the Inclosure (Consolidation) Act, 1801 (*m*), is proved by a copy or extract signed by the proper officer of the court, if the award was enrolled in one of the courts of Westminster (now the High Court) or, if it was enrolled with the clerk of the peace for the county in which the lands lie, by the clerk or his deputy (*n*). If the award was made under the Inclosure Act, 1845 (*o*), it is proved by the award itself, by a copy purporting to be sealed with the seal of the Inclosure Commissioners (*p*), or by a copy or extract signed by the clerk of the peace of the county in which the lands lie or his deputy (*q*).

Bankruptcy
proceedings.

594. A copy of the *London Gazette* containing a notice of a receiving order or order of adjudication in bankruptcy is conclusive evidence both of the making and of the date of such order (*r*).

Manor court
rolls.

595. Entries in the court rolls of a manor may be proved by production of the rolls (*s*), or by examined copies (*t*), or by copies signed by the steward and delivered to the tenant on the rolls (*u*).

The last-named copies are usually accepted without proof of the

(*i*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 61 (1); see title COPYHOLDS, Vol. VIII., p. 126; compare the earlier repealed enactments, as to awards, Copyhold Acts, 1852 (15 & 16 Vict. c. 51), s. 49; 1858 (21 & 22 Vict. c. 94), s. 10; and 1887 (50 & 51 Vict. c. 73), s. 22; as to voluntary enfranchisements, Copyhold Acts, 1841 (4 & 5 Vict. c. 35), s. 56; 1843 (6 & 7 Vict. c. 23); 1844 (7 & 8 Vict. c. 55); and 1887 (50 & 51 Vict. c. 73), s. 3; and, as to evidence of the former copyhold title after enfranchisement, see Copyhold Act, 1894 (57 & 58 Vict. c. 46), ss. 62—64.

(*j*) 15 & 16 Vict. c. 51, s. 49 (now repealed).

(*k*) 50 & 51 Vict. c. 73, s. 22 (now repealed).

(*l*) See note (*h*), p. 351, *ante*.

(*m*) 41 Geo. 3, c. 109; repealed by the Commons Act, 1899 (62 & 63 Vict. c. 30).

(*n*) Inclosure (Consolidation) Act, 1801 (41 Geo. 3, c. 109), s. 35; and see Inclosure Act, 1833 (3 & 4 Will. 4, c. 87), s. 2.

(*o*) 8 & 9 Vict. c. 118.

(*p*) See Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 2; after 1882 they were styled the Land Commissioners (Settled Land Act (45 & 46 Vict. c. 38), s. 48), and since 1889 their powers and duties have been transferred to the Board of Agriculture and Fisheries (Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2); see note (*h*), p. 351, *ante*; and see title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 535 *et seq.*

(*q*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 146; see Dart, *Vendors and Purchasers*, 7th ed., p. 181; title COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 586, 587. The award is not conclusive as to the title of the allottee (*Jacomb v. Turner*, [1892] 1 Q. B. 47).

(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 132 (2). Petitions, orders, and certificates are proved as in legal proceedings; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 316.

(*s*) *Doe d. Bennington v. Hall* (1812), 16 East, 208. But, since deposit of the copies originally delivered by the steward may create an equitable charge (*Whitbread v. Jordan* (1835), 1 Y. & C. (ex.) 303; title MORTGAGE, Vol. XXI., p. 80), their absence must be accounted for if the court rolls themselves are offered as evidence. As to inspection of the rolls, see R. S. C., Ord. 31, r. 19.

(*t*) *Doe d. Cawthorn v. Mee* (1833), 4 B. & Ad. 617; *Doe d. Burrows v. Freeman* (1844), 12 M. & W. 844; and see *Breeze v. Hawker* (1844), 14 Sim. 360.

(*u*) *Scriven on Copyholds*, 7th ed., p. 487.

handwriting of the steward, in the absence of any cause for suspecting their genuineness (v).

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596. Office copies of all writs, records, pleadings and documents filed in the High Court are admissible in evidence to the same extent as the originals (w); and in many cases certified copies of proceedings are made evidence thereof by statute (x).

Litigious
documents.

597. A fine (a) is proved by the chirograph (b), which it was the duty of the proper officer to deliver to the parties (c). Fines and also recoveries may be proved by exemplifications under the seal of the court (d), or examined copies (e), or, when coming from records under the charge of the Master of the Rolls, by a copy certified by the deputy keeper or an assistant keeper of the records, and purporting to be sealed with the seal of the Record Office (f).

Fines and
recoveries.

598. The probate of a will or an official copy is conclusive evidence of the contents and validity of a will, if it has been proved in solemn form or otherwise declared valid by the court; if not proved in solemn form or declared valid by the court, the probate or an official copy is evidence of the will and of its validity and contents, except where the validity of the will is put in issue (g).

Will.

599. Matters of pedigree are sufficiently proved as follows (h):— Birth, either by a certificate of baptism, that is, a certified copy of the entry in the parochial register, or by a certificate of birth, that is, a certified extract from the general register of births (i); marriage, by a certified extract from the parochial or general register (i); death, by a certificate of burial or by a certificate of death, that is, a certified extract from the general register of deaths (i). Evidence is not usually required of the identity of the

Matters of
pedigree.

(v) Dart, Vendors and Purchasers, 7th ed., p. 347.

(w) See title EVIDENCE, Vol. XIII., p. 549; and R. S. C., Ord. 37, r. 4; and all copies purporting to be sealed with the seal of the Central Office are to be deemed office copies (R. S. C., Ord. 61, r. 7).

(x) E.g., orders in lunacy (Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 144); as to proceedings in bankruptcy, see p. 352, *ante*. As to evidence of statutes and other public documents, see title EVIDENCE, Vol. XIII., pp. 522 *et seq.*

(a) As to fines and recoveries, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 247 *et seq.*

(b) Or "foot" of the fine.

(c) See *Appleton v. Braybrook* (Lord) (1817), 6 M. & S. 34, 37, 38.

(d) As to loss of the imprint of the seal, see *Beverley (Mayor) v. Craven* (1838), 2 Mood. & R. 140.

(e) I.e., a copy proved by the oath of the person examining it with the original record (*Doe d. Gilbert v. Ross* (1840), 7 M. & W. 102, 124).

(f) Public Record Office Act, 1838 (1 & 2 Vict. c. 94), ss. 1, 12, 13. As to evidence of documents relating to Crown lands, see title CONSTITUTIONAL LAW, Vol. VII., p. 173.

(g) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), ss. 62, 64; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 210, 212, 213. In practice letters of administration are received as evidence of intestacy; see Dart, Vendors and Purchasers, 7th ed., pp. 370, 375.

(h) As to evidence of pedigree, see, generally, title EVIDENCE, Vol. XIII., pp. 469 *et seq.*, 470, 480, 559 *et seq.*; and compare title PEERAGES AND DIGNITIES, Vol. XXII., pp. 280, 281, and the cases cited *ibid.*, p. 279, note (k).

(i) See titles EVIDENCE, Vol. XIII., pp. 533 *et seq.*; REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS, Vol. XXIV., pp. 436 *et seq.* As to

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parties named in such certificates: when it is required, it can be given by means of a statutory declaration. Matters of pedigree may also be proved by the statutory declarations of living members of the family or of other persons acquainted with the family (*j*). In the absence of formal evidence or of a statutory declaration, the proof of facts may sometimes be assisted by presumption, for example, that persons who have lived together as husband and wife were legally married, such presumption being supported by proof of general repute (*k*), or that a woman of advanced years is past child-bearing (*l*), and a purchaser must in suitable cases be satisfied with such proof.

Redemption
of land tax
and tithe.

600. Redemption of land tax and of tithe or tithe rentcharge, to both of which land is presumed to be subject unless the contrary is stated (*m*), is proved, as regards land tax, by the certificate of the Land Tax Commissioners, or, since 1889, of the Board of Agriculture (*n*), and the receipt of the cashier of the Bank of England (*o*), and as regards tithe or tithe rentcharge, by the certificate of the Tithe Commissioners (*p*), or, since 1889, of the Board of Agriculture (*n*).

non-parochial registers, see *Re Woodward, Kenway v. Kidd* (1913), 57 Sol. Jo. 426. In practice, probate of the will or letters of administration are usually accepted as sufficient evidence of death. As to presumption of death, see title EVIDENCE, Vol. X., pp. 500 *et seq.*

(*j*) All statutory declarations should be made by a person having the requisite knowledge and, where possible, by an independent person; see *Hobson v. Bell* (1839), 22 Beav. 17, 22; *Nott v. Riccard* (1856), 22 Beav. 307; Dart, Vendors and Purchasers, 7th ed., p. 370.

(*k*) See *Re Shephard, George v. Thyer*, [1904] 1 Ch. 456; *Re Haynes, Haynes v. Carter* (1906), 94 L. T. 431. The limits within which presumptions hold as between vendor and purchaser have been defined thus: "If the case be such that sitting before a jury it would be the duty of a judge to give a clear direction in favour of the fact, then it is to be considered as without reasonable doubt; but if it would be the duty of a judge to leave it to a jury to pronounce upon the effect of the evidence, then it is to be considered as too doubtful to conclude a purchaser" (*Emery v. Grocock* (1821), Madd. & G. 54, *per* LEACH, V.-C., at p. 57); see *Hillary v. Waller* (1806), 12 Ves. 239, 254, 270; see also *England d. Syburn v. Slade* (1792), 4 Term Rep. 682; *Doe d. Bowerman v. Sybourn* (1796), 7 Term Rep. 2.

(*l*) *Browne v. Warnock* (1880), 7 L. R. Ir. 3; see *Encyclopædia of Forms and Precedents*, Vol. XII., p. 95.

(*m*) See note (*f*), p. 306, *ante*.

(*n*) Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2, and, since 1903, of the Board of Agriculture and Fisheries, see note (*h*), p. 351, *ante*.

(*o*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 38; see title LAND TAX, Vol. XVIII., p. 323; Dart, Vendors and Purchasers, 7th ed., p. 393. A statutory declaration of non-payment is not, in the absence of special stipulation, sufficient evidence of redemption (*Buchanan v. Poppleton* (1858), 4 C. B. (N. S.) 20).

(*p*) Tithe Act, 1846 (9 & 10 Vict. c. 73), s. 12. Tithe or tithe rentcharge may be apportioned between the different portions of an estate (see Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 58), but, where one tithe is payable in respect of the land sold and of land belonging to other owners, the purchaser cannot, in the absence of any stipulation, call upon the vendor to apportion the tithe (*Re Ebsworth and Tidy's Contract* (1889), 42 Ch. D. 23, 35, 46, C. A.). As to whether, on the sale in lots of an estate subject to one entire tithe, a purchaser could call on a vendor to apportion the tithe, apart from any agreement, see *ibid.*, at p. 50; title ECCLESIASTICAL LAW, Vol. XI., p. 747, note (*a*). Usually the vendor protects himself from liability to apportionment by express condition; see *Encyclopædia of Forms and Precedents*, Vol. XII., p. 400.

601. Payment of succession duty is proved by the receipt of certificate of the Commissioners of Inland Revenue (*q*), and of estate duty by the certificate of discharge of the same Commissioners (*r*).

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Title.

Death duties.

SECT. 3.—*Requisitions on Title.*

602. On receipt of the abstract the purchaser's solicitor peruses it and then examines it with the original documents (*s*). This examination is directed first to the substance of the documents; secondly, to formal matters; and thirdly, to any incidental matters relevant to the title which do not appear on the abstract. As to substance, it must be ascertained that the abstract, so far as it purports to give the contents of the documents, gives them correctly and with sufficient fullness, and that no material part of any document is omitted; as to formal matters, that the documents are correctly stamped, properly executed, and duly indorsed with any necessary memoranda of acknowledgment, registration, enrolment, or other requirement; as to incidental matters, that there are no notices or memoranda with the documents, or annexed to or indorsed upon them, or any suspicious matters as regards execution or otherwise, or as regards the custody of the deeds, from which it may be inferred that the vendor's title is subject to rights of third parties (*t*).

Examination
of deeds.

603. After thus perusing the abstract and examining the deeds, the purchaser's solicitor prepares his requisitions on the title and conveyance. The requisitions on title fall generally under the following heads (*u*): (1) that the abstracted documents, though efficacious, do not show the title which the purchaser is entitled to obtain, having regard to any special stipulations in the contract (*v*); in this case a further abstract is asked for (*w*); (2) that particular

Nature of
requisitions.

(*q*) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 52; see *Re Kidd and Gibbon's Contract*, [1893] 1 Ch. 695; *Howe (Earl) v. Lichfield (Earl)* (1867), 2 Ch. App. 155; and see, generally, title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 255, 296, 302.

(*r*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 11 (4); and see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 218, 219, 224; and, as to limitation on claims for duties, see note (*m*), p. 346, *ante*. As to a condition making the master's certificate evidence on a sale by the court, see *Re Whitham, Whitham v. Davies* (1901), 84 L. T. 585.

(*s*) As to notice to the purchaser of matters discoverable by the usual inquiries and inspections, see Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3 (1), (i.), (ii.); title EQUIT, Vol. XIII., p. 87. The inspections referred to do not apparently include personal examination of the property (*Slack v. Hancock* (1912), 107 L. T. 14, 18).

(*t*) As to suspicions raised by the position of the receipt on a deed under the old practice, see *Kennedy v. Green* (1834), 3 My. & K. 699; and compare *Greenslade v. Dare* (1855), 20 Beav. 284, where there was no receipt. The receipt is now embodied in the deed (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 54); see p. 437, *post*. As to the examination of wills, see *M'Culloch v. Gregory* (1855), 1 K. & J. 286, 293.

(*u*) For forms of requisitions, see *Encyclopædia of Forms and Precedents*, Vol. I., pp. 64 *et seq.*

(*v*) As to the title which the purchaser can require under an open contract, see p. 341, *ante*; and, as to special restrictions imposed by the contract, see pp. 321, 322, *ante*.

(*w*) A perfect abstract, in the strict sense of the term, is an abstract which shows a good title (*Morley v. Cook* (1842), 2 Hare, 106, 111); but for particular purposes it may mean the most perfect abstract in the

SECT. 8.
Requisitions on Title.

documents have not the effect required in order to make out the vendor's title; (8) that there are incumbrances on the property remaining unsatisfied; (4) that the identity of the property is not shown; (5) that the documents are not in order as to stamping, execution, or other formal matters; and (6) that evidence additional to that already furnished is required as to matters of pedigree, payment of death duties (*x*), or otherwise.

Inquiries.

In addition to these requisitions, which are objections to the title, the purchaser usually addresses inquiries to the vendor, also in the shape of requisitions, which are intended (1) to protect himself from the possible omission of the vendor to disclose matters affecting the title; (2) to obtain information as to the property; and (3) to arrange for completion. Under the first head fall inquiries as to the existence of improvement or other charges (*y*), or whether, in the case of a married woman, there was any settlement made on her marriage (*a*); under the second head (*b*), inquiries as to insurance, easements, tenant right, party walls, the making up of roads, notices served by local authorities, outgoings, and so forth; and, under the third head, inquiries as to documents to be handed over, the steps to be taken in respect of increment value or other duty, and payments to be made by either side on completion. The requisition on the last point can conveniently take the form of a draft completion statement filled up so far as practicable by the purchaser. This forms the basis of the final statement upon which completion will take place.

Requisitions as to the conveyance.

The purchaser may also make requisitions as to the conveyance (*c*). These assume that the vendor has shown that he can either alone or jointly with other persons whose concurrence he can require make a title to the property, and the only question is as to the persons to make the conveyance and the form which it is to take (*d*).

Vendor's right of rescission.

604. Occasionally conditions of sale give the vendor the right to

vendor's possession, actual or constructive, at the time of his delivering it (*Morley v. Cook* (1842), 2 Hare 106, 112); compare *Blackburn v. Smith* (1848), 2 Exch. 783; *Want v. Stollibrass* (1873), L. R. 8 Exch. 175, 179; *Gray v. Fowler* (1873), L. R. 8 Exch. 249, 279, Ex. Ch. ("full and sufficient abstract"). The abstract is not perfect if it does not show 'the true state of the title (*Steer v. Crowley* (1863), 14 C. B. (N. S.) 337, 359).

(*x*) See p. 355, *ante*; Dart, *Vendors and Purchasers*, 7th ed., ch. xxi.

(*y*) As to charges which cannot be ascertained by searching at the office of Land Registry, see p. 361, *post*.

(*a*) It is the duty of the vendor's solicitor to place on the abstract all matters which affect the title so far as a purchaser is concerned (see pp. 297 *et seq.*, 344, *ante*), and the vendor is not bound to answer a requisition whether he or his solicitor is aware of any settlement, deed, fact, omission, or incumbrance affecting the property not disclosed by the abstract (*Re Ford and Hill* (1879), 10 Ch. D. 365, C. A.; *Taylor v. London and County Banking Co., London and County Banking Co. v. Nixon*, [1901] 2 Ch. 231, 258, C. A.), but such a requisition is frequently made with useful results. It directs the attention of the vendor's solicitor to possible omissions and acts as an additional security to the purchaser.

(*b*) On the sale of a rentcharge the purchaser may, it seems, be precluded by the conditions from objecting that it has not been paid for twelve years (*Hanks v. Palling* (1856), 6 E. & B. 659).

(*c*) As to the distinction between requisitions as to title and requisitions as to conveyance, see p. 325, *ante*.

(*d*) As to the parties to make the conveyance and its form, see pp. 415 *et seq.*, 421 *et seq.*, *post*.

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rescind the contract in the event of any requisition or objection being made which he is unable or unwilling to comply with, and it is then necessary for the purchaser to take care that he does not, by making a requisition not really essential, run the risk of losing the purchase (e). But more usually the right of rescission is made to arise only when a requisition is persisted in, and the purchaser runs no such risk in making the requisition in the first instance (e). Requisitions should, however, never be frivolous or unnecessary. They should either call attention to a real or apprehended defect in the title, or ask for relevant information.

SECT. 4.—*Searches and Inquiries.*

605. Certain matters affecting land, though not disclosed by the abstract, may be ascertained by search in registers or other records accessible to the public, and these searches are, in the case of unregistered land (f), an essential step in the investigation of title (g).

Matters in regard to which searches should be made.

Such matters are (1) writs or orders affecting land (h); (2) *lis pendens* (i); (3) annuities (i); (4) bankruptcies (j); (5) deeds of arrangement (j); (6) land charges (j); (7) registration under the Land Transfer Acts, 1875 and 1897 (k); (8) registration in the Middlesex and Yorkshire registries (l); (9) entries on the court rolls affecting copyhold lands (m); (10) disentailing assurances (n); and (11) acknowledgments of deeds by married women (o).

Strictly searches should be made against every person appearing by the abstract to have been owner of the land or to have had power to dispose of it; but in practice searches are confined to the period since the last preceding sale or mortgage (p).

Period of search.

(e) As to conditions entitling a vendor to rescind, see pp. 324 *et seq.*, *ante*.

(f) As to registered land, see pp. 362, 363, *post*, as to unregistered land in an area where registration is compulsory, see p. 361, *post*.

(g) The searches that should generally be made are:—at the Land Registry, for writs and orders affecting the land, *lis pendens*, annuities or rentcharges, deeds of arrangement and land charges, an official certificate being obtained of “full search,” which covers each case; at the Bankruptcy Court, for bankruptcies. For the search in bankruptcy it is not uncommon to rely on a search in the *London Gazette*, made through one of the various inquiry agencies. See, further, pp. 358 *et seq.*, *post*. The periods over which, and the persons against whom, the various searches should be made are dealt with under their respective heads. Whether any other searches should be made depends upon the title shown to the land. The search for *lis pendens* is, as a rule, the only search requiring to be made against trustees. As to costs where the searches are, in the circumstances, needless, see *Langford (Lady) v. Mahony* (1845), 3 Jo. & Lat. 97.

(h) See p. 358, *post*.

(i) See p. 359, *post*.

(j) See p. 360, *post*.

(k) 39 & 40 Vict. c. 87; 60 & 61 Vict. c. 65; see pp. 361, 432, *post*; title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 308 *et seq.* The Office of Land Registry is in Lincoln's Inn Fields, W.C.

(l) See pp. 361, 441 *et seq.*, *post*; title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 301 *et seq.*

(m) See p. 361, *post*; title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 247 *et seq.*

(n) See p. 362, *post*.

(o) See p. 362, *post*; title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 208 *et seq.*

(p) See Dart, *Vendors and Purchasers*, 7th ed., p. 1218; see title COMPANIES, Vol. V. p. 59.

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Searches
and
Inquiries.

Where the vendor is a registered company (*q*), the purchaser should search the register kept by the Registrar of Joint Stock Companies of mortgages and charges created after the year 1900 (*r*) by the company, and, if possible, the register of mortgages kept by the company itself (*s*).

Writs and
orders.

606. Every writ or order affecting land, issued or made by any court for the purpose of enforcing a judgment, whether obtained on behalf of the Crown or otherwise, every order appointing a receiver or sequestrator of land, and every delivery in execution or other proceeding taken in pursuance of such writ or order, is void as against a purchaser for value of the land, unless the writ or order is registered for the time being in the name of the person whose land is affected in the Office of Land Registry (*t*). The registration requires to be renewed every five years (*u*). Hence a purchaser should search at the Office of Land Registry (*v*) for writs and orders affecting land which have been registered or re-registered within the last five years in the names of owners during the period of search (*w*). An official search may be obtained (*a*).

Lis pendens.

607. In the absence of express notice, a purchaser is not affected by a *lis pendens* unless it is registered and re-registered every five years (*b*). Search should be made accordingly in the *lis pendens*

(*q*) See title COMPANIES, Vol. V., pp. 1 *et seq.*

(*r*) Companies Act, 1900 (63 & 64 Vict. c. 48), s. 14; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 10; and see title COMPANIES, Vol. V., p. 365.

(*s*) *I.e.*, under Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 100 (1); see title COMPANIES, Vol. V., p. 364.

(*t*) Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), ss. 5, 6, as amended by the Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 3; see titles EXECUTION, Vol. XIV., pp. 72, note (*a*), 124, 125; JUDGMENTS AND ORDERS, Vol. XVIII., p. 220.

(*u*) See title JUDGMENTS AND ORDERS, Vol. XVIII., p. 221.

(*v*) See note (*l*), p. 357, *ante*.

(*w*) That is, since the last sale or mortgage. Prior to the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), it was necessary to search for judgments and Crown debts; but that Act made it unnecessary to search for private judgments, and general provision rendering it also unnecessary to search for Crown judgments and debts was made by the Land Charges Act, 1900 (63 & 64 Vict. c. 26). Under *ibid.*, s. 2 (1), no judgment or recognisance, whether obtained or entered into on behalf of the Crown or otherwise, whatever its date, can now operate as a charge upon land or any interest in land, or upon the unpaid purchase-money for any land, unless or until a writ or order for enforcing it is registered under the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), s. 5, and the Land Charges Act, 1900, (63 & 64 Vict. c. 26), s. 2 (2), extends this provision to Crown debts. "Judgment" includes any order or decree having the effect of a judgment, except an order made by a court having jurisdiction in bankruptcy in the exercise of that jurisdiction (Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), s. 4). As to registration of judgments, see title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 220, 221.

(*a*) See p. 362, *post*.

(*b*) Judgments Act, 1839 (2 & 3 Vict. c. 11), ss. 4, 7. For the principle on which the doctrine of *lis pendens* rests, see *Bellamy v. Sabine* (1857), 1 De G. & J. 566, C. A., *per* TURNER, L.J., at p. 584; and see also *Price v. Price* (1887), 35 Ch. D. 297; Dart, *Vendors and Purchasers*, 7th ed., p. 392. The *lis pendens* does not take effect until it is registered (*Hargrave v. Hargrave* (1857), 23 Beav. 484). On dismissing an action

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register at the Office of Land Registry (c) for the last five years, and it must be made against trustees (d) and mortgagees as well as against beneficial owners. An official search may be obtained (e). If the question involved in the litigation in respect of which the *lis pendens* is registered does not affect the title to the land, the *lis pendens* will be no bar to completion of the purchase (f).

608. Annuities or rentcharges granted on or after the 26th April, 1855, otherwise than by will or marriage settlement, for a life or lives or for any term of years or greater estate determinable on a life or lives, do not affect the lands charged therewith as against purchasers, mortgagees, or creditors, unless they are registered against the name of the person whose land is to be affected in the Office of Land Registry (g). Search should be made against owners of the land during the period of search (h). An official search can be obtained (i).

Annuities.

609. Unless rendered unnecessary by the known financial position of the vendor or his predecessors in title, search must be made in the registers of the Bankruptcy Court in order to ascertain that the title of the vendor or his predecessors has not been divested by bankruptcy proceedings or by a composition or scheme of arrangement under the sanction of the court (k). The search should in strictness extend over a period of twelve years, after which the title of the trustee would be extinguished (l), but in practice a five years' search is considered sufficient (m). No official search can be obtained.

Bankruptcy.

registered as a *lis pendens* the court can order the registration to be vacated (*Baxter v. Middleton*, [1898] 1 Ch. 313).

(c) Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 1; Order under *ibid.*, 3rd August, 1900 (Stat. R. & O. Rev., Vol. VII., Land (Registration), England, p. 124); and see note (l), p. 357, *ante*.

(d) When trustees are selling, search must be also made for any *lis pendens* registered under the Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 7; see titles SETTLEMENTS, p. 641, *post*; TRUSTS AND TRUSTEES.

(e) See p. 362, *post*.

(f) *Bull v. Hutchens* (1863), 32 Beav. 615.

(g) Judgments Act, 1855 (18 & 19 Vict. c. 15), ss. 12, 14; see also title RENTCHARGES AND ANNUITIES, Vol. XXIV., p. 478. But such life annuities, even though unregistered, are valid in equity against subsequent incumbrancers and purchasers who have notice of them (*Greaves v. Tofield* (1880), 14 Ch. D. 563, C. A.). Originally the registration was in the Court of Common Pleas, then at the Central Office of the Supreme Court, and now at the Land Registry (note (l), p. 357, *ante*). As to annuities granted before the 10th August, 1854, see Elphinstone and Clark on Searches, p. 107. Between the 10th August, 1854, when the previous Registration Act, stat. (1813) 53 Geo. 3, c. 141, was repealed, and the 26th April, 1855, there was no provision for registration.

(h) The period of search is in strictness since the last dealing for value, but it is commonly restricted to five years; see Dart, Vendors and Purchasers, 7th ed., 1226.

(i) See p. 362, *post*.

(k) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 54; Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3; title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 87, 327; see also note (g), p. 357, *ante*.

(l) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 51), s. 1; see title LIMITATION OF ACTIONS, Vol. XIX., p. 104.

(m) Elphinstone and Clark on Searches, p. 97; Dart, Vendors and Purchasers, 7th ed., p. 1225.

SECT. 4.

Searches
and
Inquiries.Deeds of
Arrangement.

610. Deeds of arrangement (*n*) affecting land may be registered at the Office of Land Registry (*o*) in the name of the debtor, either on the application of a trustee thereof or a creditor, and unless or until they are registered they are void as against purchasers for value of any land comprised in or affected by them (*p*). No re-registration is necessary. Hence the search must be made against each owner during the period of search from the time when he became entitled (*q*). An official search can be required (*r*).

Land charges.

611. Land charges which fall within the definition of that term in the Land Charges Registration and Searches Act, 1888 (*s*), and have been executed after the 1st January, 1889, are void as against a purchaser of the land charged therewith or of any interest in such land, unless and until such land charges have been registered in the register of land charges in the Office of Land Registry (*t*); and land charges existing at the above date are similarly void, unless they are registered within one year from their first assignment by act *inter vivos* occurring after that date (*a*). Search should accordingly be made at the Office of Land Registry (*b*) for such charges (*c*). An official search can be obtained (*d*).

(*n*) Under the Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), ss. 5, 8, deeds of arrangement are void unless they are registered in the Bills of Sale Department of the Central Office. As to what instruments are included under the term "deeds of arrangement," see *ibid.*, s. 4. Unless they are executed for the benefit of creditors generally, they do not come within the purview of the Act (*Re Saumarez, Ex parte Saluman*, [1907] 2 K. B. 170, C. A.; *Re Hobbins, Ex parte Official Receiver* (1899), 6 Mans. 212); see, generally, title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 329 *et seq.*

(*o*) See note (*l*), p. 357, *ante*.

(*p*) Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), ss. 7—9; see title BANKRUPTCY AND INSOLVENCY, Vol. XII., pp. 329, 330. The Act applies to deeds of arrangement whether made before or after its commencement (1st January, 1889), but only as regards purchasers after that date (*ibid.*, s. 9). Where the deed of arrangement was made before the Act it had to be registered within one year from the commencement of the Act (*ibid.*).

(*q*) The period of search is since the last dealing for value.

(*r*) See p. 362, *post*.

(*s*) "Land charge" means any "rent or annuity or principal moneys payable by instalments, or otherwise, with or without interest charged, otherwise than by deed, upon land, under the provisions of any Act of Parliament, for securing to any person either the moneys spent by him, or the costs, charges, and expenses incurred by him, under such Act, or the moneys advanced by him for repaying the moneys spent, or the costs, charges, and expenses incurred by another person under the authority of an Act of Parliament," but does not include a rate or scot (Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), s. 4); see titles AGRICULTURE, Vol. I., pp. 266, 267; LAND IMPROVEMENT, Vol. XVIII., pp. 296, 297, 301, 304, 305; LAND TAX, Vol. XVIII., pp. 324, 325; RENTCHARGES AND ANNUITIES, Vol. XXIV., p. 478, note (*g*); compare title LAND IMPROVEMENT, Vol. XVIII., pp. 297, 298; and see p. 361, *post*.

(*t*) Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), s. 12.

(*a*) *Ibid.*, s. 13.

(*b*) See note (*l*), p. 357, *ante*.

(*c*) The search should be from the commencement of the register on the 1st January, 1889, unless the abstract begins since that date, in which

(*d*) For note (*d*), see p. 361, *post*.

The charges requiring registration are improvement charges created at the instance of the owner (*e*); they do not include charges created under the Public Health Act, 1875 (*f*), or other charges created without reference to the wish of the owner (*g*). As to these a requisition should be made (*h*).

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612. On a sale of unregistered land situated in an area where registration of title is compulsory, search should be made at the Office of Land Registry, by an inspection of the Index Map and the list of pending applications for, and cautions against, first registration kept there, in order to ascertain that the title has not been nor is about to be registered, inasmuch as the effect of registration with an absolute title is to enable the first registered proprietor by a registered transfer for value to extinguish the previous title (*i*).

Registration
under Land
Transfer Acts.

613. On a sale of land situated in Middlesex or in Yorkshire, search should be made in the registries established for those counties (*k*). An official search can be obtained in the Middlesex registry at the Office of Land Registry, and in the Yorkshire registries (*l*).

Middlesex
and Yorkshire
registries.

614. On a sale of copyhold or customary freehold land, search should be made in the court rolls of the manor of which the land forms part in order to ascertain that all incumbrances and matters affecting the land are disclosed by the abstract (*m*).

Court rolls.

case it should be during the period of the abstract. In the case of freehold land, the search should be against the persons beneficially entitled in possession to freehold interests; in the case of copyhold, against the tenants on the rolls (Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), s. 10).

(*d*) See p. 362, *post*.

(*e*) Such as charges under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), extended by the Limited Owners Residences Act, 1870 (33 & 34 Vict. c. 56), and the Limited Owners Residences Act (1870) Amendment Act, 1871 (34 & 35 Vict. c. 84), to the erection, completion, and improvement of limited owners' residences; by the Limited Owners Reservoirs and Water Supply Further Facilities Act, 1877 (40 & 41 Vict. c. 31), to waterworks; and by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 30, to all improvements authorised by that Act; see, generally, title LAND IMPROVEMENT, Vol. XVIII., pp. 275 *et seq*.

(*f*) 37 & 38 Vict. c. 55, s. 257; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 225.

(*g*) *R. v. Vice-Registrar of Office of Land Registry* (1889), 24 Q. B. D. 178.

(*h*) See p. 355, *ante*.

(*i*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 30; see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 313. An official search of the Index Map may be obtained (Land Transfer Rules, 1903, r. 283).

(*k*) As to registration in these cases, see, as to Middlesex, titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 88; MORTGAGE, Vol. XXI., pp. 86, 334 *et seq*.; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 301 *et seq*.; and see *Re Weir, Hollingworth v. Willing* (1888), 58 L. T. 792; an order for foreclosure absolute is not a "judgment" within the Middlesex Registry Act, 1708 (7 Anne, c. 20), so as to require registration (*Burrows v. Holley* (1887), 35 Ch. D. 123). As to Yorkshire, see titles MORTGAGE, Vol. XXI., pp. 87, 336 *et seq*.; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 304 *et seq*.

(*l*) See p. 362, *post*. In the case of lands subject to the Bedford Level Act, 1663 (15 Car. 2, c. 17), search should be made in the register kept under that Act; see p. 443, *post*.

(*m*) As to entries on the court rolls, see title COPYHOLDS, Vol. VIII.,

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**Searches
and
Inquiries.**Disentailing
deed.Acknowledg-
ments.Official
searches :
Land
Registry ;
Central officeMiddlesex
and York-
shire ;

Bankruptcy.

Registered
land.

615. If the vendor is tenant in tail or if the title is deduced from or through any predecessor as tenant in tail, search should be made in the Enrolment Department of the Central Office for disentailing assurances.(n). An official search can be obtained (a).

616. When title is made through a married woman not entitled either by statute or otherwise to her separate use, and there is ground for suspecting that she has made a conveyance of it which is not disclosed by the abstract, search should be made at the Central Office in the index of certificates of acknowledgments of deeds by married women (b). An official search can be obtained (a).

617. Official searches may be requisitioned to be made at the Office of Land Registry for writs and orders affecting land, *lis pendens*, life annuities, deeds of arrangement and land charges (c); and in the Central Office for disentailing assurances and certificates of acknowledgments of deeds by married women (d). The official certificate of the result of the search is, according to its tenor, conclusive, affirmatively or negatively as the case may be, in favour of a purchaser as against persons interested under or in respect of the matters or documents registered, and also protects solicitors, and trustees, executors, and other persons in a fiduciary position, whether acting through solicitors or not, against any loss that may arise from any error in the certificate (e). The right of making private searches is not affected by reason of the power to requisition an official search (f).

Official searches can also be obtained in the Middlesex and Yorkshire registries, but while the official certificate protects solicitors, trustees, and other persons in a fiduciary position, it is not conclusive in favour of purchasers (g).

An official search in bankruptcy cannot be obtained.

618. On a purchase of land registered with absolute title under

pp. 14 *et seq.* As to a condition precluding the purchaser from requiring entry of satisfaction of a conditional surrender by way of mortgage, see *Hopkinson v. Chamberlain*, [1908] 1 Ch. 853; and see note (a), p. 322, *ante*.

(n) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 13; R. S. C., Ord. 61, r. 9. As to disentailing assurances, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 255 *et seq.*

(a) See the text, *infra*.

(b) See Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 84; Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 7 (7); and see title HUSBAND AND WIFE, Vol. XVI., p. 384. As to the transfer of the non-separate property of married women, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 298 *et seq.*

(c) Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), s. 17; Land Charges Rules, 1889, rr. 4—9 (Stat. R. & O. Rev., Vol. VII., Land (Registration), England, p. 119).

(d) Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 2; R. S. C., Ord. 61, r. 23.

(e) Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 2 (3), (8)—(10); and see Williams, Vendor and Purchaser, 2nd ed., pp 604 *et seq.*

(f) Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 2 (7).

(g) Land Registry (Middlesex Deeds) Rules, 1892, rr. 10—14 (Stat. R. & O. Rev., Vol. VII., Land (Registration), England, p. 128) (*ibid.*, rr. 10, 11, have been altered by the Land Registry (Middlesex Deeds) Rules, 1913 ([1913] W. N., Part II., 154), so as to allow a single search in respect of the transaction instead of separate searches against various names); Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), ss. 20, 21, 23; and see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 306.

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the Land Transfer Acts, 1875 and 1897 (*h*), no search need be made except in the registers kept under those Acts, since the transfer to the purchaser vests the land in him free from all incumbrances except such as are entered on the register (*i*). If only a possessory title has been registered, the same searches are made as in the case of unregistered land (*k*). To inspect the register, an authority should be obtained from the vendor, and provision is made for an official search the certificate of which protects solicitors and persons acting in a fiduciary capacity (*l*).

619. Where the land sold is in the occupation of a tenant, the purchaser should make inquiry of the tenant (1) as to the terms of his tenancy, and (2) as to the person to whom he pays his rent (*m*). Inquiries as to tenancy.

SECT. 5.—Acceptance of Title by Purchaser.

620. A purchaser is deemed to have accepted the title when the last outstanding requisition has been answered to his satisfaction by the vendor: acceptance need not be notified to the vendor (*n*). Acceptance of title.

621. If the purchaser fails to send in requisitions or objections within the time fixed by the contract for that purpose (*o*), or if, though not satisfied with the vendor's replies to any requisitions or objections, he nevertheless does not insist upon satisfactory answers, he may be held to have waived his right to make requisitions or objections, or to insist on those which he has made, and he is then deemed to have accepted the title (*p*); and, if the purchaser enters into possession, or pays the whole or part of the purchase-money, or does other acts which a purchaser is not bound to do until a good title has been made, he may be deemed to have waived objections to the title (*q*); but this is not the case Failure to send requisitions.

Waiver of objections.

Acts not amounting to waiver.

(*h*) 38 & 39 Vict. c. 87: 60 & 61 Vict. c. 65.

(*i*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 30; see title **REAL PROPERTY AND CHATTELS REAL**, Vol. XXIV., p. 318.

(*k*) See Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 32.

(*l*) Land Transfer Rules, 1903, rr. 283, 284, 289, 293 (Stat. R. & O. Rev., Vol. VII., Land (Registration), England, pp. 80, 81).

(*m*) See *Hunt v. Luck*, [1901] 1 Ch. 45; affirmed, [1902] 1 Ch. 428, C. A.; *Clements v. Conroy*, [1911] 2 L. R. 500, C. A.; p. 453, *post*; and see title **EQUITY**, Vol. XIII., p. 87, note (*k*); *Re Derby (Earl) and Fergusson's Contract*, [1912] 1 Ch. 479. As to outstanding claims by a tenant, see *George v. Thomas* (1904), 52 W. R. 416.

(*n*) *Re Highett and Bird's Contract*, [1902] 2 Ch. 214; affirmed, [1903] 1 Ch. 287, C. A.

(*o*) See p. 323, *ante*. As to discovery of a mistake in the abstract after acceptance of the title, see *M'Culloch v. Gregory* (1858), 1 K. & J. 286; *Pegg v. Wisden* (1852), 16 Beav. 239.

(*p*) *Burroughs v. Oakley* (1819), 3 Swan. 159, 171; and see p. 413, *post*.

(*q*) *Fludyer v. Cocker* (1805), 12 Ves. 25, 27; *Fleetwood v. Green* (1819), 15 Ves. 594; *Binks v. Rokeby (Lord)* (1818), 2 Swan. 222; *Hall v. Lover* (1838), 3 Y. & C. (ex.) 191; *Haydon v. Bell* (1838), 1 Beav. 337; *Sibbald v. Lowrie* (1853), 18 Jur. 141; *Wallis v. Woodyear* (1855), 2 Jur. (n. s.) 179; *Deller v. Simonds* (1859), 5 Jur. (n. s.) 997, 1002; compare as to letting the property, *Re Barrington, Ex parte Sidebotham* (1834), 1 Mont. & A. 655, 663; *Simpson v. Sadd* (1854), 4 De G. M. & G. 665. Delivery of the keys of a house is equivalent to giving possession (*Guest v. Homfray* (1801), 5 Ves. 8). But these acts do not give rise to such implication where they are accompanied by continued negotiations as to the title (*Kitchbull v. Grueber* (1815), 1 Madd. 163, 170; affirmed (1817), 3 Mer. 124; *Burroughs v. Oakley, supra*).

SECT. 4.
Acceptance
of title by
Purchaser.

Extent of
acceptance.

if the purchaser has entered into possession under an express condition in the contract enabling him to do so before completion (*r*) or where the vendor has consented to his doing so without prejudice to his right to require a good title; nor where the purchaser was already in possession at the time of the sale, unless he has remained for a long time without raising objections as to title (*s*).

622. In whatever manner an acceptance of title has taken place, it is an acceptance only of the title shown by the abstract, and does not preclude the purchaser from taking objections, not precluded by the contract, by reason of defects not disclosed by the abstract which he subsequently discovers (*t*). Such acceptance does not operate as a waiver of the purchaser's right to have the abstract verified (*u*), nor does it preclude objections to matters which are matters of conveyance rather than of title, such as the existence of charges upon the property which are removable by the vendor (*v*). If a purchaser is willing to accept the title upon a specific objection being removed, and to waive all other objections, such waiver is conditional only on the removal of that specific objection (*x*).

Part V.—Position of Parties to Contract Pending Completion.

SECT. 1.—Rights and Duties with Respect to the Property.

SUB-SECT. 1.—Effect of the Contract on Ownership.

Effect of
agreement
for sale.

623. An agreement for the sale of land, of which specific performance can be ordered, operates as an alienation by the vendor of his beneficial proprietary interest in the property (*a*). As from the date of the contract, his beneficial interest is transferred from the land to the purchase-money, and if his interest was of the nature of real estate, it is, as from that date, converted into personalty (*b*). As regards the land, he becomes constructively a trustee for the purchaser (*c*), with the right as trustee to be

(*r*) See *Bolton v. London School Board* (1878), 7 Ch. D. 766. The ordinary provision as to possession on the day fixed for completion has not the same effect (*Bown v. Stenson* (1857), 24 Beav. 631). The title should not be accepted till the deeds and facts appearing on the abstract are proved by proper evidence; see *Newall v. Smith* (1820), 1 Jac. & W. 263.

(*s*) *Stevens v. Guppy* (1828), 3 Russ. 171; see *Vancouver v. Bliss* (1805), 11 Ves. 458, 464; *Dixon v. Astley* (1816), 1 Mer. 133.

(*t*) *Blacklow v. Laws* (1842), 2 Hare, 40, 47.

(*u*) *Southby v. Hutt* (1837), 2 My. & Cr. 207; *Turquand v. Rhodes* (1868), 37 L. J. (CH.) 830.

(*v*) *Re Gloag and Miller's Contract* (1883), 23 Ch. D. 320. As to objections as to conveyance, see p. 356, *ante*.

(*x*) *Lesturgeon v. Martin* (1834), 3 My. & K. 255.

(*a*) *Wall v. Bright* (1820), 1 Jac. & W. 404, *per* PLUMER, M.R., at p. 500; *Rose v. Watson* (1864), 10 H. L. Cas. 672, 678. As to a sale under the court, see p. 317, *ante*; Dart, *Vendors and Purchasers*, 7th ed., p. 1169.

(*b*) *Lawes v. Bennett* (1785), 1 Cox, Eq. Cas. 167, 171; *A.-G. v. Brunning* (1860), 8 H. L. Cas. 243, 265. As to the exercise of options, see titles EQUITY, Vol. XIII., p. 110; LANDLORD AND TENANT, Vol. XVIII., p. 392; compare *Kelly v. Enderton*, [1913] A. C. 191, P. C.

(*c*) *Wall v. Bright, supra*; *Shaw v. Foster* (1872), L. R. 5 H. L. 321, 333.

indemnified by the purchaser against the liabilities of the trust property (d); and the purchaser becomes beneficial owner, with the right to dispose of the property by sale, mortgage, or otherwise, and to devise it by will (e), while on his death intestate it devolves on his legal personal representatives, who hold it, subject to the requirements of administration, if the interest purchased is real estate, for the heir-at-law, and if personal estate, for the next of kin (f).

SECT. 1.
Rights and
Duties with
Respect
to the
Property.

But the vendor is not a mere trustee. Until payment he retains a personal and substantial interest in the property, a right to protect that interest, and an active right to assert it if anything in derogation of it should be done, and the relation of trustee and *cestui que trust* is subject to the paramount right of the trustee to protect his own interest as vendor of the property (g). There is, in fact, only a qualified trusteeship until the price is paid and nothing remains to be done by either party except the execution of the deed of conveyance; when, however, that stage has been reached, the full relation of trustee and *cestui que trust* thereby established relates back to the formation of the contract (h).

Interest of
vendor.

The trusteeship of the vendor and the beneficial ownership of the purchaser are, however, conditional upon the performance of the contract (i). If the contract is rescinded, or if, from want of title on the part of the vendor (k) or otherwise, the contract is such that specific performance could not be obtained, and the defect is not waived by the purchaser, the position is the same as regards the interests in the property as though the relation of vendor and purchaser had never arisen. The vendor is treated as if he had

Failure of
contract.

Before the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), it would have passed under a devise by the vendor of trust estates (*Lysaght v. Edwards* (1876), 2 Ch. D. 499), and it still does so if the property is copyhold to which the vendor has been admitted; see Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 88; title COPYHOLDS, Vol. VIII., pp. 88, 109; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 234.

(d) *Dodson v. Downey*, [1901] 2 Ch. 620, 623.

(e) *Paine v. Meller* (1801), 6 Ves. 349, 352; *Shaw v. Foster* (1872), L. R. 5 II. L. 321, 333, 338.

(f) *Paine v. Meller*, *supra*; *Broome v. Monck* (1805), 10 Ves. 597, 620. It passes under a general devise of lands or real estate (*Broome v. Monck*, *supra*; see *Greenhill v. Greenhill* (1712), Prec. Ch. 320; *Petter v. Petter* (1750), 1 Ves. Sen. 437; *Capel v. Girdler* (1804), 9 Ves. 509, 510; *Marston v. Roe d. Fox* (1838), 8 Ad. & El. 14, 63, Ex. Ch.; Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), ss. 1, 26). As to the devolution of real estate, see Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Part I.; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 238.

(g) *Shaw v. Foster*, *supra*, at p. 338; see *Lysaght v. Edwards*, *supra*, per JESSEL, M.R., at pp. 506, 507; *Ecclesiastical Commissioners v. Pinney*, [1899] 2 Ch. 729, 735.

(h) *Rayner v. Preston* (1881), 18 Ch. D. 1, C. A., per JAMES, L.J., at p. 13; see *Wall v. Bright* (1820), 1 Jac. & W. 494, per PLUMER, M.R., at p. 503; *Shaw v. Foster*, *supra*, per Lord HATHERLEY, at p. 356; *Ridout v. Fowler*, [1904] 1 Ch. 658, 661. The vendor is not a trustee within the meaning of the Trustee Act, 1893 (56 & 57 Vict. c. 53), at any rate until the purchase-money is paid (*Re Carponter* (1854), Kay, 418; *Re Colling, a Person of Unsound Mind* (1886), 32 Ch. D. 333, C. A.; and compare *Re Pagani (a Person of Unsound Mind)*, *Re Pagani's Trust*, [1892] 1 Ch. 236, C. A.; *Re Beaufort's Will* (1898), 43 Sol. Jo. 12).

(i) See *Rayner v. Preston*, *supra*.

(k) *Broome v. Monck*, *supra*; *Lysaght v. Edwards*, *supra*, at p. 507; *Re Thomas*, *Thomas v. Howell* (1886), 34 Ch. D. 166.

SECT. 1.
Rights and
Duties with
Respect
to the
Property.

Rights
against third
parties.

Vendor's and
purchaser's
rights and
liabilities.

never been trustee, and the purchaser as if he had never been equitable owner (*l*).

Until the contract is completed by conveyance of the legal estate to the purchaser, the vendor continues to be the proper person to enforce any rights in respect of the property which depend on the possession of the legal estate; but, subject to ultimate completion, the purchaser's interest ranks as against third parties like any other equitable interest, and it is subject to equities prior in date and has priority over subsequent equitable and legal interests, except a legal interest taken for value and without notice of the contract (*m*). The purchaser, however, is not, in general, entitled to enforce his interest against third parties until he has completed his title by conveyance (*n*); but, if he pays his purchase-money and takes a conveyance of the legal estate without notice of an existing equity, he gains priority over it (*o*).

624. Pending the completion of the contract, the rights of the vendor consist generally in (1) the right to retain possession until the purchase-money has been paid (*p*); (2) a lien on the property for the amount of the unpaid purchase-money (*q*); (3) a

(*l*) *Cornwall v. Henson*, [1899] 2 Ch. 710; reversed on another ground, [1900] 2 Ch. 298, C. A.; *Plews v. Samuel*, [1904] 1 Ch. 464; *Ridout v. Fowler*, [1904] 1 Ch. 658, 662; affirmed on other grounds, [1904] 2 Ch. 93, C. A. As to the position of the vendor as trustee while it is still uncertain whether the contract will be performed, see *Wall v. Bright* (1820), 1 Jac. & W. 494, 501.

(*m*) See title EQUIT, Vol. XIII., p. 79.

(*n*) See *Tasker v. Small* (1837), 3 My. & Cr. 63, per Lord COTTENHAM, L.C., at pp. 70, 71: "This rule"—namely, that, by a contract of purchase, the purchaser becomes in equity the owner of the property—"applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect, the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property." But perhaps this statement is too wide. A purchaser of an equity of redemption before completion may be entitled to redeem, though not to call for a conveyance from the mortgagee (*Pearce v. Morris* (1869), 5 Ch. App. 227); and it seems that the material point as regards third parties is not whether or not there has been a conveyance to the purchaser, but whether he has an immediate right to call for a conveyance; and he has such right when he has accepted the vendor's title and has paid or tendered the purchase-money. The completion of the contract is then no longer in doubt and the purchaser's equitable title has ceased to be in suspense: in such a case, if he is purchasing an equitable interest, conveyance seems not to be essential to vest in him the full equitable title.

(*o*) Where the conveyance and the payment of the purchase-money are not simultaneous, the material date as regards notice is the date of payment; if the purchaser takes an assignment without notice of an existing equity, and afterwards pays with notice, he is not protected (*Tildesley v. Lodge* (1857), 3 Sm. & G. 543); if he pays without notice and takes a conveyance with notice, it would seem that he is protected; see title EQUIT, Vol. XIII., p. 76, note (*q*); but see, *contra*, *Wigg v. Wigg* (1739), 1 Atk. 382. If the purchaser has notice of an equitable mortgage, he must ascertain for himself that it has been discharged. His acquisition of the legal estate is no protection if a receipt tendered by the vendor is a forgery (*Jared v. Clements*, [1903] 1 Ch. 428, C. A.).

(*p*) See p. 368, *post*.

(*q*) See *Lysaght v. Edwards* (1876), 2 Ch. D. 499, 506; title LIEN, Vol. XIX., pp. 16, 31; LIMITATION OF ACTIONS, Vol. XIX., p. 87.

right until the proper time for completion to receive the rents and profits for his own benefit (*r*); and (4) a right after the proper time for completion to interest at the rate of 4 per cent. per annum on the purchase-money till payment (*s*); but he must preserve the property from deterioration and must pay the current outgoings (*t*). The property, however, is at the risk of the purchaser (*a*), and from the proper time for completion the purchaser is entitled to be credited with rents and profits, and is liable to be charged with outgoings (*b*). If he has paid the purchase-money, or any part of it, and the purchase ultimately goes off without his default, he is entitled to a lien on the land for the amount which he has paid (*c*).

SECT. 1.
Rights and
Duties with
Respect
to the
Property.

SUB-SECT. 2.—*Possession.*

625. In regard to the completion of the contract three dates are material—the date, if any, fixed by the contract for completion; the date when the vendor shows and verifies such a title as the purchaser can require; and the date of actual completion. In the ordinary course, completion consists in the purchaser paying the purchase-money, and the vendor at the same time executing a conveyance and delivering possession to the purchaser; when these incidents are separated, the date of payment of the purchase-money may be regarded as the date of completion (*d*).

Date for
completion :

The completion of the contract is conditional on the vendor making out his title (*e*). Until the vendor makes out his title, the purchaser is not safe in paying the purchase-money and taking possession (*f*). Hence the date when the vendor makes out his title is the earliest date at which completion should take place, and it is the proper date for completion (*g*) if no date is fixed by the contract (*h*).

when no
date fixed :

If the contract fixes a date for completion (*i*), this is the proper date; and if this stipulation is of the essence of the contract (*k*), the

when date
fixed.

(*r*) See p. 371, *post*.

(*s*) See p. 374, *post*.

(*t*) See p. 347, *post*.

(*a*) See p. 369, *post*.

(*b*) See p. 374, *post*.

(*c*) As to the purchaser's lien, see, generally, title LIEN, Vol. XIX., pp. 16 *et seq.*, 27, 30 *et seq.*; and see *Hick v. Phillips* (1721), Prec. Ch. 575. The lien extends to the costs of investigating title (*Kitten v. Hewett*, [1904] W. N. 21; *Re Furneaux and Aird's Contract*, [1906] W. N. 215).

(*d*) See *Lewis v. South Wales Rail. Co.* (1852), 10 Hare, 113; see also note (*o*), p. 366, *ante*.

(*e*) *Doe d. Gray v. Stanion* (1836), 1 M. & W. 695, 701; see p. 341, *ante*.

(*f*) *Binks v. Rokeby (Lord)* (1818), 2 Swan. 222, 225; *Wilson v. Clapham* (1819), 1 Jac. & W. 36, 37. As to the usual condition relating to this, see p. 334, *ante*.

(*g*) As to completion generally, see pp. 435 *et seq.*, *post*.

(*h*) See *Williams, Vendor and Purchaser*, 2nd ed., p. 26. Where no date is fixed completion must be within a reasonable time (see *Simpson v. Hughes* (1897), 66 L. J. (CH.) 334, C. A.; *Nosotti v. Auerbach* (1898), 79 L. T. 413), but as soon as the vendor has made out his title the purchaser should be ready to complete; see also p. 333, *ante*. As to possession upon a sale under the court, where no date is fixed, see *Dart, Vendors and Purchasers*, 7th ed., p. 1179.

(*i*) See p. 332, *ante*.

(*k*) That is, if it is made so by the express terms of the contract, the nature of the property, or the surrounding circumstances (*Roberts v. Berry*

SECT. 1.
Rights and
Duties with
Respect
to the
Property.

Security for
 purchase-
 money.

Time for
 transfer of
 possession.

vendor must make out his title by that date; otherwise the purchaser cannot be required to complete either then or subsequently (*l*). If it is not of the essence of the contract, and the title has not then been made out, the purchaser can be required to complete as soon as the title has been made out. But in case of undue delay either party may fix a reasonable time for completion, and this time then becomes of the essence of the contract (*m*).

The right of the vendor to receive the purchase-money is secured, first, by a lien upon the property (*n*), and, secondly, by his right, in the absence of express stipulation as to the time of delivering possession, to retain possession until the purchase-money is paid (*o*).

The contract may contain express provision showing that possession is to be given at a fixed date, although the sale is not then otherwise completed (*p*). Under such a provision the vendor may be required to give possession before the purchase-money is paid (*q*), or the purchaser to take possession before the vendor has made out his title (*r*). Otherwise either party can insist on delivery of possession being treated as part of the completion of the contract, and, in particular, the vendor is entitled to the actual possession of the property or the actual receipt of rents and profits until the whole of the purchase-money has been paid (*s*).

SUB-SECT. 3.—Maintenance of the Property.

Liability.

626. Inasmuch as the vendor, while remaining in possession, is in a sense a trustee for the purchaser (*t*), he is bound to take reasonable care that the property does not become deteriorated between the date of the contract and the time when possession is delivered to the purchaser (*a*); and, although the delay in completion is due to the purchaser, this duty remains binding on the vendor so long as he treats his possession as a security for the purchase-money (*b*).

Subject to this duty on the part of the vendor, the property is,

(1853), 3 De G. M. & G. 284, C. A.; *Tilley v. Thomas* (1867), 3 Ch. App. 61, 67; see note (*f*), p. 332, *ante*.

(*l*) *Tilley v. Thomas*, *supra*. As to the effect of non-completion on the day fixed on the liability to pay interest, see pp. 333, *ante*, 374 *et seq.*, *post*.

(*m*) See p. 332, *ante*.

(*n*) See title LIEN, Vol. XIX., pp. 15 *et seq.*, 27.

(*o*) *Lysaght v. Edwards* (1876), 2 Ch. D. 499, 506.

(*p*) *Tilley v. Thomas*, *supra*, at p. 66.

(*q*) *Gedye v. Montrose (Duke)* (1858), 26 Beav. 45.

(*r*) See *Tilley v. Thomas*, *supra*, at p. 66. But ordinarily, where possession is to be given at a specified date, this means that the vendor shall then have shown such a title that possession can safely be taken (*ibid.*); and see *Boehm v. Wood* (1820), 1 Jac. & W. 419.

(*s*) *Acland v. Cumming, Gaisford v. Acland* (1816), 2 Madd. 28; see, further, as to the payment of interest on failure to complete on the day fixed for completion, p. 333, *ante*; and, as to completion generally, pp. 435 *et seq.*, *post*. As to what constitutes possession, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 214 *et seq.*; compare title PERSONAL PROPERTY, Vol. XXII., pp. 391 *et seq.*

(*t*) See p. 364, *ante*.

(*a*) *Clarke v. Ramuz*, [1891] 2 Q. B. 458, 462, C. A. The measure of liability is the same as in the case of any other trustee (*Phillips v. Silvester* (1872), 8 Ch. App. 173, 177; *Egmont (Earl) v. Smith, Smith v. Egmont (Earl)* (1877), 6 Ch. D. 469, 475; *Royal Bristol Permanent Building Society v. Bomash* (1887), 35 Ch. D. 390, 398); and see title TRUSTS AND TRUSTEES.

(*b*) *Phillips v. Silvester*, *supra*; and see the text, *supra*.

from the date of the contract, at the purchaser's risk as regards loss or deterioration (c), and he is entitled to any accretion to its value (d).

627. The accidental destruction of the property by fire or otherwise is a loss which falls upon the purchaser (e); and, where the vendor has an insurance existing on the property, the contract does not, in the absence of special stipulation (f), confer on the purchaser any direct interest in the policy moneys, so as to entitle him to recover from the vendor, or to deduct from the purchase-money, the amount received by the vendor under the policy (g). Nor is the vendor bound to maintain the policy, or to inform the purchaser that it has lapsed (h), unless the contract expressly or impliedly imposes such liability; where, for instance, it provides that the purchaser shall have the benefit of the insurance (i). But on a sale of leaseholds the omission of the vendor to observe a covenant to insure is a defect in his title (k), and under a condition that the vendor shall pay outgoing up to the day fixed for completion, he must, if under a covenant to insure, bear insurance premiums (l).

SECT. 1.
Rights and
Duties with
Respect
to the
Property.

Loss by fire.
Insurance.

(c) *White v. Nutts* (1702), 1 P. Wms. 61; *Paine v. Meller* (1801), 6 Ves. 349, 352; *Harford v. Purrier* (1816), 1 Madd. 532, 539; *Acland v. Cuming*, *Gaisford v. Acland* (1816), 2 Madd. 28, 32. Where an accident to the premises brings with it legal obligation, which must be immediately satisfied, where, for instance, the premises fall down and injure adjoining property, the case falls within the same principle, and the expense must be borne by the purchaser (*Robertson v. Skelton* (1849), 12 Beav. 260).

(d) Thus, if an estate for lives is sold, and a life drops before completion, the loss falls on the purchaser; but, if it is the reversion that is sold, the benefit belongs to the purchaser (*White v. Nutts*, *supra*; *Ex parte Manning* (1727), 2 P. Wms. 410). "If after the contract the estate is improved in the interval, or if the value be lessened by the failure of tenants or otherwise, and no fault on either side, the vendee has the benefit or sustains the loss" (*Harford v. Purrier*, *supra*, at p. 539). Similarly, the purchaser has the benefit of any unexpected diminution in the value of the consideration, where, for instance, part of the consideration is an annuity for the life of the vendor, and the vendor dies immediately after the contract (*Mortimer v. Capper* (1782), 1 Bro. C. C. 156). See also Dart, Vendors and Purchasers, 7th ed., p. 293.

(e) *Paine v. Meller*, *supra*; *Harford v. Purrier*, *supra*; *Poole v. Adams* (1864), 12 W. R. 683. See *Cass v. Rudele* (1692), 2 Vern. 280; 1 Bro. C. C. 157, n. It is not essential that the vendor shall have made out his title before the loss occurs; it is sufficient if he makes it out afterwards within the time which he can properly claim for that purpose; and, if the purchaser has waived objections before the loss, he is bound to complete (*Paine v. Meller*, *supra*, at p. 352); see pp. 339, 340, *ante*.

(f) See p. 340, *ante*. Under a policy in the usual form, the consent of the office is necessary for an assignment of the benefit of the policy (*Lynch v. Dalzell* (1730), 4 Bro. Parl. Cas. 431; *Sadlers' Co. v. Rudcock* (1743), 2 Atk. 554); and see note (m), p. 340, *ante*.

(g) *Poole v. Adams*, *supra*; *Rayner v. Preston* (1881), 18 Ch. D. 1, C. A. But since the contract of insurance is a contract of indemnity, the vendor cannot profit by it so as to be paid twice over; and if he receives both the policy moneys and the purchase-money, he must refund the policy moneys to the office (*Castellain v. Preston* (1883), 11 Q. B. D. 380, C. A.); see title INSURANCE, Vol. XVII., pp. 520, 521.

(h) *Paine v. Meller*, *supra*; *Dowson v. Solomon* (1850), 1 Drew. & Sm. 1, 12.

(i) See *Poole v. Adams*, *supra*; note (i), p. 339, *ante*: the purchaser may effect his own insurance; see p. 340, *ante*.

(k) *Palmer v. Goren* (1856), 4 W. R. 688.

(l) *Dowson v. Solomon*, *supra*; compare *Newman v. Maxwell* (1899), 80 L. T. 681.

SECT. 1.
Rights and
Duties with
Respect
to the
Property.

Application
of insurance
money.

Repairs and
preservation.

Fund liable.

Improve-
ments.

Although the purchaser has no direct interest in the vendor's policy of insurance, yet he is a person "interested in or entitled unto" the property within the Fires Prevention (Metropolis) Act, 1774 (*m*), and he can require the insurance company to lay out the policy moneys in rebuilding or reinstating the premises, provided that, at the time of his request, they have not already paid the moneys to the vendor (*n*).

628. In pursuance of his duty to preserve the property from deterioration, the vendor must act in regard to it as a provident beneficial owner (*o*). He must keep it in repair so far as this can be done by ordinary expenditure (*p*); he must prevent its being damaged by trespassers (*q*); and, in the case of agricultural land, he must maintain it in a proper state of management and cultivation (*r*), and if the tenancy determines before completion he must relet the land on a yearly tenancy, so as to keep it full (*s*). If damage is caused by the vendor's failure to perform his duty in this respect, the purchaser is entitled to have the amount of the loss deducted from the purchase-money (*t*); or, if he has completed the purchase, he can recover the amount by way of damages (*a*).

The maintenance of the property is a current expense which should be paid out of the rents and profits, and it is borne by the vendor so long as he is entitled to receive the rents and profits for his own benefit (*b*). After that time it must be borne by the purchaser (*c*).

Where an extraordinary outlay in permanent repairs is necessary for the preservation of the property, the vendor is, apparently, entitled to be allowed as against the purchaser the amount so expended (*d*). But the vendor's duty in respect of the property

(*m*) 14 Geo. 3, c. 78.

(*n*) *Ibid.*, s. 83; *Sinnott v. Bowden*, [1912] 2 Ch. 414. This decision appears to have removed any doubt which formerly existed both as to the Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3, c. 78), being available outside the Metropolis, and as to a purchaser having an interest entitling him to the benefit of the statutory provisions; see *Dart, Vendors and Purchasers*, 7th ed., p. 193; *Williams, Vendor and Purchaser*, 2nd ed., p. 510; title *INSURANCE*, Vol. XVII., p. 542.

(*o*) *Wilson v. Clapham* (1819), 1 Jac. & W. 36, 38; *Sherwin v. Shakspear* (1854), 5 De G. M. & G. 517, 537, C. A.; compare *Krehl v. Park* (1874), 31 L. T. 325, C. A.

(*p*) *Ferguson v. Tadman* (1827), 1 Sim. 530; *Regent's Canal Co. v. Ware* (1857), 23 Beav. 575, 588; *Royal Bristol Permanent Building Society v. Bomash* (1887), 35 Ch. D. 390, 397.

(*q*) *Royal Bristol Permanent Building Society v. Bomash*, *supra*, at p. 398; *Clarke v. Ramuz*, [1891] 2 Q. B. 456, C. A.

(*r*) *Foster v. Deacon* (1818), 3 Madd. 394; *Lord v. Stephens* (1835), 1 Y. & C. (EX.) 222.

(*s*) *Hoggart v. Scott* (1830), Tambl. 500; *Phillips v. Silvester* (1872), 8 Ch. App. 173; *Egmont (Earl) v. Smith, Smith v. Egmont (Earl)* (1877), 6 Ch. D. 469, 475; *Raffety v. Schofield*, [1897] 1 Ch. 937, 944; see also note (*d*), p. 373, *post*.

(*t*) For form of order directing such deduction, see 3 Seton, *Judgments and Orders*, 7th ed., p. 2174.

(*a*) *Clarke v. Rumuz*, *supra*.

(*b*) As to the right to rents and profits, see p. 371, *post*.

(*c*) The rule in this respect is the same as with regard to outgoings generally; see p. 374, *post*.

(*d*) See *Sherwin v. Shakspear*, *supra*, at p. 532; *Phillips v. Silvester*

does not extend to making improvements; for instance, in expending money in building, or in obtaining a renewal of a lease; and he cannot recover from the purchaser money so spent (*e*).

Where the property is leasehold, the vendor must perform all the covenants of the lease up to the time when the purchaser should take possession (*f*).

SECT. 1.
Rights and
Duties with
Respect
to the
Property.

Leaseholds.

SUB-SECT. 4.—*Rents and Profits.*

629. Although the vendor is entitled to possession or to receipt of rents and profits until payment of the purchase-money, his beneficial title does not extend beyond the time when completion ought to take place; that is, if no day is fixed for completion, the time when he first makes out his title, or, if a day is fixed for completion, then the day so fixed (*g*). Until the proper time for completion, he occupies the property or receives the rents and profits for his own benefit (*h*); after that time they belong to the purchaser (*i*), and the vendor receives them until actual completion as trustee for the purchaser and must account to him accordingly (*k*). If the vendor is in occupation, he may be charged with an occupation rent (*l*).

Right to
possession or
rents and
profits.

For the purpose of the above rule the rents and profits of the land include the rents of the land, and also all the profits accruing from the use or working of the land in the state in which it exists at the date of the contract. Thus, if it is agricultural land, the vendor, as long as he is entitled to the profits, can get in and dispose of the crops in a due course of husbandry and retain the proceeds for his own benefit (*m*). If the land has an open mine or quarry upon it, the vendor, if the mine is let, takes the rents and royalties accruing due during the same period, notwithstanding that they represent part of the substance of the land, and, if it is not let, but is being worked, he takes, apparently, for his own

What are
rents and
profits.

(1872), 8 Ch. App. 173, 176; *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295, 302, C. A.

(*e*) *Monro v. Taylor* (1850), 8 Hare, 51, 60; compare *Clare Hall (Master, etc.) v. Harding* (1848), 6 Hare, 273, 296.

(*f*) See *Dowson v. Solomon* (1859), 1 Drew. & Sm. 1, 10, 11; *Re Highett and Bird's Contract*, [1902] 2 Ch. 214, 215.

(*g*) As to the date for completion, see pp. 367, 368. *ante*.

(*h*) *Garrick v. Camden (Earl)* (1790), 2 Cox, Eq. Cas. 231; *Uddon v. Tite* (1858), 1 Giff. 395; and on his death before the day for completion the intermediate rents go to his heir or devisee (*Lumsden v. Fraser* (1841), 12 Sim. 263; see *Watts v. Watts* (1873), L. R. 17 Eq. 217), but subject to the rights of his personal representatives; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 296.

(*i*) *Paine v. Meller* (1801), 6 Ves. 349, 352; *Plews v. Samuel*, [1904] 1 Ch. 464, 468. "Equity considers that as done which is contracted to be done, and, in the absence of something special to control the rule, gives the profits of the thing sold to the purchaser from the time fixed for the completion of the contract, and interest on the purchase-money to the vendor from the same time" (*Monro v. Taylor*, *supra*, at p. 70; affirmed (1852), 3 Mac. & G. 713; *De Visme v. De Visme* (1849), 1 Mac. & G. 336, 346).

(*k*) *M'Namara v. Williams* (1801), 6 Ves. 143; *Wilson v. Clapham* (1819), 1 Jac. & W. 36; *Plews v. Samuel*, *supra*. The vendor is not entitled to retain rents received by him after the date for completion in satisfaction of rents accrued due before that date (*Plews v. Samuel*, *supra*).

(*l*) See p. 373, *post*.

(*m*) See *Webster v. Donaldson* (1865), 34 Beav. 451.

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to the
Property.

benefit the proceeds of working (*n*). On the sale of a manor the vendor takes fines accruing due on admittances before the proper day for completion (*o*).

The vendor is not, however, entitled to take under the guise of profits what is in fact part of the inheritance, and the purchaser may obtain an injunction to prevent him doing anything likely to destroy or depreciate the property sold or to prevent the property being assured to the purchaser (*p*); though, where the vendor disputes the existence of an enforceable contract for sale, such an injunction will not be granted unless the balance of convenience requires it (*q*).

Rights of
purchaser in
possession.

Saving for
vendor's lien.

630. If the purchaser is let into possession before the proper time for completion, he is, unless the contract otherwise provides, entitled to the rents and profits from the time of taking possession (*r*); and he is entitled to do all acts ordinarily incident to an estate in possession, and to gather crops or cut underwood in a proper course of husbandry, in the same way as a tenant for life (*s*). But inasmuch as the vendor is still entitled to a lien on the estate for his purchase-money (*t*), the purchaser may not do any acts which tend to depreciate the vendor's security for his money, such as cutting timber or otherwise committing waste (*u*); and, except where the

(*n*) *Leppington v. Freeman* (1891), 40 W. R. 348, C. A. In this respect the vendor and purchaser appear to be in the same position as lessor and lessee, or tenant for life impeachable for waste and remainderman (*ibid.*); see Williams, Vendor and Purchaser, 2nd ed., p. 517; compare *Nelson v. Bridges* (1839), 2 Beav. 239 (where a purchaser who had been let into possession of quarries, and was wrongfully evicted by the vendor, was entitled to the proceeds of the quarries from the time of his first possession); and see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 519.

(*o*) *Cuddon v. Tite* (1858), 1 Giff. 395. It is the same, apparently, where the event causing the change of tenant is prior to the day for completion, though the admittance is after that day (*Garrick v. Camden (Earl)* (1790), 2 Cox, Eq. Cas. 231); but since the fine is not due till admittance this case seems to be exceptional; see Williams, Vendor and Purchaser, 2nd ed., p. 517, note (e).

(*p*) *Spiller v. Spiller* (1819), 3 Swan. 556; explained in *Hadley v. London Bank of Scotland, Ltd.* (1865), 3 De G. J. & Sm. 63, C. A., per TURNER, L.J., at pp. 70, 71; see also *Echlf v. Baldwin* (1809), 16 Ves. 267; *Curtis v. Buckingham (Marquis)* (1814), 3 Ves. & B. 168; *Shrewsbury and Chester Rail Co. v. Shrewsbury and Birmingham Rail. Co.* (1851), 15 Jur. 548, 550; *London and County Banking Co. v. Lewis* (1882), 21 Ch. D. 490, C. A. As to the destruction of ornamental timber, see *Magennis v. Fallon* (1829), 2 Mol. 561, 590.

(*q*) *Turner v. Wight* (1841), 4 Beav. 40; *Hadley v. London Bank of Scotland, Ltd.*, *supra*; see also title INJUNCTION, Vol. XVII., p. 249.

(*r*) *Powell v. Martyr* (1803), 8 Ves. 146, 148; *Fludyer v. Cocker* (1805), 12 Ves. 25; *A.-G. v. Christ-Church (Dean and Chapter)* (1842), 13 Sim. 214; *Birch v. Joy* (1852), 3 H. L. Cas. 565, 591; *Ballard v. Shutt* (1880), 15 Ch. D. 122 (where the purchaser was held liable for interest from the date when he exercised certain acts of ownership over the land, although under the circumstances there were no rents and profits received by him); *Leppington v. Freeman* (1891), 40 W. R. 348, C. A.; *Fletcher v. Lancashire and Yorkshire Railway*, [1902] 1 Ch. 901, 908.

(*s*) *Burroughs v. Oakley* (1819), 3 Swan. 159, 170; compare *Pool v. Shergold* (1786), 1 Cox, Eq. Cas. 273; see p. 370, *ante*; title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 175 *et seq.*

(*t*) See *Smith v. Hibbard* (1789), 2 Dick. 730; *Ecclesiastical Commissioners v. Pinney*, [1899] 2 Ch. 729, 735; p. 366, *ante*.

(*u*) *Crockford v. Alexander* (1808), 15 Ves. 138, per Lord ELDON, L.C.

amount of depreciation threatened leaves the vendor with an adequate security for the amount unpaid, he may obtain an injunction to restrain such acts (*b*).

631. Under the ordinary judgment requiring a vendor to account for rents and profits from the proper time for completion he is chargeable only with rents and profits actually received by him or by other persons for his use (*c*); but, if it is proved that rents and profits have not been received owing to neglect or improper conduct on his part, the order is that he shall account for rents and profits received or which, but for his wilful neglect or default, might have been received by him (*d*).

If it is alleged that he has been in occupation of the property, a direction may be given that he shall, if such appears to be the fact, be charged with an occupation rent (*e*).

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Rights and Duties with Respect to the Property.

What rents and profits to be taken into account.

Occupation rent.

at p. 138. "The vendor is in the situation of an equitable mortgagee"; see title INJUNCTION, Vol. XVII., p. 272. As to waste, see titles LANDLORD AND TENANT, Vol. XVIII., p. 496; REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 175, 176; SETTLEMENTS, pp. 600 *et seq.*, *post*.

(*b*) See *Humphreys v. Harrison* (1820), 1 Jac. & W. 581; *Hippesley v. Spencer* (1820), 5 Madd. 422; *King v. Smith* (1843), 2 Hare, 239; these cases were all between mortgagee and mortgagor in possession. See also title MORTGAGE, Vol. XXI., pp. 158, 160.

(*c*) See form of judgment in 3 Seton, Judgments and Orders, 7th ed., p. 2170. This is the usual form in cases of account of rents and profits except as against a mortgagee in possession, who is always charged on the footing of wilful default (see title MORTGAGE, Vol. XXI., p. 199), and a trustee against whom a breach of trust is proved (see title TRUSTS AND TRUSTEES; *Howell v. Howell* (1837), 2 My. & Cr. 478, 486). An unpaid vendor, since he has a lien on the land, is in a position analogous to that of a mortgagee in possession, but he is not, merely on that ground, chargeable on the footing of wilful default (*Sherwin v. Shakspear* (1854), 5 De G. M. & G. 517, 531, 532, C. A.; *Regent's Canal Co. v. Ware* (1857), 23 Beav. 575, 588). In *Phillips v. Silvester* (1872), 8 Ch. App. 173, which seems to lay down a contrary rule, there was in fact wilful default; see, further, title EQUITY, Vol. XIII., p. 99, note (*h*). A vendor of a farm is charged with the proceeds of crops actually realised, subject to deduction of expenses of realisation, but under the ordinary judgment he is not allowed losses incurred in farming (*Bennett v. Stone*, [1902] 1 Ch. 226; affirmed, [1903] 1 Ch. 509, C. A.).

(*d*) See 3 Seton, Judgments and Orders, 7th ed., p. 2173. This is done, for instance, where the vendor has, by his neglect, allowed the rents to fall into arrear (*Wilson v. Clapham* (1819), 1 Jac. & W. 36; see *Acland v. Cuming*, *Gaisford v. Acland* (1816), 2 Madd. 28, where the account was specifically directed to arrears of rent), or, apparently, where he omits, without the purchaser's assent, to relet on a yearly tenancy agricultural land which falls vacant before completion; see *Egmont (Earl) v. Smith*, *Smith v. Egmont (Earl)* (1877), 6 Ch. D. 469. But the fact that the vendor, in common with other landowners in the neighbourhood, has reduced the rents, there being nothing to show that this was not done in the ordinary course of management by a prudent owner, is not a ground for an order to account on the footing of wilful default (*Sherwin v. Shakspear*, *supra*); nor is it wilful default to allow a tenant to continue at a low rent, when the purchaser has not required him to be turned out (*Crosse v. Beaufort (Duke)* (1851), 5 De G. & Sm. 7).

(*e*) See 3 Seton, Judgments and Orders, 7th ed., p. 2178; *Dyer v. Hargrave*, *Hargrave v. Dyer* (1805), 10 Ves. 505, 511. In order to charge the vendor with an occupation rent the judgment must be specially framed; see *Bennett v. Stone*, *supra*, where it was stated ([1902] 1 Ch. at p. 237) that an occupation rent might be charged under a decree on the footing of wilful default; but this term is not appropriate to the case of a vendor continuing

SECT. 1.
Rights and
Duties with
Respect
to the
Property.

Outgoings.

Vendor's
right to
interest.

When time
for com-
pletion not
fixed.

An occupation rent usually is allowed if the possession has been beneficial to the vendor (*f*), but not if the vendor has against his own wish been compelled to remain in possession of business premises (*g*).

SUB-SECT. 5.—Outgoings.

632. In a formal contract it is usually provided that the vendor shall pay all the outgoings until the day fixed for completion, and that for this purpose all necessary apportionments shall be made (*h*). In the absence of any such stipulation the vendor must, for the period during which he is entitled to take the rents and profits for his own benefit—that is, till the proper date for completion—bear all outgoings (*i*), and as to such as are current at the end of the period and are legally apportionable he bears the part attributable to the period.

SUB-SECT. 6.—Interest.

633. As a general rule, as soon as the vendor ceases to be entitled to receive the rents and profits for his own benefit, he becomes entitled to interest on the unpaid purchase-money until actual payment (*k*). The right to interest may be either an implied or an express term of the contract (*l*).

634. Where the contract is silent as to the time for completion and payment of interest, interest is payable at the rate of 4 per cent. per annum (*m*) from the time when the vendor has made out his title so that the purchaser could safely take possession (*n*). When the title is proved in an action for specific performance, interest runs from the date of the master's certificate that a good title has been made out (*o*). In the case of purchases under the Lands Clauses

in occupation, and the judgment should specially refer to that circumstance; see *Sherwin v. Shakspear* (1854), 5 De G. M. & G. 517, 539, C. A.; *Krehl v. Park* (1874), 31 L. T. 325, C. A.

(*f*) *Sherwin v. Shakspear*, *supra*; *Metropolitan Rail. Co. v. Defries* (1877), 2 Q. B. D. 189, 387, C. A.; *Halkett v. Dudley (Earl)*, [1907] 1 Ch. 590.

(*g*) *Leggott v. Metropolitan Rail. Co.* (1870), 5 Ch. App. 716.

(*h*) As to "outgoings" and apportionment, see pp. 335, 336, *ante*.

(*i*) *Carrodus v. Sharp* (1855), 20 Beav. 56.

(*k*) See *Burton v. Todd*, *Todd v. Gee* (1818), 1 Swan. 255, 260; *Leggott v. Metropolitan Rail. Co.*, *supra*, at p. 719; but not on the deposit (*Bridges v. Robinson* (1811), 3 Mer. 694). The purchaser, however, pays interest on purchase-money which he retains to meet incumbrances (*Hughes v. Kearney* (1803), 1 Sch. & Lef. 132, 134).

(*l*) For the case where the right to interest is an express term of the contract or conditions of sale, see pp. 333, 334, *ante*.

(*m*) *Calcraft v. Roebuck* (1790), 1 Ves. 221, 226; *Halkett v. Dudley (Earl)*, [1907] 1 Ch. 590, 606; see *Re Davy*, *Hollingsworth v. Davy*, [1908] 1 Ch. 61, C. A.; and, as to allowance of interest in equity, see *Hyde v. Price*, *Hart v. Craddock* (1837), 8 Sim. 578, 593; *A.-G. v. Ludlow Corporation* (1849), 1 H. & Tw. 216, 218; and see title MONEY AND MONEY-LENDING, Vol. XXI., pp. 42, 43.

(*n*) *Carrodus v. Sharp*, *supra*, at p. 58; *Wells v. Maxwell* (No. 2) (1863), 32 Beav. 550; *Re Pigott and Great Western Rail. Co.* (1881), 18 Ch. D. 146, 150; *Re Keeble and Stillwell's Fletton Brick Co.* (1898), 78 L. T. 383, 384; see *Binks v. Rokeby (Lord)* (1818), 2 Swan. 222, 226. As to the payment of interest where the contract or conditions expressly provide for it, see pp. 333, 334, *ante*.

(*o*) *Halkett v. Dudley (Earl)*, *supra*; see *Pincke v. Curteis* (1793), 4 Bro. C. C. 333, n. (Belt's ed.); *Enraght v. Fitzgerald* (1839), 2 I. Eq. R. 87.

Consolidation Act, 1845 (*p*), the same rule applies, and interest is payable from the date when the vendor makes out his title (*q*), but not before the purchase-money has been ascertained (*r*).

If the purchaser is let into possession, either immediately at the date of the contract or subsequently, interest begins to run on the unpaid purchase-money from the time of possession, unless otherwise agreed (*s*). If he is already in possession as tenant, it runs from the date of the contract, and he is from that date entitled to the rents and profits (*a*).

SECT. 1.
Rights and
Duties with
Respect
to the
Property.

635. When the contract fixes a time for completion, but is silent as to payment of interest, interest at the rate of 4 per cent. per annum (*b*) is as a general rule payable as from the date so fixed (*c*); but, if the delay in completion is caused by the vendor, he is not allowed to profit by his own default, and, if the interest exceeds the rents and profits, he takes the rents and profits, and interest does not run until he is ready to give a good title to the purchaser, or until the purchaser may first safely take possession (*d*). If the contract, though silent as to interest, gives the vendor the rents

When time
for com-
pletion fixed.

(*p*) 8 & 9 Vict. c. 18; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 12 *et seq.*

(*q*) *Re Pigott and Great Western Rail. Co.* (1881), 18 Ch. D. 146; and see the cases cited in title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 61, note (*o*).

(*r*) *Calling v. Great Northern Rail. Co.* (1869), 18 W. R. 121, 122. In *Re Eccleshill Local Board* (1879), 13 Ch. D. 365, it was held that interest ran so soon as the purchase price was ascertained; but, though this is the earliest possible date, interest does not necessarily then commence; see *Re Pigott and Great Western Rail. Co.*, *supra*, at p. 154.

(*s*) *Fludyer v. Cocker* (1805), 12 Ves. 25; *Powell v. Martyr* (1803), 8 Ves. 146, 148; see *Portman v. Hill* (1839), 3 Jur. 356; see also *Beresford v. Clarke*, [1908] 2 I. R. 317; *Glasgow and South Western Rail. Co. v. Greenock Port and Harbour Trustees*, [1909] W. N. 152, H. L.

(*a*) *Townley v. Bedwell* (1808), 14 Ves. 591, 597; *Daniels v. Davison* (1809), 16 Ves. 240, 253; compare *Mills v. Haywood* (1877), 6 Ch. D. 196, C. A. The contract for purchase does not effect a surrender of the tenancy, since completion is conditional on a good title being made (see title LANDLORD AND TENANT, Vol. XVIII., p. 550), although in equity the tenant has the ordinary rights of a purchaser (*Daniels v. Davison*, *supra*; see *Raffety v. Schofield*, [1897] 1 Ch. 937). But a mere tenancy at will is determined by the contract (*Daniels v. Davison*, *supra*, at p. 252). A purchaser who obtains possession before completion without the consent of the vendor, and without any provision in the contract authorising him to do so, is a mere trespasser (*Crockford v. Alexander* (1808), 15 Ves. 138).

(*b*) See note (*m*), p. 374, *ante*.

(*c*) *Calcraft v. Roebuck* (1790), 1 Ves. 221, 226; *Acland v. Cuming*, *Gaisford v. Acland* (1816), 2 Madd. 28; *Esdaile v. Stephenson* (1822), 1 Sim. & St. 122, 123; *Grove v. Bastard* (1851), 1 De G. M. & G. 69, 79; *Collard v. Roe* (1859), 4 De G. & J. 525, C. A.; *Calling v. Great Northern Rail. Co.* (1869), 21 L. T. 17, 19; see *Monro v. Taylor* (1852), 3 Mac. & G. 713, 725.

(*d*) *Esdaile v. Stephenson*, *supra*; *Paton v. Rogers* (1822), Madd. & G. 256, 257; *Jones v. Mudd* (1827), 4 Russ. 118; see *Pincke v. Curteis* (1793), 4 Bro. C. C. 329. Under the earlier practice interest was charged more strictly against the purchaser; see *Burton v. Todd*, *Todd v. Gee* (1818), 1 Swan. 255, 260; *Wilson v. Clapham* (1819), 1 Jac. & W. 36, 38. Where under a stipulation in the contract a vendor elects to take interest in lieu of rents, he is not at liberty, as against the purchaser, to allocate any part of such rents to arrears of rents due to himself from tenants either at the date of the contract or subsequently before the day fixed for completion (*Plews v. Samuel* [1904] 1 Ch. 464).

SECT. 1.
Rights and
Duties with
Respect
to the
Property.

Appropriation
to meet
purchase-
money.

and profits until a specified date, any implied right to interest during the same period is excluded (e).

636. Where there is no express agreement for payment of interest (f), the purchaser, if he is not responsible for the delay, can avoid payment of interest by appropriating money to meet the purchase-money and giving notice of the appropriation to the vendor (g). The money should either be placed on deposit (h), or otherwise kept available at the purchaser's bank (i). This does not interfere with the right of the purchaser to the rents and profits (k), but any interest which is actually made by the money belongs to the vendor (l).

SECT. 2.—Assignment by Either Party before Completion.

SUB-SECT. 1.—Assignment of the Property.

Disposition
by purchaser.

637. Upon the making of an enforceable contract for sale the purchaser becomes the owner of the land in equity (a), and can dispose of his equitable interest to a third party (b).

Disposition
by vendor.

But the vendor, since he becomes a trustee for the purchaser (a), is not entitled to dispose of the property to any person other than the purchaser. Where there is a clear contract for sale, any such intended disposition entitles the purchaser to obtain an injunction to prevent the disposition from being carried into effect (c), and if it has been carried into effect the purchaser can forthwith sue the vendor for damages on the ground that he has incapacitated himself from performing the contract (d).

(e) See *Brooke v. Champenowne* (1837), 4 Cl. & Fin. 589, 611, II. L.

(f) *Powell v. Mortyr* (1803), 8 Ves. 146; *Dyson v. Hornby, Ex parte Markwell* (1851), 4 De G. & Sm. 481, 484; *Regent's Canal Co. v. Ware* (1857), 23 Beav. 575, 587; compare *Howland v. Norris* (1784), 1 Cox, Eq. Cas. 59 (where the purchaser was allowed compensation in respect of the time down to which the purchase-money was unproductive); see also *Bennett v. Stone*, [1903] 1 Ch. 509, 524, C. A. The effect of the appropriation is only to stop interest; the money remains at the risk of the purchaser (*Roberts v. Massey* (1807), 13 Ves. 561). But if the vendor is in default interest does not run (see pp. 333, 375, *ante*), so that appropriation seems only to be necessary where there is delay for which neither vendor nor purchaser are to blame. As to appropriation where the payment of interest is provided for, see p. 334, *ante*.

(g) Notice to the vendor is essential (*Powell v. Mortyr* (1803), 8 Ves. 146).

(h) See *Kershaw v. Kershaw* (1869), L. R. 9 Eq. 56.

(i) *Dyson v. Hornby, Ex parte Markwell* (1851), 4 De G. & Sm. 481, 484. But interest does not stop as to any part of the sum which is in fact used for the purpose of maintaining the purchaser's usual credit balance (*Winter v. Blades* (1825), 2 Sim. & St. 393).

(k) *Regent's Canal Co. v. Ware, supra*, at p. 587.

(l) *Dyson v. Hornby, Ex parte Markwell, supra*, at p. 485; *Kershaw v. Kershaw, supra*; *Re Gold's and Norton's Contract* (1885), 33 W. R. 333.

(a) See p. 364, *ante*.

(b) *Paine v. Meller* (1801), 6 Ves. 349, 352; see p. 365, *ante*.

(c) *Hadley v. London Bank of Scotland, Ltd.* (1865), 3 De G. J. & Sm. 63, C. A., confining *Spiller v. Spiller* (1819), 3 Swan. 556 (where Lord ELDON, L.C., stated that in general the purchaser was not entitled to an injunction), to cases of 'doubt as to the contract being enforceable; see *Echiff v. Baldwin* (1809), 16 Ves. 267; *Curtis v. Buckingham (Marquis)* (1813), 3 Ves. & B. 160; title INJUNCTION, Vol. XVII., p. 249.

(d) *Main's Case* (1596), 5 Co. Rep. 20 b; *Lovelock v. Franklyn* (1846), 8 Q. B. 371; see *Synge v. Synge*, [1894] 1 Q. B. 466, C. A., *per KAY, L.J.*

638. Where the alienee from the vendor gets in the legal estate or acquires the best right to call for it (*c*), and can avail himself of the plea that he is a purchaser for value without notice of the contract, his title then prevails over the equitable interest of the purchaser (*f*), and the purchaser's only remedy is in damages. But where the alienee does not take for valuable consideration (*g*), or acquires only an equitable interest (*h*), or takes with notice of the purchaser's interest (*i*), he takes subject to the purchaser's prior equity, and may be made a defendant in the purchaser's suit for specific performance and be ordered to convey to the plaintiff (*k*). The alienee is protected against the original purchaser if he pays or performs the consideration before he has notice of the prior contract; and, if he has paid the purchase-money before notice, he can protect himself by getting in the legal estate after notice (*l*). If, however, when he receives notice, he has paid part only of the purchase-money, he cannot safely pay the balance, even though the vendor conveyed the property to him before he had notice (*m*); but he is entitled to a charge on the property for the amount already paid (*n*).

SECT. 2.
Assignment
by Either
Party
before
Completion.

Position of
vendor's
alienee.

SUB-SECT. 2.—Assignment of the Contract.

639. Either party may dispose of the benefit of the contract in favour of another person (*o*), and such disposition may be either by way of absolute assignment of the whole contract or of partial assignment, where, for instance, the contract is charged in favour

Transfer of
benefit.

at p. 471. A dictum of MOULTON, L.J., in *Re Taylor, Ex parte Norvell*, [1910] 1 K. B. 562, C. A., at p. 573, affirming the vendor's right of transfer, seems erroneous if taken literally; see also titles CONTRACT, Vol. VII., pp. 438 *et seq.*; DAMAGES, Vol. X., p. 313.

(*e*) *Willoughby v. Willoughby* (1756), 1 Term Rep. 763, 768, 773, 774; see title EQUITY, Vol. XIII., p. 81.

(*f*) *Mansell v. Mansell* (1732), 2 P. Wms. 678, 681; *Synge v. Synge*, [1894] 1 Q. B. 466, 471, C. A.; see title EQUITY, Vol. XIII., p. 81.

(*g*) *Mansell v. Mansell*, *supra*, at p. 681; *Willoughby v. Willoughby*, *supra*, at pp. 767, 768.

(*h*) *Willoughby v. Willoughby*, *supra*, at pp. 773, 774.

(*i*) *Ibid.*, at pp. 767, 771; *Mansell v. Mansell*, *supra*, at p. 681; *Clemow v. Geach* (1870), 6 Ch. App. 147.

(*k*) *Taylor v. Stibbert* (1794), 2 Ves. 437, 439; *Potter v. Sanders* (1846), 6 Hare, 1; see also titles EQUITY, Vol. XIII., p. 78; SPECIFIC PERFORMANCE.

(*l*) See *Taylor v. Russell*, [1892] A. C. 244; *Bailey v. Barnes*, [1894] 1 Ch. 25, 36, 37, C. A.; title EQUITY, Vol. XIII., pp. 82, 83. The protection of the legal estate is not allowed in respect of land subject to the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54); see title MORTGAGE, Vol. XXI., p. 337; and, as to land registered under the Land Transfer Acts, 1875 and 1897 (38 & 39 Vict. c. 87; 60 & 61 Vict. c. 85), see title MORTGAGE, Vol. XXI., p. 338.

(*m*) *Jones v. Stanley* (1731), 2 Eq. Cas. Abr. 685, pl. 9; and, as to the material date in regard to the receipt of notice, see note (*o*), p. 366, *ante*; title EQUITY, Vol. XIII., p. 76, note (*q*); compare Sugden, Vendors and Purchasers, 14th ed., p. 789.

(*n*) This would be in the nature of a purchaser's lien; see p. 367, *ante*.

(*o*) *Wood v. Griffiths* (1818), 1 Swan. 43, 55, 56; *Shaw v. Foster* (1872), L. R. 5 H. L. 321, 349, 350; *Tolhurst v. Associated Portland Cement Manufacturers* (1900), [1903] A. C. 414, 420; *Dawson v. Great Northern and City Railway*, [1905] 1 K. B. 260, 270, C. A.; but the right to make a contract by acceptance of an offer is not assignable; see *Meynell v. Surtees* (1855), 3 Sm. & G. 101, 116, 117.

SECT. 2.
Assignment
by Either
Party
before
Completion.

Action by
 assignee.

of another (*p*); or it may be an assignment of the contract as to part of the property; and the assignee may enforce the contract against the other party to it in an action for specific performance, provided that he assumes the position of his assignor and either fulfils or secures the fulfilment of all his liabilities under the contract (*q*).

The assignee may sue in his own name if the other party has recognised the assignment so as to effect a novation of the contract (*r*), or if the assignment is of the entire contract (*s*), and fulfils certain statutory requirements (*t*), but otherwise he must either sue in the name of the assignor or make the assignor a party (*a*); and the assignor remains liable to be sued on the contract unless by novation the assignee has been substituted in his place (*b*). Apart from the statutory notice (*c*), notice of assignment should be given to the other party to the contract, so that he may change his course of action accordingly (*d*).

SECT. 3.—Change in Position of Parties.

SUB-SECT. 1.—Death.

Contract not
 avoided by
 death.

640. A valid and enforceable contract for the sale of land is not avoided by the death of either or both parties before completion, but remains enforceable both at law and in equity by and against the representatives of the party so dying (*e*).

(*p*) See *Browne v. London Necropolis and National Mausoleum Co.* (1857), 6 W. R. 188; *Durham Brothers v. Robertson*, [1898] 1 Q. B. 765, C. A.

(*q*) *Dyer v. Pulteney* (1740), Barn. (CH.) 160, 169, 170; *Shaw v. Foster* (1872), L. R. 5 H. L. 321, per Lord O'HAGAN, at pp. 350, 354; *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608, 616; see *Orabtree v. Poole* (1871), L. R. 12 Eq. 13.

(*r*) As to novation, see title CONTRACT, Vol. VII., pp. 505 *et seq.*

(*s*) See *Forster v. Baker*, [1910] 2 K. B. 636, C. A.; title EQUITY, Vol. XIII., p. 103.

(*t*) See title CHOSSES IN ACTION, Vol. IV., pp. 367 *et seq.*; *Torkington v. Magee*, [1902] 2 K. B. 427; reversed, [1903] 1 K. B. 644, C. A., on the ground that no cause of action existed, as neither assignor nor assignee was ready and willing to carry out the contract in accordance with its terms.

(*a*) *Nelthorpe v. Holgate* (1844), 1 Coll. 203, 217; *Durham Brothers v. Robertson*, [1898] 1 Q. B. 765, C. A., per CHITTY, L.J., at pp. 769, 770. But this may not be necessary if there are no equities subsisting between the original parties to the contract and no suggestion of any reason for making the original contractor a party (*Manchester Brewery Co. v. Coombs*, *supra*, at p. 617).

(*b*) *Tolhurst v. Associated Portland Cement Manufacturers* (1900), *Associated Portland Cement Manufacturers* (1900) v. *Tolhurst*, [1902] 2 K. B. 660, C. A., per COLLINS, M.R., at p. 668; see *Holden v. Hayn and Bacon* (1815), 1 Mer. 47; *Chadwick v. Maden* (1851), 9 Hare, 188; *Fenwick v. Bulman* (1869), L. R. 9 Eq. 165, 168. As to assignment of contracts, see, generally, title CONTRACT, Vol. VII., pp. 494 *et seq.*; and, as to parties to an action for specific performance, see title SPECIFIC PERFORMANCE.

(*c*) I.e., under the Judicature Act, 1873 (36 & 37 Vict. c. 66); see title CHOSSES IN ACTION, Vol. IV., pp. 367 *et seq.*

(*d*) *Shaw v. Foster*, *supra*, per Lord CAIRNS, at p. 339.

(*e*) Sugden, Vendors and Purchasers, 14th ed., p. 177; see *Roberts v. Marchant* (1843), 1 Ph. 370; *Hoddel v. Pugh* (1864), 33 Beav. 489; title CONTRACT, Vol. VII., p. 503. As to the vesting of the vendor's interest on his death, and the form in which it passes, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 239; *A.-G. v. Day* (1749), 1 Ves. Sen. 218, per Lord HARDWICKE, L.C., at p. 220. The power of the personal representatives to convey under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 4 (1), applies to the sale of the fee simple

In proceedings by or against the vendor's representatives for specific performance of the contract, the heir or devisee of the vendor was formerly a necessary party, since he was interested in the question whether the contract was enforceable or not (*f*); and he is still a proper party if, under the circumstances, he has a substantial interest in the litigation; but in the first instance only the representatives should be parties, and the heir or devisee should, if necessary, be joined by order of the court (*g*).

Where a vendor who is selling in exercise of a power dies before completing his contract, the purchaser may enforce the contract against those who become entitled on the vendor's death (*h*).

641. Where a vendor who is tenant in tail agrees to sell the fee simple, and dies before barring the entail, the purchaser's only remedy is an action against the executors to recover his deposit with interest and expenses (*i*).

642. If the land is copyhold, and the vendor was not tenant on the court rolls, but had an equitable interest only, his interest passes on his death to his personal representatives (*k*), and the contract for sale can be enforced by and against them (*l*).

If the vendor was tenant on the court rolls, his interest passes

or other freehold interest descendible to heirs general. This includes a base fee, and an estate *pur autre vie*, but not an estate tail; see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 178 *et seq.*, 241 *et seq.*, 262 *et seq.* The personal representatives can also carry out the sale under their general powers over the real and leasehold estate of the deceased: see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 230, 238. In exercising the power under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), it is sufficient if the executors to whom probate is granted join in the sale (Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 12; overriding *Re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 238). As to the case of a vendor who has received the purchase-money before his death, see *Re Pagani (a Person of Unsound Mind)*, *Re Pagani's Trust*, [1892] 1 Ch. 236, C. A.; note (*h*), p. 365, *ante*; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 239, note (*f*).

(*f*) *Roberts v. Marchant* (1843), 1 Ph. 370.

(*g*) See R. S. C., Ord. 16, r. 8; p. 381, *post*; titles PRACTICE AND PROCEDURE, Vol. XXIII., pp. 104 *et seq.*; SPECIFIC PERFORMANCE; see also p. 408, *post*.

(*h*) *Shannon v. Bradstreet* (1803), 1 Sch. & Lef. 52; *Morlock v. Buller* (1804), 10 Ves. 292, 315; and see *Coventry (Lady) v. Coventry (Lord)* (1724), 1 Stra. 596; Sugden on Powers, 8th ed., p. 552. As to powers generally, see title POWERS, Vol. XXIII., pp. 1 *et seq.*; as to defective execution being helped by the court, see *ibid.*, pp. 54 *et seq.*

(*i*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 40, 47; see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 255. As to the power of a tenant for life under the Settled Land Acts to bind his successors by a contract for sale of the settled land, or to complete such a contract entered into by his predecessor, see title SETTLEMENTS, pp. 664, 665, 667, *post*.

(*k*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (4); *Re Somerville and Turner's Contract*, [1903] 2 Ch. 583; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 238.

(*l*) The statutory power to convey under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 4 (1), does not arise in such a case, since that provision only applies to certain freehold interests; but the personal representatives can complete the contract by conveyance to the purchaser under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65); see note (*e*), p. 378, *ante*.

SECT. 8. Change in Position of Parties.

Parties to
action on
contract.

Vendor selling
in exercise of
a power.

Vendor
tenant in tail.

Copyholds.

SECT. 3.
Change in
Position of
Parties.

to his devisee or customary heir, according as the vendor dies testate or intestate in respect thereof (*m*). Thus, where the land was included in a general or specific devise in the vendor's will, it passes to the devisee subject to the contract (*n*); and, where the title has been accepted in the vendor's lifetime, so that he has become an absolute, and not merely a provisional, trustee for the purchaser, the property passes under a devise of his trust estates (*o*).

Devolution
on death of
purchaser.

643. On the death of the purchaser before completion, his equitable interest in the property vests in the first instance in his legal personal representatives for the purposes of administration (*p*); but, subject thereto, the right to the property devolves, if the interest purchased is freehold or copyhold of inheritance, on the devisee or the general or customary heir-at-law, and if it is leasehold, on the legatee or next of kin, according as it is disposed of by the purchaser's will or not (*q*). But the persons beneficially entitled to the land take it subject to any lien which the vendor may have thereon for the purchase price (*r*), and a specific devisee of the purchaser's interest in the land cannot, except where the purchaser by his will or by deed or other document has signified a contrary intention (*s*), claim to have the purchase-money paid out of any other part of the deceased purchaser's estate (*t*). This liability of the land to bear the purchase-money does not, however, deprive the vendor of his right to enforce payment of the purchase-money out of the purchaser's personal estate or otherwise (*u*).

Parties to
action.

644. On the death of the purchaser the contract continues to be binding as between the vendor and the personal representatives of

(*m*) See title COPYHOLDS, Vol. VIII., pp. 88, 89.

(*n*) *Wall v. Bright* (1820), 1 Jac. & W. 494; and compare *Knollys v. Shepherd* (1819), cited by PLUMER, M.R., *ibid.*, at p. 499.

(*o*) *Lysaght v. Edwards* (1876), 2 Ch. D. 499; see note (*c*), p. 364, *ante*.

(*p*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 238. Since the purchaser's interest can, before conveyance, only be equitable, it devolves on the personal representatives, even though the contract is for the purchase of a legal estate in copyholds; see *ibid.*

(*q*) See, further, title DESCENT AND DISTRIBUTION, Vol. XI., pp. 4 *et seq.*

(*r*) See Real Estate Charges Acts, 1867 (30 & 31 Vict. c. 69), s. 2, and 1877 (40 & 41 Vict. c. 34), s. 1; title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 239.

(*s*) As to what amounts to signifying a contrary intention, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 289.

(*t*) *Re Cockcroft, Broadbent v. Groves* (1883), 24 Ch. D. 94; and see *Re Fraser, Lowther v. Fraser*, [1904] 1 Ch. 111, 726, C. A. (where the interest agreed to be purchased was a rentcharge issuing out of leasehold land, i.e., a chattel real passing to the next of kin). Formerly the specific devisee could claim to have the purchase-money paid out of the purchaser's personal estate, provided there was an enforceable contract existing at the purchaser's death; see *Broome v. Monk* (1805), 10 Ves. 597, 612; *Buckmaster v. Harrop* (1807), 13 Ves. 456, 472; *Savage v. Carroll* (1810), 1 Ball & B. 265, 281; *Collier v. Jenkins* (1831), You. 295; *Garnett v. Acton* (1860), 28 Beav. 333. If there was such a contract, and the vendor rescinded it after the purchaser's death under a power reserved to him in the contract, the heir-at-law was entitled to receive the amount of the purchase-money out of the purchaser's personal estate (*Hudson v. Cook* (1872), L. R. 13 Eq. 417).

(*u*) Real Estate Charges Act, 1854 (17 & 18 Vict. c. 113), s. 1.

SECT. 3.
Change in
Position of
Parties.

the purchaser, and an action by the vendor upon the contract, whether at law to recover damages for breach of contract or in equity for specific performance, should be brought against the personal representatives. Before the 1st January, 1898 (*v*), the heir or devisee was also a necessary party, since he was interested in the title being properly investigated (*w*), but since that date he should only be made a party by special order (*x*). An action against the vendor for damages for breach of the contract should be brought by the personal representatives, and until the interest of the purchaser has vested in the heir or other beneficiary by conveyance from the personal representatives or by assent, the personal representatives are proper plaintiffs in an action for specific performance. Moreover, the equitable interest of the beneficial owner supports an action by him, and in such action the legal personal representatives should be parties, since they are liable for the purchase-money (*a*).

SUB-SECT. 2.—*Bankruptcy.*

645. Upon the vendor under an uncompleted contract being adjudicated bankrupt, the legal estate in the property agreed to be sold vests, as a rule, in his trustee in bankruptcy, subject, nevertheless, to the equitable title of the purchaser to have the estate conveyed to him on payment of the purchase price (*b*); and this is so if the purchase-money is still unpaid, so that the vendor has a lien on the land for the amount (*c*), or if he has otherwise any beneficial interest in the property or the possibility of a beneficial interest (*d*). Bankruptcy of vendor.

Where, however, the title had been accepted and the whole purchase-money paid to the vendor before the commencement of the bankruptcy (*e*), so that the vendor was then a mere trustee for the purchaser with no beneficial interest in the property sold, the

(*v*) *I.e.*, the commencement of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65) (*ibid.*, s. 25).

(*w*) *Townsend v. Champenowne* (1821), 9 Price, 130.

(*x*) See R. S. C., Ord. 16, r. 8; p. 379, *ante*. The personal representatives are trustees of the equitable interest under the contract for the heir or other person beneficially entitled (Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (1)), and seem, therefore, to represent him for the purpose of an action for specific performance.

(*a*) Though the ultimate liability is on the land. As to the parties to the action, see, further, title SPECIFIC PERFORMANCE.

(*b*) *Re Pooley, Ex parte Rabbidge* (1878), 8 Ch. D. 367, 370, C. A.; *Re Scheibler, Ex parte Holthausen* (1874), 9 Ch. App. 722, *per* JAMES, L.J., at p. 726. As to the effect of bankruptcy upon a contract, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 162, 288. As to its effect upon a power of sale exercisable with the consent of the bankrupt, see *ibid.*, p. 145, note (*p*); and, as to its effect upon the powers of a tenant for life under the Settled Land Acts, see *ibid.*; title SETTLEMENTS, p. 636, *post*.

(*c*) See *St. Thomas' Hospital (Governors) v. Richardson*, [1910] 1 K. B. 271, C. A.; title LANDLORD AND TENANT, Vol. XVIII., p. 600, note (*h*).

(*d*) See *Carvalho v. Burn* (1833), 4 B. & Ad. 382, *per* LITLEDALE, J., at p. 393.

(*e*) *I.e.*, the time when the act of bankruptcy was committed on which the receiving order is made; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 181.

SECT. 8.
Change in
Position of
Parties.

Remedies.
 against
 trustee.
 Damages.

Specific per-
 formance.

Disclaimer
 by trustee.

property would not be assets in the bankruptcy at all, and would not pass to the trustee in bankruptcy (*f*).

646. The remedy of the purchaser is either in damages at law for breach of the contract or for specific performance in equity. The former is a claim provable in the vendor's bankruptcy (*g*), and after the making of the receiving order the purchaser cannot commence an action for the breach without the leave of the court (*h*). Unless such leave is obtained he must prove in the bankruptcy; otherwise the vendor's liability is extinguished by the discharge of the bankrupt, or by the acceptance by the creditors and approval by the court of a composition or scheme under the Bankruptcy Acts (*i*). The purchaser's claim for specific performance of the contract is not provable in the bankruptcy (*k*), and may be enforced against the trustee either by action or by claim in the bankruptcy (*l*), and if not enforced during the bankruptcy is not extinguished by the discharge of the vendor or by a composition (*m*).

647. The trustee can disclaim the property on the ground that it is burdened with onerous covenants, and he can disclaim the contract for sale on the ground that it is unprofitable (*n*), where, for instance, it binds the vendor to spend money on the property (*o*); but he cannot disclaim the contract and at the same time retain the property (*p*). He must either perform the contract and convey the property, thereby entitling himself to receive the purchase-money from the purchaser, or he must disclaim the contract and thereby cease to have any right to enforce it against the purchaser. In the latter case, though he is no longer bound to perform any onerous obligations, he has no right to receive the purchase-money (*q*); but this does not prejudice the purchaser's interest in the property.

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (1); see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 168; *Winch v. Keeley* (1787), 1 Term Rep. 619; *Boddington v. Castelli* (1853), 1 E. & B. 879, Ex. Ch.; note (*e*), p. 380, *ante*.

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 197.

(*h*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 9; and at any time after the presentation of a petition the court may stay any proceedings against the debtor or his estate (*ibid.*, s. 10 (2)); see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 60, 62.

(*i*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 30; Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (12).

(*k*) *Hardy v. Foithergill* (1888), 13 App. Cas. 351, *per* Lord SELBORNE, at p. 361; *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769, 777, 781, 787, C. A.

(*l*) *Pearce v. Bastable's Trustee in Bankruptcy*, [1901] 2 Ch. 122 (action); *Re Taylor, Ex parte Norvell*, [1910] 1 K. B. 562, C. A. (claim in the bankruptcy). Similarly the purchaser's lien for his deposit, if he relies on this only, is outside the bankruptcy (*Levy v. Stogdon*, [1898] 1 Ch. 478, 486; affirmed on another point, [1899] 1 Ch. 5, C. A.).

(*m*) *Re Reis, Ex parte Clough*, *supra*.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55 (1); Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 13. As to disclaimer, generally, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 191 *et seq.*

(*o*) *Re Bastable, Ex parte The Trustee*, [1901] 2 K. B. 518, 529, C. A.

(*p*) *Pearce v. Bastable's Trustee in Bankruptcy*, *supra*; *Re Bastable, Ex parte The Trustee*, *supra*.

(*q*) *Re Bastable, Ex parte The Trustee*, *supra*, *per* ROMER, L.J., at p. 529.

No disclaimer can take away the equitable interest which the purchaser has acquired in the property under his contract, or affect his right either to call upon the trustee to convey the land to him (r), or to apply for an order vesting the property in himself (s).

648. If at the date of completion a receiving order has been made, and adjudication of bankruptcy follows, the purchaser is not protected, even though he completes without notice of the act of bankruptcy or the adjudication (t).

649. Where a purchaser, after the making of the contract, has notice of an act of bankruptcy committed by the vendor, he cannot safely proceed to complete the contract until three months have elapsed from the act of bankruptcy without a petition being presented against the vendor (a); for, in case the vendor should be adjudicated bankrupt on a petition presented within that period, any conveyance made to the purchaser within the period would be void, and though the purchaser had paid his purchase-money to the vendor, he would have to pay it again to the trustee in bankruptcy in order to obtain an effective conveyance from him (b).

Accordingly, a vendor who has committed an act of bankruptcy is not in a position to obtain specific performance of the contract for sale until the three months have elapsed (c); and a purchaser who receives notice of an act of bankruptcy by the vendor which prevents the vendor being in a position to complete on the date fixed for completion can, if time is of the essence of the contract, immediately claim to treat the contract as broken and recover any deposit he has paid (d).

Where time is not made of the essence of the contract, either originally or by notice given subsequently (e), the purchaser may object to the title on the ground of the act of bankruptcy (f); but if, when the proper time for completion arrives, the act of bankruptcy is no longer available, or the vendor has been adjudicated bankrupt, the vendor or his trustee, as the case may be, can enforce the contract against the purchaser (g).

650. In the event of the purchaser becoming bankrupt pending completion, his trustee in bankruptcy may either elect within a

SECT. 3.
Change in
Position of
Parties.

Completion
after
receiving
order, with
or without
notice.

Notice of
act of bank-
ruptcy before
completion.

Bankruptcy
of purchaser.

(r) *Re Bastable, Ex parte The Trustee*, [1901] 2 K. B. 518, C. A., per ROMER, J., at p. 529.

(s) Under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55 (6); and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 194 *et seq.*

(t) *Re Pooley, Ex parte Rabbidge* (1878), 8 Ch. D. 367, C. A.; the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 49, does not apply in such a case. As to the effect of completion before the date of the receiving order, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 289.

(a) The trustee's title relates back to the earliest act of bankruptcy within three months before the petition (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 6 (1) (c), 43); see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 43.

(b) *Powell v. Marshall, Parkes & Co.*, [1899] 1 Q. B. 710, C. A.

(c) *Lowes v. Lush* (1808), 14 Ves. 547.

(d) *Powell v. Marshall, Parkes & Co.*, *supra*.

(e) See title CONTRACT, Vol. VII., p. 415; and p. 332, *ante*.

(f) *Lowes v. Lush* (1808), 14 Ves. 547; and see *Hipwell v. Knight* (1835), 1 Y. & C. (ex.) 401, per ALDERSON, B., at p. 419.

(g) See title SPECIFIC PERFORMANCE. Proceedings by the trustee in bankruptcy require the sanction of the committee of inspection or the Board of Trade; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 134.

SECT. 3.
Change in
Position of
Parties.

Vendor's
remedies.

Act of bank-
ruptcy while
contract
pending.

Completion
with bank-
rupt pur-
chaser.

reasonable time to pay the purchase price and complete the contract (*h*), or may disclaim the contract as unprofitable (*i*).

651. The vendor cannot obtain specific performance against the purchaser's trustee in bankruptcy (*k*). He can apply in writing to the trustee requiring him to decide whether he will disclaim or not (*l*), or he can apply for an order rescinding the contract on such terms as to payment of damages (which would be provable as a debt in the bankruptcy) or otherwise as may seem equitable to the court (*m*).

652. A vendor who completes without notice of an act of bankruptcy committed by the purchaser, and before the date of the receiving order, is protected by statute (*n*). Where the vendor before completion has notice of such an act of bankruptcy, he is liable, if he completes, to refund the purchase-money to the purchaser's trustee if the purchaser should be adjudicated bankrupt on that act of bankruptcy (*o*); and, accordingly, the purchaser cannot obtain specific performance so long as the act of bankruptcy is available against him (*a*); and if at the proper time for completion the purchaser is not in such a position that the vendor can safely accept the purchase-money from him, the vendor may claim to treat the contract as broken and retain any deposit in his hands (*b*). If, however, at the time for completion there is not any act of bankruptcy available against the purchaser, and the contract has not then been validly repudiated, the purchaser has the same right as a vendor in similar circumstances (*c*) to enforce specific performance of the contract.

653. Where the purchaser is an undischarged bankrupt, the vendor cannot safely complete unless the purchaser can show to his satisfaction that the purchase-money has been acquired by the

(*h*) *Re Nathan, Ex parte Stapleton* (1879), 10 Ch. D. 586, 590, C. A.; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 162. As to the trustee's right of action in respect of the contract, see *ibid.*, pp. 122 *et seq.*, 134.

(*i*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 191 *et seq.* If the trustee does not disclaim and does not elect to complete within a reasonable time, the vendor may prove in the bankruptcy for any loss (*Re Nathan, Ex parte Stapleton, supra*). As to the effect of the trustee's disclaimer on the rights of the vendor, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 196; and see *ibid.*, p. 165, note (*c*).

(*k*) *Holloway v. York* (1877), 25 W. R. 627; *Pearce v. Bastable's Trustee in Bankruptcy*, [1901] 2 Ch. 122, *per* COZENS-HARDY, J., at p. 125; unless, perhaps, where the trustee has adopted the contract (see note (*l*), *infra*).

(*l*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 194. If the trustee fails to disclaim within the statutory period, he is deemed to have adopted the contract (*ibid.*). It is not clear whether such adoption renders the trustee personally liable as a contracting party or not; probably he only adopts on behalf of the estate, and gives the vendor the right at his election to specific performance or damages; see Williams on Bankruptcy, 9th ed., p. 291.

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55 (5); see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 194.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 49; compare p. 383, *ante*.

(*o*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 184; compare *McCarthy v. Capital and Counties Bank*, [1911] 2 K. B. 1088, C. A.

(*a*) *Franklin v. Brownlow* (Lord) (1808), 14 Ves. 550.

(*b*) *Collins v. Stimson* (1883), 11 Q. B. D. 142.

(*c*) See p. 383, *ante*.

purchaser after the commencement of the bankruptcy, and that the trustee has not intervened to claim it (*d*).

SUB-SECT. 3.—*Winding-up.*

SECT. 3.
Change in
Position of
Parties.

Effect of
winding-up
petition.

654. In the case of a winding-up by the court, every disposition of the property of the company made after the commencement of the winding-up is void unless the court otherwise orders (*e*). Hence a contract for the purchase of land from a company cannot be safely completed after the presentation of the petition, since it involves the disposition of the land of the company; nor can a contract for the sale of land to a company, since it involves the disposition of the money of the company (*f*).

655. After the winding-up order has been made, the completion of a pending contract rests with the liquidator, subject to the control of the court (*g*); and the liquidator, in the exercise of his power to realise the assets of the company (*h*), can adopt and carry into effect a contract of sale. But apart from this, it is the duty of the liquidator, if the contract is specifically enforceable, to complete the title of the purchaser by affixing the company's common seal to a conveyance of the legal estate and to receive the purchase-money (*i*). In the case of a contract for purchase, he can, with the concurrence of the vendor, resell the land and pay the vendor *pro tanto* out of the proceeds, leaving the vendor to prove in the winding-up for any deficiency in the price (*k*).

Completion
by liquidator.

656. In the case of a voluntary winding-up the powers of the directors cease on the appointment of a liquidator (*l*), that is, in

Voluntary
winding-up.

(*d*) *Re Vanlohe, Ex parte Dewhurst* (1871), 7 Ch. App. 185; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 164, 165; and, as to a debtor against whom a receiving order has been made obtaining a release of his liabilities under a composition or scheme approved by the court, see *ibid.*, p. 83.

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 205 (2). As to the commencement of the winding-up, see title COMPANIES, Vol. V., p. 419.

(*f*) If the contract is for sale by the company and is specifically enforceable, the equitable interest is already in the purchaser, and the company on completion only disposes of the legal interest, and the court, if the transaction is *bond fide*, will probably validate the disposition. If the contract is for purchase by the company, the payment of the purchase-money by the company involves more risk; see *Re Civil Service and General Store, Ltd.* (1887), 57 L. J. (CH.) 119. In either case completion should be postponed till the petition has been dealt with. The court will validate transactions entered into in the ordinary course of business and completed before the winding-up order (*Re Wiltshire Iron Co., Ex parte Pearson* (1868), 3 Ch. App. 443, 447; see title COMPANIES, Vol. V., p. 486), but this rule would only in exceptional cases apply to a sale or purchase of land.

(*g*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 151 (3). As to the effect of the winding-up order on the powers of the directors, see title COMPANIES, Vol. V., p. 420.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 151 (2) (a); see *Re Colonial and General Gas Co.*, [1867] W. N. 42 (winding-up under supervision).

(*i*) The land, under such circumstances, is not the property of the company; the interest of the company is transferred by the contract to the purchase-money; see p. 364, *ante*.

(*k*) See *Thames Plate Glass Co. v. Land and Sea Telegraph Co.* (1870), L. R. 11 Eq. 248, 250.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 186 (iii.).

**SECT. 3.
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practice, on the passing of the resolution for winding-up, since the liquidator is usually appointed at the same time; and after this date completion with the company cannot take place. But the liquidator has the same power to carry the contract into effect as in the case of a winding-up by the court (*m*), and he ought to complete a contract for sale which is specifically enforceable (*n*). If he is in doubt as to what is beneficial for the company, he can apply to the court for directions (*o*), or submit the matter to a general meeting (*p*).

**Refusal by
liquidator to
complete.**

657. If the liquidator under a compulsory or voluntary winding-up declines to complete the contract, the other party can either prove in the winding-up for any loss which he has sustained (*q*), or bring an action for specific performance (*a*). Where judgment is given for specific performance and the company is the vendor, completion will follow by conveyance by the company and payment of the purchase-money to the liquidator (*b*); if the company is the purchaser, the vendor's claim, as the result of specific performance, is a money claim in the winding-up for the deficiency in the purchase-money left after resale of the land and payment of the proceeds to the vendor (*c*).

**Action by
liquidator.**

658. Where the other party to the contract refuses to complete, the liquidator can bring an action in the name of the company either for breach of contract or for specific performance (*d*).

(*m*) Companies Consolidation Act, 1908 (8 Edw. 7, c. 69), ss. 151 (2) (a), 186 (iv.); see *Re Bank of South Australia* (2), [1895] 1 Ch. 578, 592, C. A.; and see p. 385, *ante*.

(*n*) See p. 385, *ante*.

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 193.

(*p*) *Ibid.*, s. 194. In the event of the voluntary winding-up being followed by a supervision order, every disposition of the property of the company made after the commencement of the winding-up—that is, the passing of the winding-up resolution (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 183)—is void, unless the court otherwise orders (*ibid.*, s. 205 (2); see p. 385, *ante*). Assuming that this extends to dispositions by the liquidator in the voluntary winding-up—which may be questioned—the court would, it is presumed, validate any disposition *bonâ fide* made by him before the supervision order; after the order, the liquidator can, subject to any restrictions imposed by the court, exercise the powers of a voluntary liquidator without the sanction or intervention of the court (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 203 (1)). As to winding-up under supervision, see title COMPANIES, Vol. V., pp. 594 *et seq.*

(*q*) Or, if the claim or the amount of damages is likely to be disputed, he can bring an action for breach of contract (see *Currie v. Consolidated Kent Collieries Corporation, Ltd.*, [1906] 1 K. B. 124, C. A.), and then prove for the damages. Where the other party is the purchaser his claim is for his deposit with interest and his costs of investigating title and damages, if recoverable, for breach of contract; see pp. 411, 412, *post*.

(*a*) See *Thames Plate Glass Co. v. Land and Sea Telegraph Co.* (1870), L. R. 11 Eq. 248, 250. As to obtaining leave to bring the action, see title COMPANIES, Vol. V., p. 540. There may be an order to stay the proceedings, save so far as necessary to determine the point in dispute; see *Thames Plate Glass Co. v. Land and Sea Telegraph Co.*, *supra*.

(*b*) See p. 385, *ante*.

(*c*) See *Thames Plate Glass Co. v. Land and Sea Telegraph Co.*, *supra*.

(*d*) See title COMPANIES, Vol. V., pp. 446, 447, 573, 574.

SUB-SECT. 4.—*Lery of Execution.*SECT. 8.
Change in
Position of
Parties.Execution
on party's
interest in
land.

659. Neither a vendor nor a purchaser of land is concerned with a writ of execution or order affecting the interest of the other party in the land unless the writ or order is registered (e). As regards the vendor's interest in the land, an execution creditor of the vendor, whose writ of execution is duly registered, acquires a chattel interest in the land and also a charge upon the vendor's interest therein (f), the interest of the judgment creditor being subject to the purchaser's equitable interest in the land under the contract for sale (g). Consequently, though the right of the purchaser to completion of the contract by conveyance is unaffected, he cannot safely pay his purchase-money without either satisfying the judgment creditor so far as possible thereout or obtaining his consent to payment of the whole amount to the vendor (h), and the creditor should join in the conveyance. Where execution is not levied until after the whole of the purchase-money has been paid, so that the vendor has no longer any beneficial interest in the land, an execution by a creditor of the vendor will not, it seems, affect the land sold (i); but, in such circumstances, a judgment creditor of the purchaser can obtain a charge on his interest in the land (k).

660. The appointment of a receiver of the vendor's interest in unpaid purchase-money, or of the purchaser's interest in the land, is ineffectual if for any reason the contract is not completed, so that the money or land, as the case may be, does not come into the hands of the debtor (l).

Equitable
execution.SUB-SECT. 5.—*Lunacy.*

661. A contract for sale of land made between parties capable of contracting at the time is not avoided by the fact that either party becomes lunatic or of unsound mind before completion (m).

Contract not
avoided by
lunacy.

662. Where a vendor becomes lunatic or insane after the purchase-money has been paid, or the contract so far performed that a decree for specific performance would be a matter of course,

Vesting order
in lunacy.

(e) Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51), ss. 5, 6; Land Charges Act, 1900 (63 & 64 Vict. c. 26), s. 3; see p. 358, *ante*.

(f) See title EXECUTION, Vol. XIV., pp. 69, 125.

(g) *Lodge v. Lyseley* (1832), 4 Sim. 70; *Whitworth v. Gaugain* (1846), 1 Ph. 728.

(h) *Forth v. Norfolk (Duke)* (1820), 4 Madd. 503.

(i) See *Prior v. Penpraze* (1817), 4 Price, 99; and an opinion of Serjeant HILL in 4 Madd. 506, n.; see also Sugden, Vendors and Purchasers, 14th ed., p. 527.

(k) Statute of Frauds (29 Car. 2, c. 3), s. 10; Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 11; see title EXECUTION, Vol. XIV., p. 68.

(l) *Ridout v. Fowler*, [1904] 2 Ch. 93, C. A.; see, further, titles EXECUTION, Vol. XIV., pp. 125 *et seq.*; RECEIVERS, Vol. XXIV., p. 377; and see, generally, *ibid.*, pp. 335 *et seq.*

(m) A finding of lunacy as from a date prior to the contract does not preclude the possibility of the contract having been made in a lucid interval; see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 399, note (a); and, as to sales and purchases on behalf of lunatics, see *ibid.*, pp. 396 *et seq.*, and p. 312, *ante*. As to the carrying out of contracts by a committee or quasi-committee, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 447, 456.

SECT. 3.
Change in
Position of
Parties.

Marriage not
a bar to
completion.

and the purchase-money or the balance due is ready to be paid, the purchaser can obtain an order of the High Court (*n*) vesting the property in him (*o*).

SUB-SECT. 6.—Marriage.

663. The power of a single woman who has contracted to sell or buy land to complete the contract is not affected by her marriage pending completion (*p*). But where the other party to the contract has notice of the marriage, he should inquire whether any settlement or agreement for settlement has been made affecting the property or the interest of the married woman under the contract.

SUB-SECT. 7.—Conviction of Treason or Felony.

Completion
by adminis-
trator.

664. A person against whom judgment of death or of penal servitude has been pronounced or recorded by any court of competent jurisdiction in England, Wales, or Ireland, upon any charge of treason or felony, is incapable of alienating any property so long as he is subject to the operation of the Forfeiture Act, 1870 (*a*); but, where the convict has entered into a contract for sale of land, the administrator of his property has power to complete the contract (*b*).

SUB-SECT. 8.—Outbreak of War.

Executory
contract with
alien enemy.

665. Where the parties to a contract for sale of land are subjects of different states, and war breaks out between the states before the contract has been completed, the contract is avoided and the parties are absolved from its performance (*c*).

Part VI.—Determination of Rights of Parties under the Contract.

SECT. 1.—Vendor and Purchaser Summons.

Application
in chambers.

666. A vendor or purchaser of real or leasehold estate in England, or their representatives respectively, at any time or times

(*n*) See Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 135. The jurisdiction has been transferred from the judge in lunacy to the High Court by the Lunacy Act, 1911 (1 & 2 Geo. 5, c. 40), s. 1; see R. S. C., Ord. 55, r. 13B.

(*o*) *Re Cuming* (1869), 5 Ch. App. 72; *Re Pagani* (*a Person of Unsound Mind*), *Re Pagani's Trust*, [1892] 1 Ch. 236, C. A.

(*p*) See title HUSBAND AND WIFE, Vol. XVI., p. 380.

(*a*) 33 & 34 Vict. c. 23; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429.

(*b*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), ss. 9—14; see *Carr v. Anderson*, [1903] 2 Ch. 279, C. A., *per* ROMER, L.J., at p. 283, as to the exercise of the administrator's discretion; and as to the powers of the administrator, see, generally, p. 309, *ante*; titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 429, 430; PRISONS, Vol. XXIII., pp. 261, 262; *Re Gaskell and Walters' Contract*, [1906] 2 Ch. 1, C. A. As to the power of an *interim* curator, see note (*b*), p. 309, *ante*; title PRISONS, Vol. XXIII., pp. 262, 263.

(*c*) See title ALIENS, Vol. I., p. 311. As to who is to be considered an

and from time to time, may apply in a summary way to a judge of the Chancery Division of the High Court of Justice (*d*) in England in chambers in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract, not being a question affecting the existence or validity of the contract; and the judge can make such order upon the application as seems to him just, and will order how and by whom all or any of the costs of and incident to the application are to be paid (*e*).

In cases where this procedure is available it must be adopted in preference to bringing an action (*f*).

667. An application under the statute puts the parties in the same position in chambers in which they would have been, and with all the rights which they would have had, under a judgment for specific performance. Hence, whatever could be done in chambers upon a reference as to title under such a judgment, where the contract has been established, can be done on a vendor and purchaser summons (*g*). But the procedure was not intended to enable the court to try summarily disputed questions of fact (*h*),

SECT. 1.
Vendor and
Purchaser
Summons.

Scope of the
jurisdiction.

alien enemy for this purpose, see *Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A. C. 484, *per* Lord LINDLEY, at pp. 505, 506.

(*d*) See Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 16, 34. The Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 9, provides for application to a judge of the Court of Chancery, and came into operation on the 7th August, 1874; the Judicature Act, 1873 (36 & 37 Vict. c. 66), did not come into operation until the 2nd November, 1874; see *ibid.*, s. 2. See also title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 189, 191.

(*e*) Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 9.

(*f*) See *King v. Chamberlayn*, [1887] W. N. 158, where NORTH, J., at p. 159, said that if the plaintiff had deliberately adopted the more expensive mode of proceeding by action, he would not have allowed any more costs than the costs of a summons. The jurisdiction has been exercised in respect of contracts to create, as well as contracts to assign, leasehold interests (see *Re Lander and Bagley's Contract*, [1892] 3 Ch. 41; *Re Stephenson and Co.'s Contract* (1892), 36 Sol. Jo. 287, C. A.; *Re Anderton and Milner's Contract* (1890), 45 Ch. D. 476), and the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 9, has even been applied to a voluntary grant, on counsel for both sides admitting a contract for a nominal consideration (*Re Salisbury (Marquis)* (1875), 23 W. R. 824). Where the vendor's title depends upon a question of construction involving real difficulty, the proper mode of settling that question is not by this procedure, but by originating summons (*Re Nichols' and Von Joel's Contract*, [1910] 1 Ch. 43, C. A.). A vendor in such a case who nevertheless proceeds under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), may, even though successful, be ordered to pay costs (*Re Nichols' and Von Joel's Contract*, *supra*). But such questions have sometimes been decided under the Act (*Re Hill to Chapman* (1885), 54 L. J. (CH.) 595, C. A.; *Re Bishop and Richardson's Contract*, [1899] 1 I. R. 71; *Re Gnyton and Rosenberg's Contract*, [1901] 2 Ch. 591). As to determination by a judge of the King's Bench Division sitting in Bankruptcy of a point which would ordinarily be decided on a vendor and purchaser summons, see also *Re Martin, Ex parte Dixon v. Tucker* (1912), 106 L. T. 381.

(*g*) *Re Burroughs, Lynn and Sexton* (1877), 5 Ch. D. 601, C. A., *per* JAMES, L.J., at p. 604. The particular point in that case was that affidavit evidence could be admitted and the deponents cross-examined.

(*h*) *Re Burroughs, Lynn and Sexton*, *supra*, at p. 603; *Re Popple and Barratt's Contract* (1877), 25 W. R. 248, C. A.; *Re Gray and Metropolitan Rail. Co.* (1881), 44 L. T. 567; or questions of fraud (*Re Delany and Deegan's Contract*, [1905] 1 I. R. 602).

SECT. 1. and a vendor and purchaser summons cannot be treated as if it were an action for specific performance, or for rescission, or for any other purpose (i). It enables either party to the contract to obtain a decision upon some isolated point without having recourse to an action for specific performance (k), such as whether a requisition has been sufficiently answered, or whether a requisition is precluded by the conditions (l), or any short point of law or construction arising on the abstract, contract, or requisitions (m).

Consequential relief.

668. The jurisdiction to make such order as appears just enables the judge to give relief which is the ordinary consequence of the decision of the point submitted to him (n). Thus, when the decision of the point raised necessarily involves a determination that the vendor has not made a good title, an order may be made for the return of the deposit with interest, and payment by the vendor of the purchaser's costs of investigating title, whether the summons was taken out by the vendor or the purchaser (o). But an order for payment of unliquidated damages as compensation for a vendor's delay, or of any sum which entails an inquiry, and is not merely a matter for computation or taxation, cannot be made on a vendor and purchaser summons (p), as such an application cannot be treated as an action for damages (q).

Doubtful title.

669. Whether the point raised is decided against the purchaser or not, the judge may declare the title too doubtful to be forced on the purchaser (r).

(i) *Re Hargreaves and Thompson's Contract* (1886), 32 Ch. D. 454, C. A., per COTTON, L.J., at p. 456.

(k) *Re Hargreaves and Thompson's Contract*, *supra*, per LINDLEY, L.J., at p. 459; *Re Wallis and Barnard's Contract*, [1899] 2 Ch. 515, 519.

(l) *Re Burroughs, Lynn and Sexton*, *supra*, at p. 603.

(m) *Re Popple and Barratt's Contract* (1877), 25 W. R. 248, C. A., per JAMES, L.J., at p. 249; compare *Re Wallis and Barnard's Contract*, [1899] 2 Ch. 515, 520, 521, where KEKEWICH, J., deprecated the making on such summonses of declarations that the vendor has or has not shown a good title or a title which cannot be forced on the purchaser, *i.e.*, embracing the whole title instead of dealing with isolated questions. As to the questions which can be decided on summons, see, further, note (f), p. 389, *ante*, pp. 391 *et seq.*, *post*.

(n) *Re Hargreaves and Thompson's Contract*, *supra*.

(o) *Ibid.*; see also *Re Metropolitan District Rail. Co. and Cosh* (1880), 13 Ch. D. 607, C. A.; *Re Higgins and Hitchman's Contract* (1882), 21 Ch. D. 95; *Re Smith and Stott's Contract* (1883), 48 L. T. 512; *Re Yelding and Westbrook* (1886), 31 Ch. D. 344; *Re Ebbeworth and Tidy's Contract* (1889), 42 Ch. D. 23, 53, C. A.; *Re Bryant and Barningham's Contract* (1890), 44 Ch. D. 218, 222, C. A.; *Re Marshall and Salt's Contract*, [1900] 2 Ch. 202, 206; *Re Hare and O'More's Contract*, [1901] 1 Ch. 93, 96; *Re Haedicke and Lipski's Contract*, [1901] 2 Ch. 666, 670; compare *Re Furneaux and Aird's Contract*, [1906] W. N. 215 (where KEKEWICH, J., made a declaration on a vendor and purchaser summons as to the purchaser's lien for his costs of investigating title). Such orders were made on a vendor's summons in *Re Higgins and Percival* (1888), 59 L. T. 213, and *Re Walker and Oakshott's Contract*, [1901] 2 Ch. 383, 387.

(p) *Re Wilsons and Stevens' Contract*, [1894] 3 Ch. 546, 552.

(q) See *Re Hargreaves and Thompson's Contract*, *supra*.

(r) *Re Thackuray and Young's Contract* (1888), 40 Ch. D. 34; *Re New Land Development Association and Gray*, [1892] 2 Ch. 138, C. A.; *Re Hollis' Hospital (Trustees) and Hague's Contract*, [1899] 2 Ch. 540,

670. Owing to the express exclusion of the decision on such a summons of questions affecting the existence or validity of the contract (s), the question whether the contract is fraudulent cannot be decided on a vendor and purchaser summons (t); but the exception relates to the existence or validity of the contract in its inception, and does not preclude the court from deciding upon a summons the validity of a vendor's notice to rescind the contract (a). The fact that the existence or validity of the contract, or the right of one party or the other to rescind it, is or may be the subject of dispute between the parties, does not preclude the court from deciding a point properly raised by summons (b).

SECT. 1.
Vendor and Purchaser Summons.

Question of validity of contract excluded.

SECT. 2.—Questions which may be Decided on Summons.

671. The questions which may properly be raised and decided on a vendor and purchaser summons include the following:—

Questions determinable on summons:
(1) contract;

(1) Questions with regard to the meaning and effect of the contract for sale, such as whether a perpetual rent agreed to be sold was properly described in the contract as a rentcharge (c); whether under the terms of the contract the purchaser was entitled to a right of way to the land sold (d); the effect of a plan upon the construction of expressions in particulars of sale (e); the effect of conditions of sale limiting a purchaser's right to investigate or raise objections to the vendor's title (f), or precluding (g) or providing for (h) compensation for errors of description; whether a condition is misleading (i); whether in particular circumstances a vendor has,

555; *Re Marshall and Salt's Contract*, [1900] 2 Ch. 202; *Re Handman and Wilcox's Contract*, [1902] 1 Ch. 599, C. A.; compare *Re Wallis and Barnard's Contract*, [1899] 2 Ch. 515, 521 (where KEKEWICH, J., deprecated the making of such declarations; see note (m), p. 390, *ante*).

(s) See p. 389, *ante*.

(t) *Re Hargreaves and Thompson's Contract* (1886), 32 Ch. D. 454, 459, C. A.; *Re Davis and Cavey* (1888), 40 Ch. D. 601, 608; *Re Sandbach and Edmondson's Contract*, [1891] 1 Ch. 99, C. A. "We cannot go into any question of fraud which might avoid the contract. This is a proceeding under the Vendor and Purchaser Act, which binds the parties to admit the contract" (*Re Sandbach and Edmondson's Contract*, *supra*, per Lord HALSBURY, L.C., at p. 102).

(u) *Re Jackson and Woodburn's Contract* (1887), 37 Ch. D. 44, following *Re Dames and Wood* (1885), 29 Ch. D. 626, C. A.

(b) *Re Wallis and Barnard's Contract*, *supra*; *Re Hughes and Ashley's Contract*, [1900] 2 Ch. 595, C. A.; compare *Re Lander and Bagley's Contract*, [1892] 3 Ch. 41 (where upon a question of construction it was decided that there was a valid subsisting agreement to grant a lease).

(c) *Re Gerard (Lord) and Beecham's Contract*, [1894] 3 Ch. 296, C. A.

(d) *Re Lavery and Kirk* (1888), 33 Sol. Jo. 127; *Re Hughes and Ashley's Contract*, *supra*, at p. 600.

(e) *Re Lindsay and Forder's Contract* (1895), 72 L. T. 832; *Re Freeman and Taylor's Contract* (1907), 97 L. T. 39; *Re Welling and Parsons' Contract* (1906), 97 L. T. 165.

(f) *Re Cox and Neve's Contract*, [1891] 2 Ch. 109, 118; *Re National Provincial Bank of England and Marsh*, [1895] 1 Ch. 190; *Re Scott and Alvarez's Contract*, *Scott v. Alvarez*, [1895] 1 Ch. 596, C. A.; [1895] 2 Ch. 603, C. A.

(g) *Re Beyfus and Masters's Contract* (1888), 39 Ch. D. 110, C. A.

(h) *Re Leyland and Taylor's Contract*, [1900] 2 Ch. 625, C. A.

(i) *Re Marsh and Granville (Earl)* (1883), 24 Ch. D. 11, C. A.; *Re Sandbach and Edmondson's Contract*, *supra*; *Re Turpin and Ahern's Contract*, [1905] 1 I. R. 85.

SECT. 2.

Questions
which
may be
Decided on
Summons.

(2) abstract ;

under the conditions, a right to rescind (*k*), and, if so, on what terms (*l*); whether a purchaser is entitled to repudiate the contract (*m*); whether, and as from what date, a purchaser is liable to pay interest on his purchase-money (*n*); and whether, on a sale of premises with possession, the property sold includes a claim for dilapidations against an outgoing tenant (*o*).

(3) title ;

(2) Questions as to the abstract, such as whether the abstract is complete notwithstanding that a particular document is not abstracted in chief (*p*).

(3) Questions whether the vendor has discharged his obligation to show and prove a good title in accordance with the contract (*q*),

(*k*) *Re Jackson and Oakshott* (1880), 14 Ch. D. 851; *Re Great Northern Rail. Co. and Sanderson* (1884), 25 Ch. D. 788; *Re Monckton and Gilzean* (1884), 27 Ch. D. 555; *Re Dames and Wood* (1885), 29 Ch. D. 626, C. A.; *Re Jackson and Woodburn's Contract* (1887), 37 Ch. D. 44; *Re Arbib and Class's Contract*, [1891] 1 Ch. 601, C. A.; *Re Deighton and Harris's Contract*, [1898] 1 Ch. 458, C. A.; *Re Jackson and Haden's Contract*, [1906] 1 Ch. 412, C. A.; *Re Weston and Thomas's Contract*, [1907] 1 Ch. 244.

(*l*) *Re Spindler and Mear's Contract*, [1901] 1 Ch. 908.

(*m*) *Re White and Smith's Contract*, [1896] 1 Ch. 637; *Re Haedicke and Lipski's Contract*, [1901] 2 Ch. 666.

(*n*) *Re Pigott and Great Western Rail. Co.* (1881), 18 Ch. D. 146; *Re Riley to Streetfield* (1886), 34 Ch. D. 386; *Re Helling and Merton's Contract*, [1893] 3 Ch. 269, C. A.; *Re London (Mayor) and Tubbs' Contract*, [1894] 2 Ch. 524, C. A.; *Re Wilsons and Stevens' Contract*, [1894] 3 Ch. 546; *Re Strafford (Earl) and Maples*, [1896] 1 Ch. 235, C. A.; *Re Woods and Lewis' Contract*, [1898] 2 Ch. 211, C. A.; see also *Re Young and Harston's Contract* (1885), 31 Ch. D. 168, C. A. (where the court ordered a vendor to repay an excess of interest paid under protest and without prejudice).

(*o*) *Re Edie and Brown's Contract* (1888), 58 L. T. 307; see also *Re Derby (Earl) and Fergusson's Contract*, [1912] 1 Ch. 479 (sale of agricultural land where tenant entitled to compensation for improvements).

(*p*) *Re Stamford, Spalding and Boston Banking Co. and Knight's Contract*, [1900] 1 Ch. 287; compare *Re Ebsworth and Tidy's Contract* (1889), 42 Ch. D. 23, C. A., *per* NORTH, J., at pp. 31, 34.

(*q*) Such questions, being the subject of requisitions or objections, are necessarily within the scope of a vendor and purchaser summons; see *Re Great Northern Rail. Co. and Sanderson*, *supra* (removal of incumbrance); *Re Horne and Hellard* (1885), 29 Ch. D. 736 (proof that charge in debentures has not crystallized); *Re Lidiard and Jackson's and Broadley's Contract* (1889), 42 Ch. D. 254 (presumption as to enfranchisement of copyholds); *Re Naylor and Spendla's Contract* (1886), 34 Ch. D. 217, C. A. (as to fine and fees payable to lord and steward in respect of copyholds, where lord and steward agreed to be bound by decision on summons); *Re Harman and Uxbridge and Rickmansworth Rail. Co.* (1883), 24 Ch. D. 720; *Re Blaiberg and Abrahams*, [1899] 2 Ch. 340 (notice of trusts); *Re Walker and Hughes' Contract* (1883), 24 Ch. D. 698; *Re Glenny and Hartley* (1884), 25 Ch. D. 611; *Re Coates to Parsons* (1886), 34 Ch. D. 370 (as to validity of appointment of trustees); *Re Lord and Fullerton's Contract*, [1896] 1 Ch. 228, C. A. (as to effect of disclaimer by trustee); *Hallett to Martin* (1883), 24 Ch. D. 624 (power to grant lease); *Re Marshall and Salt's Contract*, [1900] 2 Ch. 202 (power to assign leaseholds without consent of lessor); *Re Frith and Osborne* (1876), 3 Ch. D. 618 (power to partition); *Re Rumney and Smith*, [1897] 2 Ch. 351, C. A. (power of sale by transferee of mortgage); *Re Sudeley (Lord) and Baines & Co.*, [1894] 1 Ch. 334; *Re Dyson and Fowke*, [1896] 2 Ch. 720 (validity of power of sale given by will); *Re Tweedie and Miles* (1884), 27 Ch. D. 315 (continuance of trust for sale); *Re Judd and Poland and Skelcher's Contract*, [1906] 1 Ch. 684, C. A. (sale of leaseholds in lots by trustees by means of underleases); *Re Lloyds Bank, Ltd. and Lillingston's Contract*,

and whether the vendor is bound to answer or comply with a particular requisition (r).

(4) Questions as to the interpretation and effect of Acts of Parliament, if they arise out of, or are connected with, the contract (s).

SECT. 2.
Questions
which
may be
Decided on
Summons.

[1912] 1 Ch. 601 (sale as "leasehold" of property held on underlease and forming part of property comprised in two head leases); *Re Packman and Moss* (1875), 1 Ch. D. 214; *Re Brown and Sibly's Contract* (1876), 3 Ch. D. 156; *Re Coleman and Jarrom* (1876), 4 Ch. D. 165; *Re White and Hindle's Contract* (1877), 7 Ch. D. 201; *Re Hutchinson and Tenant* (1878), 8 Ch. D. 540; *Sturge and Great Western Rail. Co.* (1881), 19 Ch. D. 444 (construction of will); *Re Foster and Lister* (1877), 6 Ch. D. 87 (validity of post-nuptial settlement); *Re Carter and Kenderdine's Contract*, [1897] 1 Ch. 776, C. A. (effect of bankruptcy on voluntary settlement); *Re New Land Development Association and Gray*, [1892] 2 Ch. 138, C. A., and *Re Clayton and Barclay's Contract*, [1895] 2 Ch. 212 (power of bankrupt to dispose of after-acquired property); *Re Calcott and Elvin's Contract*, [1898] 2 Ch. 460, C. A. (registration in Middlesex of adjudication in bankruptcy); *Nichols to Nixey* (1885), 29 Ch. D. 1005 (as to power of appointment not vesting in trustee in bankruptcy); *Re Hollis' Hospital (Trustees) and Hague's Contract*, [1899] 2 Ch. 540 (application of rule against perpetuities); *Re Coward and Adam's Purchase* (1875), L. R. 20 Eq. 179 (receipt by married woman for legacy); *Re Bellamy and Metropolitan Board of Works* (1883), 24 Ch. D. 387, C. A., and *Re Flower (U., M.P., and Metropolitan Board of Works, Re Flower (M.) and Same* (1884), 27 Ch. D. 592 (payment of purchase-money to trustee-vendors personally). As to title of persons filling particular capacity, see also *Re Maskell and Goldfinch's Contract*, [1895] 2 Ch. 525 (assurance of gavelkind land by infant); *Re Morton and Hallett* (1880), 15 Ch. D. 143, C. A. (heir of last surviving trustee); *Osborne to Rowlett* (1880), 13 Ch. D. 774; *Re Crunden and Meux's Contract*, [1909] 1 Ch. 690 (devisee or executor of last surviving trustee); *Re Tanqueray-Villaume and Landau* (1882), 20 Ch. D. 465, C. A. (executor selling freeholds); *Re Whistler* (1887), 35 Ch. D. 561; *Re Venn and Furze's Contract*, [1894] 2 Ch. 101; *Re Verrell's Contract*, [1903] 1 Ch. 65 (executor selling leaseholds); *Re Cavendish and Arnold's Contract*, [1912] W. N. 83 (executor selling with reservation of minerals); *Re Kearley and Clayton's Contract* (1878), 7 Ch. D. 615 (debtor who has entered into composition with his creditors); *Re Waddell's Contract* (1876), 2 Ch. D. 172 (survivor of two trustees in bankruptcy); *Re Metropolitan Bank and Jones* (1876), 2 Ch. D. 366 (survivor of two liquidators of a company).

(4) interpretation of statutes;

(r) *Re Ford and Hill* (1879), 10 Ch. D. 365, C. A.; compare *Re Glenton and Saunders to Haden* (1885), 53 L. T. 434, C. A.

(s) See *Re Dudson's Contract* (1878), 8 Ch. D. 628, C. A. (Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74)); *Re Bowling and Welby's Contract*, [1895] 1 Ch. 663, C. A. (Companies Act, 1862 (25 & 26 Vict. c. 89)); *Re Smith and Stott* (1883), 29 Ch. D. 1009, n.; *Re Chapman and Hobbs* (1885), 29 Ch. D. 1007; *Re Highett and Bird's Contract*, [1903] 1 Ch. 287, C. A.; *Re Taunton and West of England Perpetual Benefit Building Society and Roberts' Contract*, [1912] 2 Ch. 381 (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41)); *Re Harkness and Allsopp's Contract*, [1896] 2 Ch. 358; *Re Brooke and Fremlin's Contract*, [1898] 1 Ch. 647 (Married Women's Property Act, 1882 (45 & 46 Vict. c. 75)); *Re Earle and Webster's Contract* (1883), 24 Ch. D. 144; *Re Strafford (Earl) and Maples*, [1896] 1 Ch. 235, C. A.; *Re Pocock and Pranker's Contract*, [1896] 1 Ch. 302; *Re Fisher and Grasebrook's Contract*, [1898] 2 Ch. 660; *Re Mundy and Roper's Contract*, [1899] 1 Ch. 275, C. A. (Settled Land Acts, 1882 to 1890); *Re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58; *Re Cary and Lott's Contract*, [1901] 2 Ch. 463; *Re Cohen's Executors and London County Council*, [1902] 1 Ch. 187; *Re Cavendish and Arnold's Contract*, *supra* (Land Transfer Act, 1897 (60 & 61 Vict. c. 65)); *Re Bateman (Baroness) and Parker's Contract*, [1899] 1 Ch. 599 (Consecration of Churchyards Act, 1867 (30 & 31 Vict. c. 133)); *Re Ponsford and Newport District School Board*, [1894] 1 Ch. 454, C. A.; *Re Ecclesiastical Commissioners*

SECT. 2.

**Questions
which
may be
Decided on
Summons.**

- (5) expenses;
(6) compensation;
(7) conveyance;

(5) Questions as to the incidence of and liability for expenses, such as succession duty (*t*), stamps (*a*), the cost of searching for and obtaining title deeds not in the vendor's possession (*b*), of the perusal and execution of the conveyance by concurring parties (*c*), or of obtaining a surveyor's certificate to prove performance of a building covenant in a lease (*d*).

(6) Questions as to the payment of compensation (*e*).

(7) Questions as to the form of the assurance to the purchaser. These include questions as to the proper parties to concur in the conveyance (*f*), as to the form of the conveyance (*g*), and as to the insertion therein of restrictions, or of covenants on the part of the purchaser (*h*) or the vendor (*i*).

and *New City of London Brewery Co.'s Contract*, [1895] 1 Ch. 702 (Disused Burial Grounds Act, 1884 (47 & 48 Vict. c. 72)); *Corporation of the Sons of the Clergy and Skinner*, [1893] 1 Ch. 178 (Charitable Trusts Acts, 1853 (16 & 17 Vict. c. 137), and 1855 (18 & 19 Vict. c. 124)).

(*t*) *Re Cooper and Allen's Contract for Sale to Harlech* (1876), 4 Ch. D. 802; *Re Kidd and Gibbon's Contract*, [1893] 1 Ch. 695; *Re Weston and Thomas's Contract*, [1907] 1 Ch. 244.

(*a*) *Whiting to Loomes* (1881), 17 Ch. D. 10, C. A.

(*b*) *Re Willett and Argenti* (1889), 60 L. T. 735; *Re Stuart and Olivant and Seadon's Contract*, [1896] 2 Ch. 328, C. A. (deeds required to verify abstract); *Re Duthy and Jesson's Contract*, [1898] 1 Ch. 419 (deeds required for purpose of being handed over to purchaser on completion); *Re Johnson and Tustin* (1885), 30 Ch. D. 42, C. A. (deeds required for purpose of making proper abstract).

(*c*) *Re Willett and Argenti, supra*; *Re Sander and Walford's Contract* (1900), 83 L. T. 316.

(*d*) *Re Moody and Yates' Contract* (1885), 30 Ch. D. 344, C. A.

(*e*) *Re Terry and White's Contract* (1886), 32 Ch. D. 14, C. A.; *Aspinalls to Powell and Scholefield* (1889), 60 L. T. 595; *Re Fawcett and Holmes' Contract* (1889), 42 Ch. D. 150, C. A.; *Re Hare and O'More's Contract*, [1901] 1 Ch. 93 (compensation to purchaser for deficiency in quantity); *Re Orange and Wright's Contract* (1885), 52 L. T. 606 (claim by vendor for increase of price on ground of mistake in quantities); *Re Lailwood's Contract* (1892), 36 Sol. Jo. 255 (compensation for delay in delivery of possession, and for injury to and deterioration of premises by removal of fixtures and fittings sold with the premises); see also *Re Turner and Skelton* (1879), 13 Ch. D. 130 (compensation after completion); and compare *Re Leyland and Taylor's Contract*, [1900] 2 Ch. 625, C. A. Damages for the vendor's delay in completion are not "compensation," and cannot be recovered on a vendor and purchaser summons; see *Re Wilsons and Stevens' Contract*, [1894] 3 Ch. 546.

(*f*) *Re Cookes' Contract* (1877), 4 Ch. D. 454; *Davies to Jones and Evans* (1883), 24 Ch. D. 190 (beneficiaries on sale by trustees or executors); *Re Bedingfield and Herring's Contract*, [1893] 2 Ch. 332 (incumbrancers and trustee in bankruptcy of tenant for life consenting to sale by trustees); *Royal Society of London and Thompson* (1881), 17 Ch. D. 407; *Finnis and Young to Forbes and Pochin* (No. 2) (1883), 24 Ch. D. 591 (Charity Commissioners); *Re Thompson and Curzon* (1885), 29 Ch. D. 177; *Re Brooke and Fremlin's Contract*, [1898] 1 Ch. 647 (husband of married woman; see title HUSBAND AND WIFE, Vol. XVI., p. 380, note (*f*)).

(*g*) *Re Pigott and Great Western Rail. Co.* (1881), 18 Ch. D. 146; see also *Re Agg-Gardner* (1884), 25 Ch. D. 800 (right of purchaser to acknowledgment and undertaking as to documents).

(*h*) *Re Gray and Metropolitan Rail. Co.* (1881), 44 L. T. 567; *Re Monckton and Gilean* (1884), 27 Ch. D. 555; *Re Mordy and Cowman* (1884), 51 L. T. 721, C. A.; *Re Wallis and Barnard's Contract*, [1899] 2 Ch. 515; *Re Hughes and Ashley's Contract*, [1900] 2 Ch. 595, C. A.; see also *Re Poole and Clarke's Contract*, [1904] 2 Ch. 173, C. A., as to the proper form of covenant by a purchaser buying subject to restrictions.

(*i*) *Re Birmingham and District Land Co. and Allday*, [1893] 1 Ch. 342.

(8) Questions as to the right to the title deeds of the property sold (*k*).

SECT. 2.
Questions
which
may be
Decided on
Summons.

SECT. 3.—*Procedure.*

672. The summons should be entitled in the matter of the contract, stating shortly the date, parties and subject-matter, and in the matter of the Vendor and Purchaser Act, 1874 (*l*).

(8) title deeds.
Title.
Parties.

673. The party to the summons who is the applicant makes the other party respondent (*m*), and, generally speaking, these are the only parties as between whom a decision on the summons is binding (*n*); other parties may appear and agree to be bound by the decision on the summons (*o*), but parties not before the court in either of these ways are not affected by the decision of any question raised on the summons (*p*); and, though a question has been decided, the same point may be raised on another summons when the purchaser resells (*q*). Where the question at issue primarily concerns other parties than the purchaser—where, for instance, the vendor's title depends on the construction of a will—the vendor should not raise this by a vendor and purchaser summons, but should have it determined on an originating summons for the construction of the will, so that all persons interested in the property may be bound (*r*).

674. The summons may be adjourned from chambers into court and from court to chambers (*s*). Hearing.

Any evidence required may be given by affidavit (*t*).

(*k*) *Re Williams and Newcastle's (Duchess) Contract*, [1897] 2 Ch. 144.

(*l*) See Yearly Practice of the Supreme Court, 1913, p. 1520; 3 Seton, Judgments and Orders, 7th ed., p. 2200. For forms of summons, see Daniell, Chancery Forms, 5th ed., pp. 1201–1203; R. S. C., Appendix K, No. 1B.; Yearly Practice of the Supreme Court, 1913, p. 2033.

(*m*) Technically, the summons is not *inter partes*, i.e., the parties are not mentioned in the title as plaintiffs and defendants; but the respondent must enter an appearance, and beyond the title there is no substantial difference between an originating summons in the general form and one not *inter partes*; see also title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 186 *et seq.*

(*n*) *Re Naylor and Spendla's Contract* (1886), 34 Ch. D. 217, C. A., per COTTON, L.J., at p. 220; see also *Re Bartlett and Berry's Contract* (1897), 76 L. T. 751.

(*o*) *Re Naylor and Spendla's Contract*, *supra*.

(*p*) *Re Cooper and Allen's Contract for Sale to Harlech* (1876), 4 Ch. D. 802, per JESSEL, M.R., at p. 827 (the Crown, on question as to succession duty); *Re Bartlett and Berry's Contract*, *supra* (vendor, as to questions between sub-vendor and sub-purchaser).

(*q*) *Osborne to Rowlett* (1880), 13 Ch. D. 774, per JESSEL, M.R., at p. 781.

(*r*) *Re Nichols' and Von Joel's Contract*, [1910] 1 Ch. 43, C. A.; see also note (*f*), p. 389, *ante*; but a vendor and purchaser summons has been amended so as to make it also a summons for construction (*Re Tippet's and Newbould's Contract* (1888), 37 Ch. D. 444, C. A.). As to service of a summons out of the jurisdiction, see R. S. C., Ord. 11, r. 8A; title PRACTICE AND PROCEDURE, Vol. XXIII., p. 187.

(*s*) R. S. C., Ord. 54, r. 9; *Re Coleman and Jarrom* (1876), 4 Ch. D. 165, 168; *Re Jackson and Woodburn's Contract* (1887), 37 Ch. D. 44, 47; and see *Re Warner's Settled Estates, Warner to Steel* (1881), 17 Ch. D. 711 (where the adjournment into court was at the request of the vendors).

(*t*) *Re Burroughs, Lynn and Sexton* (1877), 5 Ch. D. 601, C. A.

SECT. 4.

SECT. 4.—*The Order.*The Order.
Order.

675. Such order may be made on the summons as the judge thinks just, and he can also order how and by whom all or any of the costs of and incident to the application are to be borne and paid (a).

Costs.

676. As a general rule, the costs of the application are ordered to be paid by the party whose contention has not been upheld by the court (b); and, if it is decided that the title is good, the purchaser must pay the costs, although it is not such as a conveyancer would advise a purchaser to accept without a decision of the court upon it (c). A vendor who does not exercise his right to rescind directly the summons is issued, but does so at a later stage before the hearing, may be ordered to pay the costs of the proceedings, although the condition giving the right to rescind provides for the return of the deposit without any interest, costs of investigating title, or other compensation or payment whatsoever (d). Where a vendor is ordered to pay costs, they may be made a charge upon his interest in the property (e).

Appeal.

677. Since a vendor and purchaser summons is not an action, any appeal from an order made thereon must be brought within fourteen days (f). This period runs, in the case of an order made in chambers, from the time when the order is pronounced or the appellant first has notice of it, and in other cases from the time when the order is signed, entered, or otherwise perfected (g). It would

(a) Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 9; see p. 389, *ante*. The judge may direct a reference to chambers as to the form of conveyance (*Re Monckton and Gilzean* (1884), 27 Ch. D. 555, 564), or the amount of compensation payable (*Aspinalls to Powell and Scholefield* (1889), 60 L. T. 595). For forms of order, see 3 Seton, Judgments and Orders, 7th ed., pp. 2197 *et seq.*

(b) *Re Packman and Moss* (1875), 1 Ch. D. 214, 217; *Re Waddell's Contract* (1876), 2 Ch. D. 172, 176; *Re Cooke's Contract* (1877), 4 Ch. D. 454, 463; *Re Ford and Hill* (1879), 10 Ch. D. 365, 367, 371, C. A.; *Re Johnson and Tustin* (1885), 30 Ch. D. 42, 49, C. A.; *Re Davis and Cavey* (1888), 40 Ch. D. 601, 609; *Re Ebsworth and Tidy's Contract* (1889), 42 Ch. D. 23, 53, C. A.; *Re Starr-Bowkett Building Society and Sibun's Contract* (1889), 42 Ch. D. 375, 386, C. A. A vendor who insists on proceeding under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 9, where the proper procedure is by originating summons (see p. 395, *ante*, and note (f), p. 389, *ante*), may, even if successful, be ordered to pay costs (*Re Nichols' and Von Joel's Contract*, [1910] 1 Ch. 43, C. A.).

(c) *Osborne to Rowlett* (1880), 13 Ch. D. 774, 798; *Re Tanqueray-Williamson and Landau* (1882), 20 Ch. D. 465, 483, C. A. But sometimes the purchaser has not been made to pay costs where the question was proper to be submitted to the court (*Re Coward and Adam's Purchase* (1875), L. R. 20 Eq. 179; *Finch v. Julkes*, [1877] W. N. 211; *Re Metropolitan District Rail. Co. and Cosh* (1880), 13 Ch. D. 607, 613, C. A.; *Re Great Northern Rail. Co. and Sunderson* (1884), 25 Ch. D. 788, 794), or where it is one on which there have been conflicting decisions (*Osborne to Rowlett*, *supra*, at p. 798).

(d) *Re Spindler and Mear's Contract*, [1901] 1 Ch. 908.

(e) *Re Yeilding and Westbrook* (1886), 31 Ch. D. 344; *Re Higgins and Percival* (1888), 59 L. T. 213, 214.

(f) R. S. C., Ord. 58, rr. 9, 15; *Re Blyth and Young* (1880), 13 Ch. D. 416, C. A.; *Re Ricketts and Avent's Contract*, [1890] W. N. 16, C. A.; see title PRACTICE AND PROCEDURE, Vol. XXIII., p. 196.

(g) R. S. C., Ord. 58, r. 15; *Re Olay and Telley* (1880), 16 Ch. D. 3, 7. But on the mere refusal of an application, time runs from the date of refusal (R. S. C., Ord. 58, r. 15).

seem that an order on a vendor and purchaser summons is in most cases not an interlocutory order, but a final order from which an appeal lies to the Court of Appeal without leave (*h*).

SECT. 4.
The Order.

678. Where a party has obtained an order on a vendor and purchaser summons which requires something to be done by the other party, and the other party fails to comply, it is usually proper to apply to the court for enforcement of the order, and not to commence an action for specific performance (*i*). Where, however, the order does not contain any direction with which a party fails to comply, but merely decides the rights of one or both parties under the contract, an action for specific performance is, it seems, the only remedy open if one party declines to complete the contract (*k*).

Enforcement
of order.

679. In a proper case where, after an order is made, fresh matter is for the first time discovered which is material to the questions raised on the summons and could not be produced or used by the party claiming the benefit of it at the time when the order on the summons was made, the order may be reviewed, and the question decided on the summons reopened: in such circumstances, a judge of the Chancery Division has jurisdiction to review an order of the Court of Appeal (*l*).

Review of
order.

Part VII.—Remedies under an Uncompleted Contract.

SECT. 1.—*Rescission and Resale by Vendor.*

680. If the contract contains a condition entitling the vendor to rescind on the happening of certain events, the vendor may, if these events arise, rescind (*m*). In the absence of such a condition, the vendor can only rescind if the conduct of the purchaser is such as to amount to a repudiation of the contract (*n*). If the vendor, acting within his rights, rescinds the contract, he

Rescission.

(*h*) See title JUDGMENTS AND ORDERS, Vol. XVIII., pp. 178 *et seq.*

(*i*) *Thompson v. Ringer* (1881), 44 L. T. 507. As to the mode of enforcing orders, see title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., pp. 297 *et seq.*

(*k*) See *Re Scott and Alvarez's Contract*, *Scott v. Alvarez*, [1895] 1 Ch. 596, 610, C. A., where this course was adopted, and its propriety does not appear to have been questioned.

(*l*) *Re Scott and Alvarez's Contract*, *Scott v. Alvarez*, *supra*, per KEKEWICH, J., at pp. 610, 622: S. C., [1895] 2 Ch. 803, 611, C. A.; see also title ESTOPPEL, Vol. XIII., p. 333.

(*m*) See pp. 324 *et seq.*, *ante*.

(*n*) *Howe v. Smith* (1884), 27 Ch. D. 89, C. A., per COTTON, L.J., at p. 95. Conduct which would disentitle the purchaser to specific performance does not necessarily amount to a repudiation of the contract. Although the purchaser has lost his equitable right to specific performance, he may be entitled to treat the contract as subsisting and recover damages for breach of it (*Cornwall v. Henson*, [1900] 2 Ch. 298, C. A.). If, after an order for specific performance, the purchaser makes default in payment of the purchase-money, the vendor is entitled to an order for rescission (*Foligno v. Martin* (1853), 16 Beav. 586; *Watson v. Cox* (1873), L. R. 15 Eq. 219; *Hall v. Burnell*, [1911] 2 Ch. 551). As to conduct amounting to repudiation, see title CONTRACT, Vol. VII., pp. 438 *et seq.*

SECT. 1.
Rescission
and Resale
by Vendor.

may resell the property as owner (o) and retain any excess of price obtained on such resale beyond that fixed by the contract (p); but he cannot recover damages (q), nor, if the purchaser has been in possession, occupation rent (r).

Where the vendor rescinds the contract and resells under his absolute title, the purchaser forfeits the deposit entirely whatever the result of the resale, but the vendor loses his right to claim for the deficiency in price, if any (s).

SECT. 2.—Forfeiture and Recovery of Deposit.

SUB-SECT. 1.—Forfeiture.

Deposit.

681. A deposit paid under a contract of sale serves two purposes; if the sale is carried out it goes against the purchase-money; but primarily it is a security for the performance of the contract (t), and it is usual to provide expressly that, in the event of the purchaser failing to observe the conditions of the contract, the deposit shall be forfeited to the vendor (a). Such provision, however, is not necessary, and unless the contract taken as a whole shows an intention to exclude forfeiture (b), the vendor is entitled, by virtue of the purpose of the deposit, to retain it as forfeited if the contract goes off by the default of the purchaser (c); or, if the deposit has been paid to a stakeholder, he can require it to be paid over to himself (d). But the rule as to retention by the vendor appears to

(o) *Howe v. Smith* (1884), 27 Ch. D. 89, C. A. As to resale where there is no rescission, see note (q), p. 341, *ante*.

(p) *Ex parte Hunter* (1801), 6 Ves. 94. As to retention of the deposit, see the text, *infra*.

(q) *Henty v. Schröder* (1870), 12 Ch. D. 660; *Hutchings v. Humphreys* (1885), 54 L. J. (CH.) 650, not following *Sweet v. Meredith* (1863), 4 Giff. 207.

(r) *Hutchings v. Humphreys*, *supra*; as to occupation rent, see p. 373, *ante*.

(s) *Howe v. Smith*, *supra*, per FRY, L.J., at p. 105.

(t) *Depree v. Bedborough* (1863), 4 Giff. 479; *Collins v. Stimson* (1883), 11 Q. B. D. 142; *Howe v. Smith*, *supra*, at pp. 95, 98; *Soper v. Arnold* (1889), 14 App. Cas. 429, per Lord MACNAGHTEN, at p. 435; *Levy v. Stogdon*, [1898] 1 Ch. 478, 485; affirmed, [1899] 1 Ch. 5, C. A.; *Hall v. Burnell*, [1911] 2 Ch. 551. As to payment of deposits, see, further, p. 320, *ante*; title CONTRACT, Vol. VII., p. 482.

(a) *Gee v. Pearce* (1848), 2 De G. & Sm. 325, 341; see pp. 340, 341, *ante*.

(b) See *Palmer v. Temple* (1839), 9 Ad. & El. 508 (where a provision for payment of £1,000 as liquidated damages by either party in default was held to show an intention against forfeiture of a deposit of £300). The question of forfeiture depends, it was there said, on the intention of the parties to be collected from the whole instrument (see *ibid.*, per COTTON, L.J., cited with approval in *Howe v. Smith*, *supra*, per BOWEN, L.J., at p. 97). But in practice an exclusion of forfeiture is never intended. Either there is an express clause of forfeiture, or there is simply a payment by way of deposit, and this implies liability to forfeiture; see the text, *supra*.

(c) "According to the law of vendor and purchaser the inference is that such a deposit"—that is, a payment of money simply as a "deposit"—"is paid as a guarantee for the performance of the contract, and where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit" (*Collins v. Stimson*, *supra*, per POLLOCK, B., at p. 143; *Howe v. Smith*, *supra*; *Levy v. Stogdon*, *supra*; *Sprague v. Booth*, [1909] A. C. 576, 580, P. C.). The law as to forfeiture of deposits applies to sales by the court (*Depree v. Bedborough*, *supra*).

(d) The nature of the deposit and the implied terms on which, in the

apply only to money paid as a deposit, not to instalments of purchase-money (e).

682. Where in accordance with the contract the deposit is invested between the dates of sale and completion, the vendor is entitled to any increase, and must bear the loss, if any, in the value of the securities (f).

683. Where the contract gives the vendor an express right of forfeiture on non-performance of the contract or non-observance of its conditions, the right is exercisable when such non-performance or non-observance is finally ascertained, that is, at the date for performance or observance named in the contract if time is of the essence of the contract (g). But the right cannot be exercised upon non-performance or non-observance at such date, unless time in this respect is of the essence of the contract (h).

Where the contract gives the vendor no express right of forfeiture, the right is exercisable when—there being no default on the part of the vendor—the purchaser has expressly or impliedly repudiated the contract (i). An express repudiation gives the vendor an immediate right to retain the deposit as forfeited. There is an implied repudiation if the purchaser fails to complete on the day when he is bound to complete (j). This is the day, if any, fixed by the contract for completion, if time in this respect is of the essence of the contract (k); otherwise, if the purchaser is in default, the vendor can make time of the essence of the contract by giving the purchaser notice to complete at a reasonable date and threatening forfeiture of the deposit on non-completion on that date (l).

SECT. 2.
Forfeiture
and
Recovery of
Deposit.

Investment
of deposit.

When right
of forfeiture
arises.

absence of express terms, it is paid, are not affected by the fact that it is paid to a stakeholder instead of to the vendor (*Hall v. Burnell*, [1911] 2 Ch. 551; see *Collins v. Stimson* (1883), 11 Q. B. D. 142, 143; *Hart v. Porthgarn Harbour Co., Ltd.*, [1903] 1 Ch. 690, 696). As to the authority of an auctioneer to receive payment of a deposit, see title AUCTION AND AUCTIONEERS, Vol. I., p. 503. It is important that the deposit should be paid to a stakeholder, since payment to the vendor's solicitor as his agent is equivalent to payment to the vendor; see *Ellis v. Goulton*, [1893] 1 Q. B. 350, C. A.; see note (f), p. 320, *ante*. An I.O.U. given for the deposit can be sued upon in the event of the deposit being forfeited (*Hinton v. Sparkes* (1868), L. R. 3 C. P. 161; see *Teate v. Moors* (1857), 3 Jur. (N. S.) 48; *Hodgens v. Keon*, [1894] 2 I. R. 657, C. A.; title AUCTION AND AUCTIONEERS, Vol. I., p. 519); see also p. 320, *ante*.

(e) See *Cornwall v. Henson*, [1900] 2 Ch. 298, 302, 305, C. A.

(f) *Burroughes v. Browne* (1862), 9 Hare. 609. As to putting the unpaid balance of purchase-money on deposit, see pp. 334, 376, *ante*. A deposit paid to an auctioneer is at the risk of the vendor (see title AUCTION AND AUCTIONEERS, Vol. I., p. 513); if paid to a stakeholder, it is apparently at the risk of whichever party is ultimately entitled to it; but see *Fenton v. Browne* (1807), 14 Ves. 144, 150.

(g) See *Sprague v. Booth*, [1909] A. C. 576, 581, P. C.

(h) *Lennon v. Napper* (1802), 2 Sch. & Lef. 682, 684; see *Roberts v. Berry* (1853), 3 De G. M. & G. 284, C. A.; *Tilley v. Thomas* (1867), 3 Ch. App. 61, 67; and, as to when time is of the essence of the contract, see p. 332, *ante*.

(i) This gives the vendor the right to rescind the contract; see p. 397, *ante*.

(j) See *Howe v. Smith* (1884), 27 Ch. D. 89, 95, 103, C. A.

(k) See p. 332, *ante*.

(l) See *Cornwall v. Henson*, [1900] 2 Ch. 298, C. A.; *Green v. Serin* (1879),

SECT. 2.

**Forfeiture
and
Recovery of
Deposit.**Rights to
rescind and
retain deposit.Deficiency on
resale.Rescission
after title
accepted.

684. The vendor, if he becomes entitled to rescind the contract owing to the purchaser's default, can both rescind and retain the deposit (*m*). The contract being thus at an end, the forfeiture of the deposit is not strictly in the nature of damages for breach of contract, though it has been said to be in the nature of liquidated damages and not a penalty (*n*). But the purchaser is not entitled to terminate the contract by giving up the deposit. Notwithstanding the deposit the vendor can insist on the contract, and sue either for specific performance (*o*) or for damages beyond the deposit (*p*).

685. In calculating the deficiency on a resale (*q*) under a power contained in the contract, the purchaser is entitled to be credited with the amount of the deposit (*r*); but this rule only applies where the power of resale is exercised (*s*).

686. If the purchaser has by his default in completion after he has accepted the title given the vendor the right to rescind the contract and retain the deposit as forfeited, and such right has been exercised, the forfeiture is final, and the purchaser cannot recover the deposit on the ground that the vendor's title is subsequently discovered to be defective (*t*).

13 Ch. D. 589; and, as to failure by the purchaser to complete after notice, see *Howe v. Smith* (1884), 27 Ch. D. 89, C. A.; *Soper v. Arnold* (1889), 14 App. Cas. 429. It is not enough that the purchaser has, by delay or otherwise, lost the right to specific performance; his conduct must amount to repudiation of the contract on his part (*Howe v. Smith, supra, per Cotton, L.J.*, at p. 95), involving the loss of his right to maintain an action for damages (*ibid., per Fry, L.J.*, at p. 104); see *Levy v. Stogdon*, [1898] 1 Ch. 478, 485. Three weeks' notice after two years' delay by the vendors has been held unreasonably short (*Green v. Sevin* (1879), 13 Ch. D. 589); compare *Stickney v. Keeble* (1913), 57 Sol. Jo. 389, C. A.; note (*a*), p. 402, *post*.

(*m*) Consequently, upon the purchaser failing to complete in pursuance of a judgment for specific performance, the vendor can obtain an order for rescission of the contract and for forfeiture of the deposit (*Hall v. Burnell*, [1911] 2 Ch. 551, 555, 556, not following *Jackson v. De Kadich*, [1904] W. N. 168); see *Dunn v. Vere* (1870), 19 W. R. 151; *Re Parnell, Ex parte Barrell* (1875), 10 Ch. App. 512 (bankruptcy of purchaser); *Olde v. Olde*, [1904] 1 Ch. 35. Where the deposit was not made as required by the contract, the vendor recovered the amount which should have been deposited, though it exceeded his loss on resale (*Dewar v. Mintoft*, [1912] 2 K. B. 373).

(*n*) *Hinton v. Sparkes* (1868), L. R. 3 C. P. 161; *Collins v. Stimson* (1883), 11 Q. B. D. 142, 144; *Wallis v. Smith* (1882), 21 Ch. D. 243, 258, C. A. As to the distinction between a penalty and liquidated damages, see title DAMAGES, Vol. X., pp. 328 *et seq.*

(*o*) *Crutchley v. Jerningham* (1817), 2 Mer. 502, 506; see *Palmer v. Temple* (1839), 9 Ad. & El. 508.

(*p*) *Icely v. Grew* (1836), 6 Nev. & M. (K. B.) 467. As to repudiation by the purchaser, see pp. 402 *et seq., post*. As to resale where a purchaser on a sale by the court fails to complete, see Dart, Vendors and Purchasers, 7th ed., p. 1188.

(*q*) As to resale after rescission, see p. 398, *ante*.

(*r*) *Ockenden v. Henly* (1858), E. B. & E. 485; *Howe v. Smith, supra*; *Shuttleworth v. Clews*, [1910] 1 Ch. 176 (pointing out the error in this respect in the order in *Griffiths v. Vezey*, [1906] 1 Ch. 796); see *Lamond v. Davall* (1847), 9 Q. B. 1030, 1032; *Culton v. Bennett* (1884), 51 L. T. 70.

(*s*) *Essex v. Daniell, Daniell v. Essex* (1875), L. R. 10 C. P. 538, 550. As to resale after rescission instead of under an express power, see p. 341, *ante*.

(*t*) *Soper v. Arnold, supra*.

SUB-SECT. 2.—*Recovery.*

SECT. 2.

Forfeiture
and
Recovery of
Deposit.Recovery of
deposit by
purchaser.

687. Where the vendor makes such default in performing his part of the contract (*a*) as entitles the purchaser to rescind the contract (*b*), the purchaser can recover the deposit with interest at the rate of 4 per cent. per annum (*c*); and, although on rescission of the contract he cannot obtain damages, he is entitled to *restitutio in integrum* (*d*), and on this ground can recover the costs of investigating the title (*e*), and apparently other expenses incurred in consequence of entering into the agreement (*f*), though, perhaps, not the costs of the agreement itself (*g*). If, instead of rescinding, the purchaser sues for damages for breach of contract, he can under this head recover his expenses in addition to the deposit (*h*). The fact that the purchaser has by delay lost the right to specific performance does not prevent him from recovering the deposit (*i*).

688. The right of the purchaser to recover his deposit is a legal right and springs out of breach of contract by the vendor (*k*). Where there has been no breach of contract, the vendor is not liable to return the deposit (*l*), notwithstanding that he is not entitled to specific performance (*m*). Thus, a defect in title, which the

When right
arises.

(*a*) *E.g.*, by failing to make a good title (*Gray v. Gutteridge* (1828), 1 Man. & Ry. (K. B.) 614; *Edwards v. Hoddling* (1814), 5 Taunt. 815; *Want v. Stallibrass* (1873), L. R. 8 Exch. 175; *Hone v. Gakstatter* (1909), 53 Sol. Jo. 286 (failure to disclose restrictive covenants)); see p. 341, *ante*. If the vendor has a good title, but has not satisfied the purchaser that he can convey—where, for instance, he himself is entitled under an uncompleted contract—this does not enable the purchaser to repudiate the contract and recover his deposit (*Re Hucklesby and Atkinson's Contract* (1910), 102 L. T. 214); and see title CONTRACT, Vol. VII., p. 482.

(*b*) See p. 402, *post*.

(*c*) *Day v. Singleton*, [1899] 2 Ch. 320, 327, C. A.; *Powell v. Marshall, Parkes & Co.*, [1899] 1 Q. B. 710, C. A.; see *Warren v. Moore* (1898), 14 T. L. R. 497, C. A. In *Weston v. Savage* (1879), 10 Ch. D. 736, interest was allowed at 5 per cent. per annum; but 4 per cent. is the usual rate (*Re Bryant and Barningham's Contract* (1890), 44 Ch. D. 218, C. A., *per KAY, J.*, at p. 222); and see title MONEY AND MONEY-LENDING, Vol. XXI., pp. 42, 43. In equity no prior demand is necessary for recovery of interest; see *Williams, Vendor and Purchaser*, 2nd ed., p. 1052, note (*p*); note (*m*), p. 374, *ante*. As to repayment of the deposit where so provided by the conditions of sale, see p. 325, *ante*; and, as to the purchaser's lien for his deposit, see p. 367, *ante*; title LIEN, Vol. XIX., pp. 16 *et seq.*, 31.

(*d*) See *Williams, Vendor and Purchaser*, 2nd ed., p. 1052, note (*m*).

(*e*) *Re Bryant and Barningham's Contract*, *supra*; *Re Hare and O'More's Contract*, [1901] 1 Ch. 93, 96; *Re Walker and Oakshott's Contract*, [1901] 2 Ch. 383, 387 (where this relief was granted on a vendor and purchaser summons (see note (*o*), p. 390, *ante*); overruled on another point by *Re Judd and Poland and Skelcher's Contract*, [1906] 1 Ch. 684, C. A.).

(*f*) See *Gosbell v. Archer* (1835), 2 Ad. & El. 500; *De Bernardy v. Harding* (1863), 8 Exch. 822.

(*g*) See *Williams, Vendor and Purchaser*, 2nd ed., p. 1053.

(*h*) See p. 411, *post*; and, as to costs of the contract, see *Pearl Life Assurance Co. v. Buttenshaw*, [1893] W. N. 123. As to recovery of a deposit from an auctioneer, see title AUCTION AND AUCTIONEERS, Vol. I., pp. 512, 513; and, as to recovery from a solicitor, see *Ellis v. Goulton*, [1893] 1 Q. B. 350, C. A.; see note (*f*), p. 320, *ante*; note (*d*), p. 398, *ante*.

(*i*) *Levy v. Stogdon*, [1898] 1 Ch. 478; affirmed, [1899] 1 Ch. 5, C. A.

(*k*) Compare *Howe v. Smith* (1832), 27 Ch. D. 89, C. A.; and see *Farrer v. Nightingal* (1798), 2 Esp. 639.

(*l*) *Best v. Hamand* (1879), 12 Ch. D. 1, C. A.

(*m*) *Re Day and Cavey* (1888), 40 Ch. D. 601, 607.

SECT. 2.
Forfeiture
and
Recovery of
Deposit.

Verbal
contract.

purchaser was by the conditions precluded from objecting to (n), or mere delay (o), may prevent the vendor from obtaining specific performance without rendering him liable to return the deposit (p).

689. Where a deposit has been paid under a verbal contract for the sale of land, a vendor who resists the purchaser's action on the contract by the plea of the Statute of Frauds (q) is liable to return the deposit as money had and received to the use of the purchaser (r); but it seems that if the purchaser sets up the statute in order to escape from his contract he cannot recover the deposit (s).

SECT. 3.—Repudiation by Purchaser.

Repudiation
for defect of
title.

690. The purchaser has the right to repudiate the contract immediately upon the failure of the vendor to perform something which goes to the root of the contract (t). The right usually arises upon the failure of the vendor to perform his obligation to show and prove a good title (u); thus, where the vendor does not deliver a proper abstract (v), and the purchaser has given reasonable notice fixing a time for its delivery, he can repudiate the contract if the vendor is still in default on the expiration of the notice (a); and

(n) *Re Scott and Alvarez's Contract*, *Scott v. Alvarez*, [1895] 2 Ch. 603, C. A.; see *Re National Provincial Bank of England and Marsh*, [1895] 1 Ch. 190.

(o) *Southcomb v. Exeter (Bishop)* (1847), 6 Hare, 213, 227.

(p) Before the Judicature Acts (see title EQUITY, Vol. XIII., p. 61), a court of equity, on dismissing the vendor's suit for specific performance, would order a return of the deposit if it was clear that the vendor had lost his legal rights under the contract, but not otherwise (*Southcomb v. Exeter (Bishop)*, *supra*); and a decree might be made for specific performance even after the purchaser had recovered the deposit at law (*Hoggart v. Scott* (1830), 1 Russ. & M. 293 (where at the date of the contract the vendor had no title, but the purchaser did not at once repudiate, and the title was subsequently completed)).

(q) 29 Car. 2, c. 3.

(r) *Gosbell v. Archer* (1835), 2 Ad. & El. 500.

(s) *Thomas v. Brown* (1876), 1 Q. B. D. 714, questioning *Casson v. Roberts* (1862), 31 Beav. 613, *contra*.

(t) This is in accordance with the rule applicable to contracts generally (*Mersey Steel and Iron Co. v. Naylor, Benson & Co.* (1884), 9 App. Cas. 434, 443); see title CONTRACT, Vol. VII., p. 439. A purchaser cannot both repudiate and insist on the contract (*Smith v. Buller*, [1900] 1 Q. B. 694, 698, C. A.). A document containing a repudiation of a contract may be available as a memorandum for the purpose of the Statute of Frauds (29 Car. 2, c. 3); see title CONTRACT, Vol. VII., p. 368; *Dewar v. McIntosh*, [1912] 2 K. B. 373. The purchaser cannot terminate the contract by giving up the deposit; see p. 400, *ante*.

(u) As to this obligation, see pp. 341 *et seq.*, *ante*. The title to be shown by the vendor must be such as was stipulated for, *i.e.*, it must commence with the specified document or at the specified date (*Re Head's Trustees and Macdonald* (1890), 45 Ch. D. 310, C. A.; *Bellamy v. Debenham*, [1891] 1 Ch. 412, C. A.; see p. 321, *ante*). As to the purchaser being bound to take a possessory title, see note (g), p. 351, *ante*.

(v) See *Re Priestley and Davidson's Contract* (1892), 31 L. R. Ir. 122.

(a) *Venn v. Oatoll* (1873), 27 L. T. 469; *Compton v. Bagley*, [1892] 1 Ch. 313 (fourteen days was held a reasonable time, having regard to previous requests for the delivery of the abstract, and the nature of the property, a farm of which the purchaser was to have early possession); and see *Stickney v. Keeble* (1913), 57 Sol. Jo. 389, C. A. The purchaser cannot repudiate if, after such a notice, he receives the abstract and keeps it without objection (*Seton v. Slade, Hunter v. Seton* (1892), 7 Ves. 265).

where the vendor is neither able to convey himself, nor has the power to compel a conveyance from any other person, the purchaser, so soon as he finds this to be the case, may repudiate: he is not bound to wait to see whether the vendor can induce some third person, who has the power, to join in making a good title to the property (b).

SECT. 3.
Repudia-
tion by
Purchaser.

The rule does not apply to a defect of conveyance as distinguished from a defect of title (c).

Similarly, where the property which the vendor can convey is not substantially the same as the property contracted to be sold (d), the purchaser can repudiate; but trifling defects in the property may be regarded by the court merely as matters for compensation (e).

Defect in
parcels.

691. Where the completion of the contract depends on the consent of a third person—where, for instance, the vendor of leasehold property requires a licence to assign (f)—the vendor is not bound to procure such consent before the date for completion; and the purchaser cannot repudiate earlier on the ground that the consent has not been obtained, unless there are special circumstances entitling him to treat the contract as at an end—if, for instance, he can prove, or the vendor has admitted, that the consent cannot be obtained by the due date (g).

Completion
depending on
third person.

692. The purchaser's right of repudiation arises so soon as the vendor's defect of title is definitely ascertained either from the abstract, or from his replies to the purchaser's requisitions (h). The defect giving a right of repudiation must be a substantial

When the
right must be
exercised.

(b) *Farrer v. Nash* (1865), 35 Beav. 167; *Brewer v. Broadwood* (1882), 22 Ch. D. 105; *Lee v. Soames* (1888), 36 W. R. 884; *Wylson v. Dunn* (1887), 34 Ch. D. 569, 577; *Re Bryant and Barningham's Contract* (1890), 44 Ch. D. 218, C. A.; *Re Head's Trustees and Macdonald* (1890), 45 Ch. D. 310, C. A.; *Bellamy v. Debenham*, [1891] 1 Ch. 412, 420, C. A.; *Re Cooke and Holland's Contract* (1898), 78 L. T. 106; *Warren v. Moore* (1897), 14 T. L. R. 138; affirmed (1898), 14 T. L. R. 497, C. A.; *Powell v. Marshall, Parkes & Co.*, [1899] 1 Q. B. 710, C. A.; *Smith v. Butler*, [1900] 1 Q. B. 694, 700, C. A.; *Re Hucklesby and Atkinson's Contract* (1910), 102 L. T. 214, 217; compare *Boehm v. Wood* (1820), 1 Jac. & W. 419, 421; *Forster v. Hoggart* (1850), 15 Q. B. 155.

(c) *Hatten v. Russell* (1888), 38 Ch. D. 334, 347; *Re Hucklesby and Atkinson's Contract*, *supra*; see note (a), p. 401, *ante*.

(d) *Flight v. Booth* (1834), 1 Bing. (N. C.) 370; *Portman v. Mill* (1826), 2 Russ. 570; *Re Arnold*, *Arnold v. Arnold* (1880), 14 Ch. D. 270, C. A.; *Re Fawcett and Holmes' Contract* (1889), 42 Ch. D. 150, C. A.; *Jacobs v. Revell*, [1900] 2 Ch. 858; see p. 329, *ante*, and *Hearn v. Tomlin* (1793), Peake, 253 [192]; *Gardiner v. Tate* (1876), 10 I. R. C. L. 460; title SPECIFIC PERFORMANCE.

(e) *Shepherd v. Croft*, [1911] 1 Ch. 521 (latent defect: watercourse under property); compare *Re Brewer and Hankins's Contract* (1899), 80 L. T. 127, C. A.; *Re Puckett and Smith's Contract*, [1902] 2 Ch. 258, C. A.; and see *Carlsh v. Salt*, [1906] 1 Ch. 335; see, further, pp. 300, *ante*, 405, 406, *post*.

(f) *Ellis v. Rogers* (1885), 29 Ch. D. 661, 671, 672, C. A.; see *Stowell v. Robinson* (1837), 3 Bing. (N. C.) 928; compare *Dotesio v. Biss* (1912), 56 Sol. Jo. 612, C. A.

(g) *Smith v. Butler*, [1900] 1 Q. B. 694, 699, C. A.

(h) See *Lee v. Soames*, *supra*; *Weston v. Savage* (1879), 10 Ch. D. 735; *Maconchy v. Olxton*, [1898] 1 I. R. 291, 308, C. A. As to rescission on the vendor's refusal to comply with a requisition as to conveyance, see *Denny v. Hancock* (1870), 6 Ch. App. 1, 13.

SECT. 3.
Repudia-
tion by
Purchaser.

defect, and not a slight defect which can be properly met by compensation (i). The right, however, must be exercised immediately the defect is so ascertained. If the purchaser continues in negotiation as to the title, and thus treats the contract as subsisting, he cannot repudiate at any subsequent moment he may choose (k), but must give the vendor a reasonable time to remedy the defect (l).

Restrictions
on repudia-
tion.

693. The purchaser cannot repudiate if he is in the first instance informed by the vendor of the defect in the title, and that it will not be cured without some delay (m). After a judgment for specific performance the purchaser cannot repudiate the contract without the leave of the court (n). In such circumstances he should, on the discovery of the defect in title, move to be discharged from the contract (o).

Nature of
right of
repudiation.

694. Rightful repudiation by the purchaser is available as a defence to an action by the vendor for specific performance (p), and in this aspect it depends on the doctrine of mutuality in the contract (q); but it appears also to operate as a rescission of the contract at law, so as to entitle the purchaser to maintain an action for a declaration of rescission and the return of the deposit (r), and to be available as a defence to the vendor's action for breach of contract on non-completion at the proper time (s).

(i) *Halkett v. Dudley (Earl)*, [1907] 1 Ch. 590, 596; see *Rudd v. Lascelles* [1900] 1 Ch. 815; *Jacobs v. Revell*, [1900] 2 Ch. 858; p. 406, *post*.

(k) *Hoggart v. Scott* (1830), 1 Russ. & M. 293; *Eyston v. Simonds* (1842), 1 Y. & C. Ch. Cas. 608; *Salisbury v. Hatcher* (1842), 2 Y. & C. Ch. Cas. 54, 66; *Murrell v. Goodyear* (1860), 1 De G. F. & J. 432, C. A.; *Halkett v. Dudley (Earl)*, [1907] 1 Ch. 590, 596.

(l) *Murrell v. Goodyear*, *supra*, per TURNER, L.J., at p. 450; and see *Thomson v. Miles* (1794), 1 Esp. 184. As to making time of the essence of the contract by notice, see *Taylor v. Brown* (1839), 2 Beav. 180; *Wood v. Machu* (1846), 5 Hare. 158; *Nott v. Riccard* (1856), 22 Beav. 307; p. 333, *ante*; and see *Royou v. Paul* (1858), 28 L. J. (Ch.) 555; *Laughton v. Port Erin Commissioners*, [1910] A. C. 565, 569, P. C.

(m) *Wylson v. Dunn* (1887), 34 Ch. D. 569, 578; see *Hoggart v. Scott*, *supra*; *Weston v. Savage* (1879), 10 Ch. D. 736.

(n) *Halkett v. Dudley (Earl)*, *supra*.

(o) *Ibid.* The jurisdiction of the court is discretionary, and as a rule the purchaser is not discharged if the title can be made good in a reasonable time (*ibid.*, at p. 593; see *Jenkins v. Hiles* (1802), 6 Ves. 646; *Wynn v. Morgan* (1802), 7 Ves. 202).

(p) *Bellamy v. Debenham*, [1891] 1 Ch. 412, 420, C. A.; see *Royou v. Paul*, *supra*. As to the effect of a purchaser pleading the Statute of Frauds (29 Car. 2, c. 3) to escape from his contract, see p. 293, *ante*. As to defences to an action of specific performance generally, see title SPECIFIC PERFORMANCE.

(q) *Wylson v. Dunn*, *supra*, at p. 577; *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295, 300, C. A.; *Halkett v. Dudley (Earl)*, *supra*, at p. 596; see title SPECIFIC PERFORMANCE; and, as to mutuality, see title CONTRACT, Vol. VII., p. 354.

(r) *Lee v. Soames* (1888), 36 W. R. 884; *Weston v. Savage*, *supra*, at p. 741.

(s) *Brewer v. Broadwood* (1882), 22 Ch. D. 105. This point was left open in *Bellamy v. Debenham*, *supra*, and in *Halkett v. Dudley (Earl)*, *supra*. PARKER, J., treated the purchaser's immediate right of repudiation for defect of title as an equitable right only, leaving him liable on the contract, if the vendor makes a good title at the time fixed for completion. But this overlooks the special obligation of a vendor of land to make out his title prior to completion so as to enable the purchaser to rely on and prepare

SECT. 3.
Repudia-
tion by
Purchaser.

695. The purchaser may also repudiate a contract which is vitiated by a material misrepresentation of fact (*t*), even though innocent (*a*), made by the vendor, either verbally (*b*), or by conduct (*c*), or by the vendor's agent (*d*).

Misrepresentation.

for completion, and the better opinion seems to be that the right of repudiation is a legal as well as an equitable right (see Williams, Vendor and Purchaser, 2nd ed., p. 185, note (1)).

(*t*) As to mere puffing statements, see p. 301, *ante*; title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 670, 671. The following are misrepresentations of fact giving the right to repudiate:—That the property is not subject to restrictive covenants when in fact it is (*Nottingham Patent Brick and Tile Co. v. Buller* (1885), 15 Q. B. D. 261; affirmed (1886), 16 Q. B. D. 778, C. A.), or is subject to certain restrictive covenants less onerous than those in fact affecting the property (*Flight v. Booth* (1834), 1 Bing. (N. C.) 370; *Phillips v. Caldcleugh* (1868), L. R. 4 Q. B. 159); that the property is freehold when in fact it is copyhold (*Ayles v. Cox* (1852), 16 Beav. 23), or leasehold when held on an underlease (*Macleay v. Booth* (1848), 2 De G. & Sm. 718; *Re Beyfus and Masters's Contract* (1888), 39 Ch. D. 110, C. A.); see also *Dobell v. Hutchinson* (1835), 3 Ad. & El. 355; *Evans v. Robins* (1862), 8 Jur. (N. S.) 846; see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 742 *et seq.*, 746 *et seq.* These misrepresentations may also be regarded as defects of title; see p. 302, *ante*. A representation that the vendor has a statutory or other power of sale is a representation of fact (*Richardson v. Williamson* (1871), L. R. 6 Q. B. 276; *West London Commercial Bank v. Kilson* (1894), 13 Q. B. D. 360, C. A.; and see *Cripps v. Reade* (1796), 6 Term Rep. 606), and not a misrepresentation of law; see p. 302, *ante*; title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 668, 669. It must be of a material fact, and the misrepresentation must have been believed by the purchaser and have caused him to enter into the contract (see p. 300, *ante*); see, generally, title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 658, 659. In sales under the direction of the court special regard is had that there should be no taint of misrepresentation in the conduct of the officers of the court (*Mahomed Kala Mea v. Harperink* (1908), 25 T. L. R. 180, P. C.). As to sales by order of the court, see pp. 313 *et seq.*, *ante*.

(*a*) *Holliwell v. Seacombe*, [1906] 1 Ch. 426 (land, subject to restrictive covenant which prevented purchasers from using it except for almshouses, described as "building land"); *Re Puckett and Smith's Contract*, [1902] 2 Ch. 258, C. A.; *Dougherty v. Oates* (1900), 45 Sol. Jo. 119; *Halkett v. Dudley (Earl)*, [1907] 1 Ch. 590; *Isaacs v. Towell*, [1898] 2 Ch. 285; *Carlisk v. Salt*, [1906] 1 Ch. 335 (innocent non-disclosure of service of party wall notice); *Pemsel and Wilson v. Tucker*, [1907] 2 Ch. 191 (restrictive stipulation as to light). As to innocent misrepresentation generally, see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 692 *et seq.*; and, as to property used for an illegal purpose, see *Hope v. Walter*, [1900] 1 Ch. 257, C. A.

(*b*) *E.g.*, that land is fit for building (*Re Puckett and Smith's Contract*, [1902] 2 Ch. 258, C. A.; *Dougherty v. Oates*, *supra*; *Holliwell v. Seacombe*, *supra*; or for business purposes (*Re Davis and Cavey* (1888), 40 Ch. D. 601); or as to the structural condition or state of a house (*Grant v. Munt* (1815), Coop. G. 173; *Dyer v. Hargrave*, *Hargrave v. Dyer* (1805), 10 Ves. 505; *Cree v. Stone* (1907), *Times*, 10th May; *De Lassalle v. Guildford*, [1901] 2 K. B. 215, C. A. (drains in good order); *Strangways v. Bishop* (1857), 29 L. T. (O. S.) 120 (house not damp); *Lamare v. Dixon* (1873), L. R. 6 H. L. 414 (cellars dry); *Stanley v. M'Gauran* (1882), 11 L. R. Ir. 314, C. A. (statement as to freedom from restrictions on user); *Smith v. Land and House Property Corporation* (1884), 28 Ch. D. 7, C. A. (house let to desirable tenant); and see *Higgins v. Samels* (1862), 2 John. & H. 460; *Tibbatts v. Boulter* (1895), 73 L. T. 534. As to the distinction between latent and patent defects, see p. 297, *ante*.

(*c*) *E.g.*, active concealment of defects which would otherwise be patent (*Pickering v. Dowson* (1813), 4 Taunt. 779, 785; *Schneider v. Heath* (1813),

(*d*) For note (*d*), see p. 406, *post*.

SECT. 3.
Repudia-
tion by
Purchaser.

Restitutio in
integrum.

696. Unless *restitutio in integrum* can substantially be made, the purchaser cannot exercise his right of rescission on the ground of the vendor's default(e); thus a lessee of mines, who continues to work the mines after warning of circumstances which would entitle him to set aside the lease, cannot exercise such right (f).

SECT. 4.—Compensation under an Open Contract(g).

Effect of
misrepresen-
tation or mis-
description
in open
contract.

697. Where there is a material defect in the quantity or quality of the property which the vendor has contracted to convey, and there is no condition giving or excluding compensation, the vendor cannot enforce the contract and compel the purchaser to accept compensation for the deficiency(h). Where, however, the error in description or the defect is trivial and innocently(i) made, the purchaser may be forced to take the property with compensation(k). A vendor cannot, it seems, enforce specific performance with compensation in his own favour(l).

Purchaser's
right to
compel
specific per-
formance
with com-
pensation.

698. Where the vendor has either expressly, or impliedly by his conduct, represented that he can convey a certain property and is

3 Camp. 506, 508; see also *Walters v. Morgan* (1861), 3 De G. F. & J. 718, 724; p. 297, *ante*. Mere silence as regards a material fact which the vendor is not obliged to disclose is no ground for rescission; see p. 298, *ante*.

(d) See title AGENCY, Vol. I., p. 211.

(e) *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218.

(f) *Vigers v. Pike* (1842), 8 Cl. & Fin. 562, 650, H. L.

(g) As to conditions giving or excluding compensation, see pp. 328 *et seq.*, *ante*. Where there is no provision for compensation, this cannot be obtained after conveyance; see note (l), p. 331, *ante*.

(h) *Drewe v. Hanson* (1802), 6 Ves. 675, 679; *Halsey v. Grant* (1806), 13 Ves. 73, 77, 79; *Binks v. Rokeby (Lord)* (1818), 2 Swan. 222, 225; *Cox v. Coventon* (1802), 31 Beav. 378; *Re Arnold, Arnold v. Arnold* (1880), 14 Ch. D. 270, 279, C. A.; *Rudd v. Lascelles*, [1900] 1 Ch. 815, 819. Even where there is a condition for compensation (see p. 329, *ante*), the court does not compel the purchaser to take property substantially different from that which he contracted to buy (*Flight v. Booth* (1834), 1 Bing. (N. C.) 370, 377; *Re Fawcett and Holmes' Contract* (1889), 42 Ch. D. 150, C. A.). Where there is a clause excluding compensation (see p. 332, *ante*), the case is a stronger one in favour of the purchaser (*Jacobs v. Revell*, [1900] 2 Ch. 858, 864; *Re Puckett and Smith's Contract*, [1902] 2 Ch. 258, C. A.).

(i) *Secus*, where the misdescription is dishonest (*Clermont (Viscount) v. Tasburgh* (1819), 1 Jac. & W. 112); notwithstanding there is a condition allowing compensation (*Re Terry and White's Contract* (1886), 32 Ch. D. 14, 29, C. A.; see *Dimmock v. Hallett* (1866), 2 Ch. App. 21, 28, 31).

(k) *Calcraft v. Roebuck* (1790), 1 Ves. 221 (land described as freehold though small part held at will); *Howland v. Norris* (1784), 1 Cox, Eq. Cas. 59 (estate sold with unlimited right of common, though in fact the right only extended to sheep); *Esdaille v. Stephenson* (1822), 1 Sim. & St. 122; *Prendergast v. Eyre* (1828), 2 Hog. 78, 81, 94 (undisclosed quit-rents or rentcharges of trifling amount); *Outhbert v. Baker* (1790), Sugden, Vendors and Purchasers, 14th ed., p. 313; *King v. Wilson* (1843), 6 Beav. 124 (error in measurement); see *Powell v. Elliott* (1875), 10 Ch. App. 424; and compare *Shepherd v. Croft*, [1911] 1 Ch. 521 (watercourse under property, where the vendor waived a condition excluding compensation); and see title SPECIFIC PERFORMANCE. A purchaser who has precluded himself from repudiating the contract may nevertheless be entitled to compensation (*Hughes v. Jones* (1861), 3 De G. F. & J. 307, 316, C. A.).

(l) *Manser v. Back* (1848), 6 Hare, 443, 447; see Williams, Vendor and Purchaser, 2nd ed., p. 724.

entitled to a certain interest in it (*m*), and it appears that there is a deficiency either in the quantity or quality of the property (*n*) or in his interest or title (*o*), and that such deficiency is capable of pecuniary assessment (*p*), the purchaser can compel the vendor to convey what he has got and submit to a reduction of the purchase-money (*q*). It is immaterial that the representation is honestly believed in by the vendor or his agent, provided that it is erroneous and the purchaser relies on it (*r*).

SECT. 4.
Compensation under an Open Contract.

699. Specific performance with compensation is, however, not decreed at the instance of the purchaser where there is a substantial difference between the property agreed to be sold and that which the vendor can convey (*s*), and partial performance would inflict real hardship on the vendor (*t*); or where it would be unjust to

No specific performance with compensation where hardship to vendor or injustice to third parties.

(*m*) See *Price v. Griffith* (1851), 1 De G. M. & G. 80, C. A.; *Rudd v. Lascelles*, [1900] 1 Ch. 815, 819.

(*n*) *Hill v. Buckley* (1811), 17 Ves. 394 (area which vendor was able to sell less than amount stated in contract); *McKenzie v. Hesketh* (1877), 7 Ch. D. 675; *Connor v. Potts*, [1897] 1 I. R. 534.

(*o*) Where, for instance, a vendor who purports to sell the fee simple has no title to part of the land (*Western v. Russell* (1814), 3 Ves. & B. 187), or has title only to an undivided moiety (*Mortlock v. Buller* (1804), 10 Ves. 292, 315, 316; *Hooper v. Smart*, *Bailey v. Piper* (1874), L. R. 18 Eq. 683; *Horrocks v. Rigby* (1878), 9 Ch. D. 180; *Burrow v. Scammell* (1881), 19 Ch. D. 175), or is entitled only as tenant for life (*Clenton v. Gower* (1674), Cas. temp. Finch, 164), or *pur autre vie* (*Barnes v. Wood* (1869), L. R. 8 Eq. 424), or in remainder (*Bolingbroke's (Lord) Case* (undated), 1 Sch. & Lef. 19, n.; *Nelthorpe v. Holgate* (1844), 1 Coll. 203; *Barker v. Cox* (1876), 4 Ch. D. 404). The court also assesses the want of a right to renewal of a lease (*Painter v. Newby* (1853), 11 Hare, 26); a deficiency in the length of a term (*Leslie v. Crommelin* (1867), 2 I. R. Eq. 134; see *Dale v. Lister* (circa 1808), cited 16 Ves. 7), or in the parcels agreed to be leased (*McKenzie v. Hesketh* (1877), 7 Ch. D. 675); the amount of compensation payable for outstanding leases (*Besant v. Richards* (1830), Tam. 509; compare *Linehan v. Cotter* (1844), 7 I. Eq. R. 176); or the possibility of a wife becoming entitled to dower (*Wilson v. Williams* (1857), 3 Jur. (N. S.) 810); and see title SPECIFIC PERFORMANCE.

(*p*) *Secus*, where compensation is impossible or extremely difficult of assessment, as in the case of partial interests (*Thomas v. Dering* (1837), 1 Keen, 720, 746) or of restrictive covenants (*Cato v. Thompson* (1882), 9 Q. B. D. 616, 618, C. A.; *Rudd v. Lascelles*, *supra*). The court cannot, it seems, as a rule assess compensation for the existence of sporting rights (*Durham (Earl) v. Legard* (1865), 34 Beav. 611; in *Burnell v. Brown* (1820), 1 Jac. & W. 168, the purchaser had waived his objection to the title on this ground); or for differences of tenure (*Ayles v. Cox* (1852), 16 Beav. 23, where there was a condition for compensation); but in *Barnes v. Wood* (1869), L. R. 8 Eq. 424, JAMES, V.-C., considered that the court must assess compensation in the best way it can; and see p. 330, *ante*.

(*q*) *Mortlock v. Buller* (1804), 10 Ves. 292, 315; *Milligan v. Cooke* (1808), 16 Ves. 1; *Powell v. Elliott* (1875), 10 Ch. App. 424.

(*r*) *Hill v. Buckley*, *supra*; *Hooper v. Smart*, *Bailey v. Piper*, *supra*; *Burrow v. Scammell*, *supra*; *Connor v. Potts*, *supra*; see *Castle v. Wilkinson* (1870), 5 Ch. App. 534.

(*s*) *Durham (Earl) v. Legard*, *supra* (where the vendor had 11,814 acres and contracted to sell 21,750); *contra*, *Connor v. Potts*, *supra*; see *Castle v. Wilkinson*, *supra*; *Rudd v. Lascelles*, *supra*.

(*t*) See *Price v. Griffith*, *supra*, at p. 86; *Lumley v. Ravenscroft*, [1895] 1 Q. B. 683, C. A.; *Hexter v. Pearce*, [1900] 1 Ch. 341, 345.

SECT. 4.
Compensation under an Open Contract.

Remedy of specific performance.

When specific performance refused.

third parties (*u*); or where the purchaser was aware of the defect or misrepresentation when he entered into the contract (*a*), or did not rely on the vendor's representation (*b*).

SECT. 5.—*Specific Performance.*

700 Specific performance (*c*) of a contract is ordered at the discretion of the court (*d*) in cases where damages do not afford a complete remedy (*e*); and although, since a vendor's claim is, strictly speaking, merely a pecuniary demand, and damages would sufficiently compensate him, yet the court acts on the principle that the remedy must be mutual, and, therefore, specifically enforces the contract at the suit of the vendor in every case where a similar remedy is open to the purchaser (*f*).

The court does not specifically enforce an agreement to enter into a contract for the sale of land (*g*).

701. The plaintiff is not entitled to the remedy of specific performance if there has been conduct on his part—such as misrepresentation—disentitling him to the relief in equity, and the remedy may be refused if it would impose great hardship on an innocent vendor—where, for instance, he has entered into the contract under mistake, although the other party has not contributed to it (*h*). Moreover, the relief must be sought promptly (*i*).

(*u*) *Thomas v. Dering* (1837), 1 Keen, 729, 747; *Naylor v. Goodall* (1877), 47 L. J. (CH.) 53.

(*a*) *Hopcraft v. Hopcraft* (1897), 76 L. T. 341. Compensation is not payable in respect of patent defects; see *Cobbett v. Locke-King* (1900), 16 T. L. R. 379; *Bowles v. Round* (1800), 5 Ves. 508; p. 297, *ante*. But the fact that the purchaser is acquainted with the property does not affect him with notice of easements of water (*Shackleton v. Sutcliffe* (1847), 1 De G. & Sm. 609, C. A.).

(*b*) *Rudd v. Lascelles*, [1900] 1 Ch. 815, 818. See *Thomas v. Dering*, *supra*, at p. 747; *Bolingbroke's (Lord) Case* (undated), 1 Sch. & Lef. 19, n. (where the purchaser, who, it would seem, knew of the vendor's limited interest, but had, with the vendor's consent, expended money on the property, was awarded compensation).

(*c*) As to specific performance generally, see title SPECIFIC PERFORMANCE. As to specific performance with compensation, see pp. 406, 407, *ante*; and see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 547.

(*d*) *Cox v. Middleton* (1854), 2 Drew. 209; *Haywood v. Cope* (1857), 25 Beav. 140, 151; *Re Scott and Alvarez's Contract*, *Scott v. Alvarez*, [1895] 2 Ch. 603, C. A., *per* RIGBY, L.J., at p. 615. For the form of order in a vendor's action for specific performance, where the purchaser has accepted the title, see *Seton, Judgments and Orders*, 7th ed., p. 2170; *Cooper v. Morgan*, [1909] 1 Ch. 261.

(*e*) *Adderley v. Dixon* (1824), 1 Sim. & St. 607, 610; *Re Scott and Alvarez's Contract*, *Scott v. Alvarez*, *supra*; see titles EQUITY, Vol. XIII., p. 11; SPECIFIC PERFORMANCE.

(*f*) *Adderley v. Dixon*, *supra*; *Regent's Canal Co. v. Ware* (1857), 23 Beav. 575; *Cogent v. Gibson* (1864), 33 Beav. 557.

(*g*) *Johnston v. Boyes* (1898), 14 T. L. R. 475; see also *Von Hatzfeldt-Willenburg v. Alexander*, [1912] 1 Ch. 284, *per* PARKER, J., at p. 289.

(*h*) See *Hexter v. Pearce*, [1900] 1 Ch. 341, *per* FARWELL, J., at p. 346; and, for defences against specific performance, see, further, titles CONTRACT, Vol. VII., pp. 417 *et seq.*; MISREPRESENTATION AND FRAUD, Vol. XX., pp. 754 *et seq.*; MISTAKE, Vol. XXI., p. 14; SPECIFIC PERFORMANCE.

(*i*) See title EQUITY, Vol. XIII., p. 174; and, as to the effect of possession by the purchaser, see *Sharp v. Milligan* (1856), 22 Beav. 606.

SECT. 6.—*Damages.*SECT. 6.
Damages.Action for
damages.

702. Either the vendor (*j*) or the purchaser (*k*) can maintain an action for damages for breach of the contract by the other party; but for this purpose there must be a contract enforceable at law (*l*). The claim may be in the alternative for specific performance or damages (*m*).

703. Damages for breach of contract are in the nature of compensation, not of punishment (*n*), and, as a rule, the measure of damage is the amount of injury sustained by reason of the breach of contract (*o*). This principle is applicable in the case of a sale of land where the contract is broken by the purchaser (*p*).

Vendor's
action.

Hence the vendor cannot recover the purchase-money, notwithstanding that the purchaser has been let into possession (*q*), unless the conveyance has been executed (*r*); but, on a resale at a lower price, he can recover the difference in price and the expenses of the resale (*s*).

704. The damages which a purchaser of real estate (*a*) can

Purchaser's
action.

(*j*) *Laird v. Pim* (1841), 7 M. & W. 474.

(*k*) *Williams v. Glendon* (1866), 1 Ch. App. 200, 209. The breach may also give a right to rescind, but the exercise of this right precludes a claim for damages; see p. 401, *ante*.

(*l*) *Rock Portland Cement Co. v. Wilson* (1882), 52 L. J. (CH.) 214; *Re Northumberland Avenue Hotel Co., Ltd., Sully's Case* (1885), 54 L. T. 76; affirmed (1886), 33 Ch. D. 16, C. A.; see *Lavery v. Pursell* (1888), 39 Ch. D. 508, 519; note (*g*), p. 295, *ante*. As to the discharge of the right of action for breach of contract, see title CONTRACT, Vol. VII., pp. 441 *et seq.*

(*m*) *Cornwall v. Henson*, [1900] 2 Ch. 298, C. A.; see *Hipgrave v. Case* (1885), 23 Ch. D. 356, C. A.; *Ellis v. Rogers* (1885), 29 Ch. D. 661, 663, C. A.; *Nicholson v. Brown*, [1897] W. N. 52. Formerly only one of these remedies could be obtained (*Orme v. Broughton* (1834), 10 Bing. 533, 538; *Sainter v. Ferguson* (1849), 1 Mac. & G. 286, 290); but, on the claim for specific performance, the court can now give damages either in lieu of, or in addition to, specific performance; see titles EQUITY, Vol. XIII., pp. 11, note (*g*), 51, note (*m*); PLEADING, Vol. XXII., pp. 444, 445; SPECIFIC PERFORMANCE. A claim for the price of land sold can only be specially indorsed when the land has actually been conveyed; see p. 412, *post*.

(*n*) *Addis v. Gramophone Co., Ltd.*, [1909] A. C. 488, 494, 495.

(*o*) See title DAMAGES, Vol. X., pp. 337, 338; *Robinson v. Harman* (1848), 1 Exch. 850, *per* PARKE, B., at p. 855 (a party who has sustained loss by reason of a breach of contract is, with respect to damages, to be placed in the same position as he would have been if the contract had been performed); *Wall v. City of London Real Property Co.* (1874), L. R. 9 Q. B. 249, 253.

(*p*) *Laird v. Pim*, *supra*.

(*q*) *Ibid.*, at p. 478; *Moor v. Roberts* (1858), 3 C. B. (N. S.) 830, 844. As to the recovery of interest on the purchase-money, see pp. 333, 374, *ante*.

(*r*) *Laird v. Pim*, *supra*; *East London Union v. Metropolitan Rail. Co.* (1869), L. R. 4 Exch. 309; *Leader v. Tod-Heally*, [1891] W. N. 38.

(*s*) *Noble v. Edwardes*, *Edwardes v. Noble* (1877), 5 Ch. D. 378, C. A.; see *Barrow v. Arnaud* (1846), 8 Q. B. 604, 609, 610, Ex. Ch. The deposit, if any, must be taken into account (*Ockenden v. Henty* (1858), E. B. & E. 485); and see p. 341, *ante*. As to whether the vendor is entitled to resell except under a condition giving him such power, see note (*q*), p. 341, *ante*. If he rescinds he can sell as absolute owner, but then he cannot recover damages; see p. 398, *ante*.

(*a*) Including incorporeal hereditaments (*Pounsett v. Fuller* (1856), 17

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Damages.

recover for a breach of contract (b) by the vendor are, in general, limited to the expenses which he has incurred. This rule forms an exception to the ordinary law of contract (c). Thus, if a vendor who has not expressly undertaken to deduce a good title (d) is unable, acting in good faith (e), and without committing a breach of trust (f), to make a title, the purchaser, in an action for breach of contract, can only recover the expenses he has incurred (g), but not damages for the loss of his bargain (h). This rule applies where the vendor has made reasonable efforts to perfect his title, but not where his inability to do so is occasioned by his own default (i). The purchaser has no lien on the land for damages (k).

Vendor's
fraud.

705. Where the vendor, at the time of entering into the contract, knows that he has no title and no means of acquiring one,

C. B. 660), and contracts to grant leases of land (*Pease v. Courtney*, [1904] 2 Ch. 503, 511, 512; *Robinson v. Harman* (1848), 1 Exch. 850; *Hanslip v. Padwick* (1850), 5 Exch. 615; *Gas Light and Coke Co. v. Towse* (1887), 35 Ch. D. 519, 543; *Rowe v. London School Board* (1887), 36 Ch. D. 619); see title LANDLORD AND TENANT, Vol. XVIII., p. 380. Upon the death of the purchaser, the right to sue for damages goes to his personal representatives (*Orme v. Broughton* (1834), 10 Bing. 533; Sugden, *Vendors and Purchasers*, 14th ed., p. 238); and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 224 *et seq.*

(b) The rule applies only to a broken contract, not to a breach of covenant in a conveyance (*Lock v. Furze* (1866), L. R. 1 C. P. 441).

(c) See title DAMAGES, Vol. X., pp. 302, 303. This exceptional rule is based upon the uncertainty of making out a good title owing to the complexity of the English law of real property; see *Day v. Singleton*, [1899] 2 Ch. 320, 329, C. A.

(d) See p. 341, *ante*; Farrer, *Conditions of Sale*, 2nd ed., p. 10.

(e) *Jones v. Gardiner*, [1902] 1 Ch. 191, *per* BYRNE, J., at p. 195; *Walker v. Moore* (1829), 10 B. & C. 416, 421.

(f) *Wall v. City of London Real Property Co.* (1874), L. R. 9 Q. B. 249.

(g) *Flureau v. Thornhill* (1776), 2 Wm. Bl. 1078; *Bain v. Fothergill* (1874), L. R. 7 H. L. 158, 207, 210; see *Sikes v. Wild* (1861), 1 B. & S. 587; (1863), 4 B. & S. 421, Ex. Ch.; *Hyam v. Terry* (1881), 25 Sol. Jo. 371, C. A.; *Rowe v. London School Board* (1887), 36 Ch. D. 619. As to what expenses come within this description, see p. 411, *post*.

(h) *Bain v. Fothergill*, *supra*; *Williams v. Glenton* (1866), 1 Ch. App. 200, 209; but if the contract is rescinded, the amount recoverable, though sometimes erroneously called damages (*Compton v. Bagley*, [1892] 1 Ch. 313), is limited to the return of the deposit with interest and conveyancing costs; see p. 401, *ante*.

(i) *Engell v. Fitch* (1869), L. R. 4 Q. B. 659, Ex. Ch. (sale by mortgagees with vacant possession who deliberately omitted to eject mortgagor); *Godwin v. Francis* (1870), L. R. 5 C. P. 295, 306, 308; *Jacques v. Millar* (1877), 6 Ch. D. 153 (overruled on another point by *Marshall v. Berridge* (1881), 19 Ch. D. 233, C. A.); *Royal Bristol Permanent Building Society v. Bomash* (1887), 35 Ch. D. 390; *Day v. Singleton*, [1899] 2 Ch. 320, C. A. (where a vendor of leaseholds assignable with the consent of the lessor did not endeavour to obtain that consent); *Jones v. Gardiner*, [1902] 1 Ch. 191. See also *Gedye v. Montrose (Duke)* (1858), 26 Beav. 45; *Lehmann v. McArthur* (1868), 3 Ch. App. 496, 500; *Wesley v. Walker* (1878), 26 W. R. 368. As to the vendor's duty to do all he reasonably can to perfect his title, see *Costigan v. Hustler* (1804), 2 Sch. & Lef. 160, 166; *Day v. Singleton*, [1899] 2 Ch. 320, *per* JEUNE, P., at p. 332; and compare pp. 341 *et seq.*, *ante*. But where the vendor's abstract, which was negligently but not fraudulently prepared, showed a good title, and the purchaser resold without comparing it with the deeds, he did not obtain damages (*Walker v. Moore* (1829), 10 B. & C. 416, 423).

(k) *Cornwall v. Henson*, [1900] 2 Ch. 298, 305, C. A.; see title LIEN, Vol. XIX., p. 17.

and the circumstances are such as to make his conduct fraudulent, the purchaser can recover damages in an action of deceit (*l*).

SECT. 6.
Damages.

706. The expenses which a purchaser, affirming a contract, can recover as damages, include the cost of preparing, stamping, and executing the contract (*m*), investigating the title (*n*), searching for incumbrances (*o*), examining deeds (*p*), and, if the vendor's breach took place after the title has been accepted, of preparing the conveyance (*q*). These conveyancing costs are recoverable whether they have actually been paid to the purchaser's solicitor or not (*r*).

Purchaser's expenses recoverable by way of damages.

The purchaser cannot recover expenses incurred prior to the contract of sale, such as the costs of negotiations, surveys or valuations (*s*), or of preparing the conveyance prior to his acceptance of the title (*t*), or any loss incurred in raising the purchase-money by a sale of stock (*u*), or the expenses of raising the purchase-money by borrowing (*b*), or moneys expended in repairs (*c*), or improvements (*d*), or the difference between party and party and solicitor and client costs of an action for specific performance (*e*), or any expenses incurred after he is aware of a definite breach of the contract on the part of the vendor (*f*); but, on a sale under the court, the purchaser can recover, in addition to his other expenses, all costs incurred by his having bid for and become the purchaser of the property (*g*).

707. Where a purchaser recovers substantial damages for the loss of his bargain on account of a breach of the contract by the

Recovery of damages for loss of bargain precludes recovery of expenses.

(*l*) *Bain v. Fothergill* (1874), L. R. 7 H. L. 158, 207; see *Day v. Singleton*, [1899] 2 Ch. 320, 329, C. A.; compare *Derry v. Peek* (1889), 14 App. Cas. 337; title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 687 *et seq.* It seems that, having regard to the requirement of actual fraud in an action of deceit, some other ground would now have to be found for giving the purchaser damages for loss of his bargain in this case.

(*m*) *Hanslip v. Padwick* (1850), 5 Exch. 615.

(*n*) *Ibid.*; *Richards v. Barton* (1795), 1 Esp. 268; *Compton v. Bagley*, [1892] 1 Ch. 313; and see *Hall v. Betty* (1842), 5 Scott (N. R.), 508, 513.

(*o*) *Hanslip v. Padwick*, *supra*.

(*p*) *Hodges v. Litchfield (Earl)* (1835), 1 Bing. (N. C.) 492.

(*q*) Sugden, Vendors and Purchasers, 14th ed., p. 362; Dart, Vendors and Purchasers, 7th ed., p. 990; Williams, Vendor and Purchaser, 2nd ed., p. 1059.

(*r*) *Hodges v. Litchfield (Earl)*, *supra*, at p. 498; *Richardson v. Chasen* (1847), 10 Q. B. 756; and see title LANDLORD AND TENANT, Vol. XVIII., p. 380.

(*s*) *Hodges v. Litchfield (Earl)*, *supra*. The expenses of a survey made after a good title was shown might be recoverable (Williams, Vendor and Purchaser, 2nd ed., p. 1070).

(*t*) *Hodges v. Litchfield (Earl)*, *supra*; *Jarmain v. Egelstone* (1831), 5 C. & P. 172; Sugden, Vendors and Purchasers, 14th ed., p. 362.

(*u*) *Flureau v. Thornhill* (1776), 2 Wm. Bl. 1078.

(*b*) *Hanslip v. Padwick*, *supra*; see *Sherry v. Oke* (1835), 3 Dowl. 349, 361.

(*c*) *Bratt v. Ellis* (1805), Sugden, Vendors and Purchasers, 14th ed., p. 812.

(*d*) *Worthington v. Warrington* (1849), 8 C. B. 134.

(*e*) *Hodges v. Litchfield (Earl)*, *supra*; *Cockburn v. Edwards* (1881), 18 Ch. D. 449, C. A.; see *Malden v. Fyson* (1847), 11 Q. B. 292; *Wood v. Scarth* (1855), 2 K. & J. 33, 44.

(*f*) *Pounsett v. Fuller* (1856), 17 C. B. 660; *Sikes v. Wild* (1861), 1 B. & S. 587, 590; (1863) 4 B. & S. 421, 424, Ex. Ch.

(*g*) *Holliswell v. Seacombe*, [1906] 1 Ch. 426.

SECT. 6.

Damages.**Procedure.**

vendor, he is not, it seems, entitled to his expenses as well; otherwise he would actually benefit by the breach (*h*).

708. Where there has been no conveyance, the purchase-money cannot be recovered on a writ specially indorsed, as the claim is only for damages (*i*), nor can damages for breach of the contract be recovered on a vendor and purchaser summons (*k*).

The pleadings in a vendor's action should aver that he is ready and willing to convey or assign the subject-matter of the sale (*l*), unless the purchaser repudiates prior to the date fixed for completion (*m*).

Save where time is of the essence of the contract, a purchaser seeking damages is not obliged to prove his readiness to complete on the stipulated day. He may still recover if he can prove such readiness within a reasonable time after that date (*n*); but, unless the vendor has failed to make a title, or has incapacitated himself from conveying, or has declined to convey, the purchaser should tender the conveyance and the purchase-money with interest if any (*o*).

Part VIII.—The Assurance.

SECT. 1.—Preparation.

**Purchaser
prepares
assurance.**

709. The contract is completed by payment of the purchase-money by the purchaser and execution at the same time of a conveyance by the vendor (*p*). In the absence of agreement to the contrary, the purchaser prepares the draft conveyance and submits it to the vendor for approval (*q*). The purchaser should not prepare the draft conveyance before production of the deeds (*r*).

(*h*) Since, if the purchase had been completed, he would have had to pay these himself; see *Williams, Vendor and Purchaser*, 2nd ed., pp. 1071, 1072; see *Hopkins v. Grazebrook* (1826), 6 B. & C. 31; *Robinson v. Harman* (1848), 1 Exch. 850; *Day v. Singleton*, [1899] 2 Ch. 320; compare *Engel v. Fitch* (1868), L. R. 3 Q. B. 314; (1869) L. R. 4 Q. B. 659, and *Godwin v. Francis* (1870), L. R. 5 C. P. 295, where damages for loss of bargain and expenses were both allowed.

(*i*) I.e., under R. S. C., Ord. 3, r. 6; see *Leawler v. Tod-Heatly*, [1891] W. N. 38; *Laird v. Pim* (1841), 7 M. & W. 474; *East London Union v. Metropolitan Rail. Co.* (1869), L. R. 4 Exch. 309.

(*k*) See p. 390, *ante*.

(*l*) *Ellis v. Rogers* (1885), 29 Ch. D. 661, 667, C. A.; compare R. S. C., Ord. 19, r. 14; and see *Perry v. Smith* (1842), Car. & M. 554.

(*m*) See *Johnstone v. Milling* (1886), 16 Q. B. D. 460.

(*n*) *Howe v. Smith* (1884), 27 Ch. D. 89, C. A., *per FRY, L.J.*, at p. 103.

(*o*) See *Poole v. Hill* (1840), 6 M. & W. 835, 841; *Lovelock v. Franklyn* (1846), 8 Q. B. 371.

(*p*) In strictness a conveyance may not be necessary in the case of the purchase of an equitable interest (see note (*n*), p. 366, *ante*), but it is usual to have a formal conveyance; compare *Fenner v. Hepburn* (1843), 2 Y. & C. Ch. Cas. 159; see *Dart, Vendors and Purchasers*, 7th ed., p. 529.

(*q*) *Sugden, Vendors and Purchasers*, 14th ed., pp. 240, 241. A possible exception occurs where the consideration for the purchase is a rentcharge, in which case the assurance is sometimes prepared by the vendor, but the practice seems to be unsettled; see *Dart, Vendors and*

(*r*) For note (*r*), see p. 413, *post*.

SECT. 1.
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710. The submission by the purchaser of the draft conveyance to the vendor for his approval does not necessarily operate as an acceptance of the title (*s*), but it is a circumstance from which the inference may be drawn that outstanding objections or requisitions have been waived and the title accepted (*t*).

Effect of submission of draft of assurance.

711. The form of the conveyance is primarily for the purchaser to determine, and the vendor is not entitled to raise objections to the draft save as regards matters of substance affecting himself (*a*).

Form of conveyance at option of purchaser.

712. The purchaser of property included in a single contract may divide it into parts, apportioning the purchase-money among the parts, and may require the vendor to convey the several parts by separate deeds (*b*), provided that undue trouble is not thereby imposed on the vendor, and that the purchaser pays the additional costs thereby occasioned to the vendor (*c*). The property is frequently conveyed by separate deeds where it comprises distinct estates or lands held under different titles, as the inclusion in one deed would render future dealing with the several parts difficult or expensive (*d*).

Separate deeds.

713. Where a vendor contracts to sell land which is in fact incumbered, though this is not shown by the contract, the purchaser, in the absence of special stipulation, can compel the vendor at his own expense to get in the outstanding interest or incumbrance by separate deed (*e*). But this right is not usually insisted upon (*f*), and generally the property is conveyed by one deed, in

Sale of incumbered land.

Purchasers, 7th ed., p. 528; Copinger on Rents, p. 73. A deed creating a rentcharge should be executed in duplicate; see *Encyclopædia of Forms and Precedents*, Vol. XII., p. 604, note (*s*). Sometimes, when a building estate is being sold in lots, the conditions provide that each purchaser shall be entitled to a conveyance free of all cost to him, except stamp duty; see *Encyclopædia of Forms and Precedents*, Vol. XII., p. 304. As to settling the conveyance on a sale by the court, see *Dart, Vendors and Purchasers*, 7th ed., p. 1181.

(*r*) *Jarman v. Egelstone* (1831), 5 C. & P. 172.

(*s*) Sugden, *Vendors and Purchasers*, 14th ed., p. 345; *Burroughs v. Oakley* (1819), 3 Swan. 159, 171; *Harwood v. Bland* (1842), Fl. & K. 540; *Lukcy v. Higgs* (1855), 1 Jur. (N. S.) 200; see p. 363, *ante*; see also *Re Perriam*, *Perriam v. Perriam* (1883), 32 W. R. 369 (where the taking of a conveyance of property by the correct description, and payment of the purchase-money into court, was held not to be a waiver of a claim to compensation for misdescription in the particulars).

(*t*) See *Clive v. Beaumont* (1848), 1 De G. & Sm. 397; *Smith v. Capron* (1849), 7 Hare, 185, 191; *Sweet v. Meredith* (1862), 8 Jur. (N. S.) 637; (1863), 9 Jur. (N. S.) 569.

(*a*) *Clark v. May* (1852), 16 Beav. 273; *Cooper v. Cartwright* (1860), John. 679, 685.

(*b*) *Clark v. May*, *supra*.

(*c*) *Egmont (Earl) v. Smith*, *Smith v. Egmont (Earl)* (1877), 6 Ch. D. 469. It is doubtful whether a vendor, in the absence of express stipulation, could be required by the purchaser to convey the land in parcels by separate conveyances at intervals of time.

(*d*) See *Dart, Vendors and Purchasers*, 7th ed., p. 534; *Williams, Vendor and Purchaser*, 2nd ed., p. 618.

(*e*) Sugden, *Vendors and Purchasers*, 14th ed., pp. 555, 557; see *Jones v. Lewis* (1847), 1 De G. & Sm. 245; and compare *Reeves v. Gill* (1838), 1 Beav. 375; and see pp. 336, *ante*, 434, *post*.

(*f*) Sugden, *Vendors and Purchasers*, 14th ed., p. 557; *Williams, Vendor and Purchaser*, 2nd ed., p. 620. It is not, as a rule, to the purchaser's advantage to allow the legal estate of incumbered land to become vested

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Prepara-
tion.

which the vendor and the incumbrancers join as parties (*g*). Satisfied terms becoming attendant on the inheritance cease by statute (*h*), but when, although provision has been made for payment of the money secured by the term, the term is not satisfied, but is still outstanding, the purchaser can require it to be got in and extinguished (*i*).

When an existing incumbrance is paid off out of the purchase-money, the purchaser is entitled to have it kept on foot for his own protection against subsequent incumbrances (*k*); but if the vendor is under any personal liability he can insist on this being discharged (*l*).

Incumbrances
discharged by
payment into
court.

714. Where it is desired to sell incumbered land freed from incumbrances, but without joining the incumbrancers as parties, either vendor or purchaser can apply to the court to allow payment into court of a sum of money sufficient, when invested in Government securities, to satisfy the amount charged on the land, and also an additional amount to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth of the original amount to be paid in, unless for special reason the court requires a larger additional amount. Thereupon the court can, either after or without notice to the incumbrancer, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale (*m*).

Copyholds.

715. A steward of a manor may by custom be entitled to prepare all surrenders of copyholds of the manor for a fixed or reasonable fee (*n*).

Statutory
forms of
conveyance.

716. In certain cases special forms of conveyance are authorised by statute (*o*). Where the statute, in addition to authorising

in the vendor (*ibid.*; and see *General Finance and Mortgage Discount Co. v. Liberator Permanent Benefit Building Society* (1878), 10 Ch. D. 15, 20).

(*g*) For forms of such conveyances, see *Encyclopædia of Forms and Precedents*, Vol. XII., pp. 560, 568 *et seq.*

(*h*) Satisfied Terms Act, 1845 (8 & 9 Vict. c. 112); see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 271.

(*i*) *Stronge v. Hawkes* (1856), 2 Jur. (N. S.) 388.

(*k*) *Cooper v. Cartwright* (1860), John. 679; see *Barry v. Harding* (1844), 1 Jo. & Lat. 475. As to the method of keeping incumbrances on foot for the benefit of a purchaser, see title MORTGAGE, Vol. XXI., pp. 321 *et seq.* For form of conveyance by mortgagee of freeholds, the mortgage being kept on foot, see *Encyclopædia of Forms and Precedents*, Vol. XII., p. 563; and of leaseholds, see *ibid.*, p. 867.

(*l*) *Cooper v. Cartwright*, *supra*.

(*m*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 5; see Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 1; title MORTGAGE, Vol. XXI., p. 256. The court does not compel the vendor to submit to payment into court where this would be a hardship to him, but allows him to rescind the contract under a condition for rescission (*Re Great Northern Rail. Co. and Sanderson* (1884), 25 Ch. D. 788). On an application under the statute the court decides a question of the construction of a will affecting the existence or amount of incumbrances (*Re Freme's Contract*, [1895] 2 Ch. 778, 780, C. A.).

(*n*) See title COPYHOLDS, Vol. VIII., pp. 63, 64. As to the rule that separate admittances are required where separate tenements are sold to one purchaser, see *ibid.*, p. 100; and, as to surrender and admittance generally, see *ibid.*, pp. 89 *et seq.*

(*o*) See Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 81,

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tion.

the form, gives it special statutory effect, it has been said that the form should as a rule be used, even though not obligatory (*p*); otherwise the form is merely a precedent, to be used or not as the draftsman thinks proper (*q*).

SECT. 2.—Parties to Make the Assurance.

717. On a sale of land for an estate in fee simple all persons in whom is vested any legal or equitable estate or interest in the land must be parties to the conveyance (*r*), unless such estate or interest can be vested in the purchaser by the exercise of some overriding statutory (*s*) or other power (*t*). Similarly, where the sale is for an estate less than the fee simple, all persons having legal or equitable estates or interests in the land, co-extensive with or comprised in the estate sold, must be parties. Necessary parties.

A direction by the court in an action for specific performance that the vendor shall convey means the vendor and all other necessary parties (*u*).

718. A vendor absolutely entitled to land, both at law and in equity, can, if he is of full capacity, transfer it by virtue of his absolute ownership, and he alone is the conveying party (*a*). Vendor absolute owner.

Sched. A; Schools Sites Act, 1841 (4 & 5 Vict. c. 38), s. 10. For forms following the statutory forms, see *Encyclopædia of Forms and Precedents*, Vol. VIII., p. 105; Vol. XII., p. 815; Vol. XVI., pp. 591, 593, 595.

(*p*) Special statutory effect is given to the form scheduled to the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18); see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 111, note (*q*); as to the effect of "grant" in a conveyance by the promoters, see Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 132; p. 428, *post*. A form of conveyance in which short forms of covenants for title and production of title deeds had the effect of the common forms was authorised by the Real Property Conveyancing Act, 1845 (8 & 9 Vict. c. 119), now repealed, but, like the form in the Leases Act, 1845 (8 & 9 Vict. c. 124), it did not get into general use; see *Encyclopædia of Forms and Precedents*, Vol. VII., p. 205. The former statute is repealed and replaced by the provisions for implied covenants for title and for acknowledgment of right to production of deeds contained in the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41); see pp. 425 *et seq.*, 429, 461 *et seq.*, *post*.

(*q*) See Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 57, Sched. IV., Form III. In practice these statutory forms are now rarely used.

(*r*) See, for instance, conveyances by a mortgagor and mortgagee (*Encyclopædia of Forms and Precedents*, Vol. XII., p. 568), by a second mortgagee with concurrence of the first (*ibid.*, p. 588), by trustees exercising a power of sale, a mortgagee concurring (*ibid.*, p. 666), by a tenant for life and remainderman (*ibid.*, p. 959), and by an owner in fee, a lessee joining to merge his term (*ibid.*, p. 479). As to the order in which the parties should be enumerated, see *Encyclopædia of Forms and Precedents*, Vol. IX., p. 402.

(*s*) *E.g.*, where the conveyance is made by a tenant for life under the provisions of the Settled Land Act, 1882 (45 & 46 Vict. c. 38). As to conveyance by a tenant for life and the various estates and interests which will not be defeated by such an assurance, see title SETTLEMENTS, pp. 665 *et seq.*, *post*.

(*t*) *E.g.*, where the conveyance is made under a power or trust for sale contained in a will or settlement; see titles SETTLEMENTS, pp. 626 *et seq.*, *post*; TRUSTS AND TRUSTEES.

(*u*) *Minton v. Kirwood* (1868), 3 Ch. App. 614.

(*a*) For precedents of a conveyance by and to persons of full capacity, see *Encyclopædia of Forms and Precedents*, Vol. XII., pp. 461 *et seq.* As

SECT. 2.

**Parties to
Make the
Assurance.**

Vendor
under
disability.
Trustees.

If he is under a disability, or has a limited or special capacity, he, or some person on his behalf, may be able to convey under special statutory or other powers (*b*).

719. Trustees in whom the legal estate is vested, and also trustees with an equitable estate only, who are disposing of the land under their powers as trustees without the concurrence of their beneficiaries, are necessary parties (*c*); but intermediate trustees are not necessary parties to a conveyance by the head trustees and the beneficiaries (*d*), unless they have acquired a lien on the land for costs or expenses, when, it seems, a purchaser may require their concurrence to discharge the lien (*e*).

Sale by order
of court.

720. Where a sale takes place by order of the court the persons to convey are, as a rule, the persons having the legal estate. The concurrence of persons having equitable interests only, who are parties to the action or have been served with notice of the judgment or order, is unnecessary (*f*).

Parties joined
for collateral
purposes.

721. Persons who have no estate or interest to convey are sometimes joined in the assurance for a collateral purpose; thus, in a conveyance by trustees, selling under a statutory or other power, beneficiaries may be joined to give covenants for title (*g*); where the power of the trustees to sell depends on the beneficiaries not having all elected to take land, which is notionally personalty, as realty, one may be joined to show that there has been no such unanimous election (*h*); and, on a sale by a tenant for life under the Settled Land Acts (*i*), the trustees for the purposes of the Acts are usually joined in order to give a receipt for the purchase-money.

to the parties to convey on completion of the contract after the death of the vendor, see pp. 378 *et seq.*, *ante*.

(*b*) See pp. 308 *et seq.*, *ante*; Encyclopædia of Forms and Precedents, Vol. XII., pp. 518—546. As to conveyance of property of a bankrupt, see pp. 381 *et seq.*, *ante*.

(*c*) A condition requiring the purchaser to take a conveyance from a trustee implies power in the trustee to convey (*Mosley v. Hide* (1851), 17 Q. B. 91, 101).

(*d*) *Grainge v. Wilberforce* (1889), 5 T. L. R. 436; see *Head v. Teynham* (Lord) (1783), 1 Cox, Eq. Cas. 57, where it was held that the trustees of a term, who had the legal estate, and the persons having the entire beneficial interest, could sell the term without making an intermediate trustee of the equitable interest a party. *Steele v. Waller* (1860), 28 Beav. 466, where a purchaser of copyholds, who got the whole legal and beneficial estate, was held to be entitled to require the concurrence of trustees under a covenant to surrender is, perhaps, not reconcilable with this principle.

(*e*) See Williams, Vendor and Purchaser, 2nd ed., p. 614.

(*f*) *Cole v. Sewell* (1849), 17 Sim. 40; *Re Williams' Estate* (1852), 5 De G. & Sm. 515; *Basnett v. Moxon* (1875), L. R. 20 Eq. 182, 184; and see p. 314, *ante*, and Encyclopædia of Forms and Precedents, Vol. XII., p. 554.

(*g*) See Encyclopædia of Forms and Precedents, Vol. XII., pp. 671, 827, 919.

(*h*) This may be necessary in a case where trustees who have purchased land without power to invest the trust funds in that manner are reselling; see *Re Jenkins and Randall (H. E.) & Co.'s Contract*, [1903] 2 Ch. 362; title EQUITY, Vol. XIII., p. 113, note (*c*).

(*i*) See title SETTLEMENTS, p. 640, *post*; Encyclopædia of Forms and Precedents, Vol. XII., p. 697. As to the Settled Land Acts, see title SETTLEMENTS, note (*e*), p. 624, *post*.

SECT. 2.
Parties to
Make the
Assurance.

When concurrence to be obtained by vendor.

722. The vendor must obtain the concurrence of necessary parties (*j*), for example, trustees of the legal estate (*k*), but he need not obtain the concurrence of unnecessary parties unless he has expressly contracted to do so (*l*). Thus, on a sale by a mortgagee under a power of sale, the purchaser cannot require the vendor to obtain the concurrence of the mortgagor (*m*), even though the latter has in the mortgage deed agreed to join in any sale if required (*n*). But a mortgagor vendor, who has contracted to sell free from incumbrances, must, unless the contract otherwise provides, procure at his own expense the concurrence of the mortgagee (*o*).

723. Where a married woman is selling property which is her separate estate either in equity or by statute (*p*), the concurrence of her husband is unnecessary; and the husband is not (*q*) a necessary party to a conveyance by a married woman under the provisions of the Settled Land Acts (*r*), nor to a disposition of real or personal property held by a married woman solely or jointly with any other person as trustee or personal representative (*s*), nor to a conveyance by her as mortgagee, the mortgage money being her separate estate (*t*).

Sale of married woman's property.

724. A married woman need not join in a conveyance by her husband for the purpose of releasing her right to dower, the conveyance of the husband being of itself sufficient to bar dower (*u*).

Sale of husband's property.

(*j*) It is the duty of the vendor to effect the conveyance either by force of his own interests, or of the interests of others which he can control (*Bain v. Fothergill* (1874), L. R. 7 H. L. 158, 209).

(*k*) *Costigan v. Hastler* (1804), 2 Sch. & Lef. 160, 166; *Howell v. George* (1815), 1 Madd. 1, 11. If they are not bound to convey at his direction, this, of course, is an objection to the title; see pp. 341, 342, *ante*.

(*l*) *Corder v. Morgan* (1811), 18 Ves. 344; *Benson v. Lamb* (1846), 9 Beav. 502.

(*m*) *Allen v. Martin* (1841), 5 Jur. 239; *Clay v. Sharpe* (1802), 18 Ves. 346, n; and see Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 19, 20.

(*n*) *Corder v. Morgan*, *supra*.

(*o*) See *Re Willett and Argenti* (1889), 60 L. T. 735. *Prima facie* a sale is free from incumbrances (*Bulkeley v. Hope* (1855), 1 K. & J. 482, 489); and see *Re Martin*, *Ex parte Dixon v. Tucker* (1912), 106 L. T. 381. As to objections in respect of conveyance, see *Townsend v. Champenown* (1827), 1 Y. & J. 538; p. 325, *ante*.

(*p*) See pp. 312, 313, *ante*; title HUSBAND AND WIFE, Vol. XVI., pp. 348 *et seq.* For a form of conveyance, by husband and wife married before the 1st January, 1883, of freeholds of which the wife was then seised in fee simple, see *Encyclopædia of Forms and Precedents*, Vol. XII., p. 518.

(*q*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 61.

(*r*) As to the Settled Land Acts, see title SETTLEMENTS, p. 624, note (*e*), *post*.

(*s*) Married Women's Property Act, 1907 (7 Edw. 7, c. 18), s. 1; see title HUSBAND AND WIFE, Vol. XVI., p. 380, note (*f*). The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), did not enable a married woman who was trustee to convey as a *feme sole* (*Re Harkness and Allsopp's Contract*, [1896] 2 Ch. 358), but under the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 16, a married woman who was a bare trustee could so convey; see *Re Docwra, Docwra v. Faith* (1885), 29 Ch. D. 693; and, as to the meaning of "bare trustee," see title TRUSTS AND TRUSTEES.

(*t*) See titles HUSBAND AND WIFE, Vol. XVI., p. 380; MORTGAGE, Vol. XXI., p. 173.

(*u*) Dower Act, 1833 (3 & 4 Will. 4, c. 105), ss. 4, 5; see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 192 *et seq.*; see, further, titles

SECT. 2.
Parties to
Make the
Assurance.

Where a husband dies intestate, without having barred his widow's right to dower, the administrator can sell his freeholds without the widow's concurrence (*a*); but, after the administrator has conveyed the land to the heir-at-law, the widow is a necessary party to a conveyance by the heir-at-law to a purchaser, for the purpose of releasing her right to dower (*b*). This necessity ceases, however, upon the dower being assigned by metes and bounds, as to any land not so assigned (*c*).

Conveyance
by company
in liquidation.

725. Where land belonging to a company in liquidation is being conveyed, the company, in whom the legal estate remains notwithstanding the liquidation (*d*), is a necessary party, and the seal is affixed on its behalf by the liquidator (*e*). The liquidator has no estate, legal or equitable, and is not a necessary party to the conveyance (*f*), but he invariably joins to show his concurrence in the sale, and to covenant against incumbrances (*g*).

Powers of
Liquidator.

A liquidator, whether the winding-up is compulsory or under supervision, may, subject to any restrictions imposed by the court, sell the property of the company and exercise his powers without the sanction of the court or of the committee of inspection, just as if the liquidation was voluntary (*h*).

SECT. 3.—Parties to Whom the Assurance is Made.

Conveyance
to nominee.

726. As a rule the conveyance is made to the purchaser, but, provided the vendor is not prejudiced, the purchaser can direct it

HUSBAND AND WIFE, Vol. XVI., p. 448; REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 180, note (*l*), 189 *et seq.* For the law previous to the Dower Act, 1833 (3 & 4 Will. 4, c. 105), see Sugden, Vendors and Purchasers, 14th ed., p. 623; Dart, Vendors and Purchasers, 7th ed., pp. 538 *et seq.* As to concurrence of a trustee under uses to bar dower under the old practice, see *Collard v. Roe* (1859), 4 De G. & J. 525, C. A.

(*a*) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 296 *et seq.*

(*b*) For forms of conveyance, see Encyclopædia of Forms and Precedents, Vol. V., p. 637; Vol. XII., p. 677.

(*c*) As to assignment of dower, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 196 *et seq.*

(*d*) See *Re Oriental Inland Steam Co., Ex parte Scinde Rail. Co.* (1874), 9 Ch. App. 557, 560; and see title COMPANIES, Vol. V., p. 506.

(*e*) See title COMPANIES, Vol. V., pp. 446, 505, 506. For forms of conveyance, see Encyclopædia of Forms and Precedents, Vol. IV., p. 810; Vol. XII., pp. 765, 767, 770. As to the position of liquidators of unregistered companies, see *Re Ebsworth and Tidy's Contract* (1889), 42 Ch. D. 23, 49, C. A.; title COMPANIES, Vol. V., pp. 653, 654.

(*f*) See title COMPANIES, Vol. V., pp. 505, 506, and, as to the powers of a liquidator, see *ibid.*, pp. 446 *et seq.*; see also pp. 385, 386, *ante*.

(*g*) See title COMPANIES, Vol. V., p. 506.

(*h*) See *ibid.*, pp. 446, 505, 506, 509. Where the winding-up is voluntary, the winding-up resolutions under which the liquidator is appointed should be recited (Encyclopædia of Forms and Precedents, Vol. XII., p. 766); where it is compulsory, the winding-up order and order appointing the liquidator are recited (*ibid.*, p. 768); and where it is under supervision the resolutions for winding-up, as in a voluntary liquidation, and the supervision order should be recited (*ibid.*, p. 768). It is usually proper to obtain an order sanctioning a sale by the liquidator where the winding-up is compulsory or under supervision (*ibid.*, p. 769, note (*f*)); and, as to the powers of the liquidator, see pp. 385, 386, *ante*. As to the purchase of the company's property by the liquidator or a member of the committee of inspection, see title COMPANIES, Vol. V., pp. 442, 465.

to be made to a nominee (i), for such estate and interest, not exceeding the interest purchased, as he pleases (k). Where the grantee is to enter into covenants with the vendor, the purchaser cannot substitute a new covenantor for himself without the vendor's consent, and in such a case the nominee must not be a person under disability (l).

SECT. 3.
Parties to
Whom the
Assurance
is Made.

727. When the purchaser has disposed of the land before the completion of the contract, it is usual, for the purpose of saving the expense of the second conveyance and double stamp duty, to take the assurance direct to the second purchaser. The disposition may be either by assignment of the contract or resale of the land (m). Upon an assignment of the contract the original purchaser is not usually a necessary party to the conveyance (n), nor is he a necessary party where there is a resale without increase of price (o).

Sub-purchaser.

If the original purchaser was bound by the contract to assume a personal liability under the conveyance, the vendor is not bound to accept the liability of another person; where, for instance, the property sold is an equity of redemption so that the purchaser can be required to enter into a covenant of indemnity against the mortgage debt (p); in such a case the original purchaser is a necessary party unless the vendor consents to accept the covenant of the assignee or sub-purchaser (q). Where there is a resale of the land at an increased price, the conveyance states the increased price as the consideration and the original purchaser is joined as the party receiving the increase (r).

When original
purchaser a
necessary
party.

(i) If the purchaser provides the money on his own account, and not by way of loan to the nominee, and the nominee is a stranger, there is a resulting trust to the purchaser; see *Dyer v. Dyer* (1788), 2 Cox, Eq. Cas. 92, 93; *Lynch v. Clarkin*, [1900] 1 I. R. 178, C. A.; titles GIFTS, Vol. XV., p. 415; TRUSTS AND TRUSTEES. But as a rule there is no resulting trust where the conveyance is taken in the name of a wife, child or other near relative; see *Dyer v. Dyer*, *supra*; titles GIFTS, Vol. XV., p. 415; TRUSTS AND TRUSTEES.

(k) See *Egmont (Earl) v. Smith*, *Smith v. Egmont (Earl)* (1877), 6 Ch. D. 469, *per* JESSEL, M.R., at p. 474: "An ordinary contract of sale is not only to convey to the purchaser, but to convey as the purchaser shall direct." But the vendors are not bound to accept the nominee, if the nomination discloses a breach of trust: where, for instance, they are trustees and the nominee is himself one of the trustees (*Delves v. Gray*, [1902] 2 Ch. 606).

(l) See, further, the text, *infra*.

(m) See pp. 376, 377, *ante*.

(n) But apparently the vendor could require a recital in the conveyance of the original contract and the assignment; see *Hartley v. Burton* (1868), 3 Ch. App. 365.

(o) Williams, *Vendor and Purchaser*, 2nd ed., p. 616.

(p) See title MORTGAGE, Vol. XXI., pp. 145, 270; p. 428, *post*.

(q) Williams, *Vendor and Purchaser*, 2nd ed., p. 617.

(r) See 2 Davidson, *Precedents in Conveyancing*, 4th ed., Pt. I., p. 319. For forms of conveyance by vendor and purchaser to a sub-purchaser, see *Encyclopædia of Forms and Precedents*, Vol. XII., pp. 475—477; as to transfer of registered land on a sub-sale, see *ibid.*, Vol. XI., p. 369. The joining of the original purchaser brings on to the title the equitable interest which he obtained under the contract, and any incumbrances created by him on such interest might cause difficulty on a resale; see Dart, *Vendors and Purchasers*, 7th ed., p. 536; Williams, *Vendor and Purchaser*, 2nd ed., pp. 615 *et seq.* There would be the same difficulty if the original contract was recited without making the original purchaser a party (see note (n), *supra*). But it is believed that in practice this

SECT. 3.

Parties to Whom the Assurance is Made.

Conveyance to partners.

728. As a rule it is convenient on a purchase of land with partnership money to make the conveyance to the partners as joint tenants at law upon trust for the partnership (*s*); but such a conveyance may be made to a trustee for the partnership (*t*), to partners as joint tenants without adding any words showing what the equitable interests are (*u*), or to the partners as tenants in common (*a*).

The devolution of the legal estate is not affected by the equities (*b*); and a surviving partner with the legal estate vested in him can, it seems, sell and convey the partnership property without the concurrence of the personal representatives of the deceased partner (*c*).

Conveyance to husband and wife.

729. Where land is conveyed to a husband and wife in terms which, but for the marriage, would have constituted them joint tenants in fee, they take as joint tenants and not, as formerly, by entireties (*d*).

Persons not parties.

730. An immediate estate or interest in land may be taken by a person not named as a party to a conveyance (*e*), but if the grantee is dead at the date of the deed the grant fails (*f*).

Copyholds.

731. A copyholder may surrender to the uses of a will (*g*);

risk is treated as negligible, and it is usual to join the original purchaser. In the case of a sub-sale, the sub-purchaser is entitled to an abstract of the original contract (*Re Hucklesby and Atkinson's Contract* (1910), 102 L. T. 214). As to a sub-purchaser's right to specific performance, see *Shaw v. Foster* (1872), L. R. 5 H. L. 321, 333, 334; title SPECIFIC PERFORMANCE. The original purchaser need not be a party to such an action, if there has been a novation of the contract (*Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608, 616); see p. 378, *ante*.

(*s*) See title PARTNERSHIP, Vol. XXII., pp. 52 *et seq.* For form of conveyance to partners, see Encyclopædia of Forms and Precedents, Vol. XII., p. 502. As to parol agreements of partnership in the case of a joint purchase of land, see *Forster v. Hale* (1798), 3 Ves. 696; (1800) 5 Ves. 308; title PARTNERSHIP, Vol. XXII., pp. 6, 22; compare *ibid.*, p. 102. As to joint tenancy generally, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 199 *et seq.*

(*t*) For form, see Encyclopædia of Forms and Precedents, Vol. XII., p. 970.

(*u*) *Ibid.*, p. 503, note (v).

(*a*) *Ibid.* As to tenancy in common generally, see title REAL PROPERTY AND CHATELS REAL, Vol. XIV., pp. 206 *et seq.*

(*b*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 20 (2); see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 6, 7.

(*c*) See *Re Bourne, Bourne v. Bourne*, [1906] 2 Ch. 427, C. A.; Williams, Vendor and Purchaser, 2nd ed., p. 409; titles DESCENT AND DISTRIBUTION, Vol. XI., p. 7; EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 222. As to the sale of partnership land on a winding up of the partnership, see title PARTNERSHIP, Vol. XXII., p. 102.

(*d*) See *Thornley v. Thornley*, [1893] 2 Ch. 229. Prior to the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), they would have taken by entireties; see Littleton's Tenures, s. 291; Co. Litt. 187 a; titles HUSBAND AND WIFE, Vol. XVI., pp. 354, 355; REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 211.

(*e*) Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 5; see *Dyson v. Forster*, *Dyson v. Seed*, *Quinn, Morgan, etc.*, [1909] A. C. 98; title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 379, 380.

(*f*) *Re Tili, Lampet v. Kennedy* (1896), 74 L. T. 163; and see title GIFTS, Vol. XV., p. 405.

(*g*) *Flack v. Downing College (Master etc.)* (1853), 13 C. B. 945; and see, further, title COPYHOLDS, Vol. VIII., pp. 81, 91.

but on a sale of copyholds the purchaser cannot require the surrender to be made to such uses as he shall appoint and in default of appointment to his own use in fee (*h*); nor, in the absence of special custom, need the lord of the manor accept a surrender in such form (*i*); but, if he accepts it, he cannot afterwards say that the surrenderee had no authority to nominate the person who was to be tenant (*k*).

SECT. 3.
Parties to
Whom the
Assurance
is Made,

SECT. 4.—Form of the Assurance.

SUB-SECT. 1.—Freeholds.

732. The assurance of freehold property to the purchaser is effected by deed (*l*), the form of which is settled by him (*m*). It should be framed so that at a future date it may form a good root of title (*n*).

Conveyance
by deed.

733. The conveyance usually commences with recitals (*o*). These are intended either to explain the operation of the deed or to make evidence of matters of fact. Under the former head recitals are introduced to show the interests of the various parties, and the purpose and effect of their concurrence (*p*).

Recitals.

Where the vendor is absolutely entitled to the whole estate in freehold property his seisin in fee is recited (*q*), or recitals may be omitted altogether (*r*). Where he is not an absolute owner, the recitals show how he is entitled to make the assurance (*s*).

Vendor seised
in fee.

(*h*) Dart, Vendors and Purchasers, 7th ed., p. 535.

(*i*) *Fluck v. Downing College (Master etc.)* (1853), 13 C. B. 945; and see title COPYHOLDS, Vol. VIII., p. 91.

(*k*) *R. v. Oundle (Lord of the Manor)* (1834), 1 Ad. & El. 283; *Eddleston v. Collins* (1853), 3 De G. M. & G. 1, C. A.; *Fluck v. Downing College (Master etc.)*, *supra*; and see title COPYHOLDS, Vol. VIII., p. 91.

(*l*) See titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 367; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 301. As to getting in outstanding incumbrances and estates by separate deed, see p. 413, *ante*.

(*m*) See p. 412, *ante*; and, as to the parties to make the assurance and parties to whom the assurance is made, see pp. 415 *et seq.*, 418 *et seq.*, *ante*. As to the formal parts of a deed, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 381.

(*n*) As to what constitutes a good root of title, see p. 345, *ante*.

(*o*) A vendor is not bound to admit into the deed recitals at variance with the truth, nor can he insist on the insertion of recitals explaining the title of other parties to the deed if, in fact, all necessary persons are parties (*Hartley v. Burton* (1865), 3 Ch. App. 365). Recitals can frequently be avoided or shortened by making the deed supplemental to a previous deed. The deed then takes effect as if it were indorsed on the previous deed, or contained a full recital of it (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 53: see Encyclopædia of Forms and Precedents, Vol. XII., p. 834). As to the construction of recitals, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 459 *et seq.*; and, as to their occasional effect as covenants, *ibid.*, p. 463; and see title ESTOPPEL, Vol. XIII., pp. 366 *et seq.*

(*p*) Dart, Vendors and Purchasers, 7th ed., p. 545; Williams, Vendor and Purchaser, 2nd ed., p. 637; Sugden, Vendors and Purchasers, p. 558. For lists of references to introductory and narrative recitals, see Encyclopædia of Forms and Precedents, Vol. XVII. (Index), pp. 565 *et seq.*, 569 *et seq.*

(*q*) For form of conveyance, see Encyclopædia of Forms and Precedents, Vol. XII., p. 464. As to the effect of the recital, see note (*n*), p. 344, *ante*.

(*r*) For form of conveyance, see Encyclopædia of Forms and Precedents, Vol. XII., p. 461.

(*s*) The insertion of such recitals is usually required in the interest of the

SECT. 4. No document or matters which are irrelevant, or which cast doubts on the validity of the title, or which might be difficult or impossible to explain or produce on a future sale, should be recited (*t*), nor should the preliminary contract be recited as a document (*a*) save under special circumstances, where, for instance, the contract is in pursuance of an order for sale by the court (*b*), or one of the parties has died before completion (*c*).

Form of the Assurance. **734.** Facts or events, such as deaths or matters of pedigree, on which the title depends, and which would not otherwise appear from the documents of title, are recited with a view to the recitals being used as evidence on a future sale, or to assist a purchaser by giving him information where the proper certificates of such facts may be procured (*d*).

Recital of evidence supporting title. **735.** Where outstanding estates are got in or released by the conveyance, or where at the date of the contract the land is subject to incumbrances, and the incumbrancers are paid off on completion and join in the conveyance, the recitals show the title of these additional conveying parties (*e*).

Incumbrances. **736.** Where a conveyance is made in exercise of a power, the recitals should show how the power was created, how it has become exercisable, and that all necessary consents have been obtained. If possible, the consenting parties should join in the deed (*f*).

Recital of power. **737.** The consideration for the conveyance must be specified in order to prevent a resulting use (*g*), to prevent the conveyance being deemed voluntary (*h*) and to comply with the statutory provisions as to stamps (*i*).

Consideration. purchaser; and, if they are omitted in the draft conveyance, the vendor can probably insist on them; see Dart, Vendors and Purchasers, 7th ed., p. 546.

(*t*) See Williams, Vendor and Purchaser, 2nd ed., p. 629.

(*a*) Dart, Vendors and Purchasers, 7th ed., p. 550. It is usual to recite that the vendor has agreed to sell and the purchaser to buy, but not to refer to any written contract, since this would bring it on the title; and see note (*n*), p. 419, *ante*. For recitals in the case of a sub-sale, see Encyclopædia of Forms and Precedents, Vol. XII., pp. 475 *et seq.*

(*b*) See Encyclopædia of Forms and Precedents, Vol. XII., p. 551.

(*c*) See *ibid.*, p. 680. As to the effect of the death of the vendor or purchaser before completion, see pp. 378 *et seq.*, *ante*.

(*d*) See Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, second rule; Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3 (3). But as to recital of seisin in fee, see p. 343, *ante*.

(*e*) See Williams, Vendor and Purchaser, 2nd ed., p. 628. For forms, see Encyclopædia of Forms and Precedents, Vol. XII., pp. 479 (lessee joining to merge his term), 487 (conveyance by owner in fee with concurrence of annuitant), 558 (mortgagor and mortgagee).

(*f*) Dart, Vendors and Purchasers, 7th ed., pp. 546, 547. For forms, see Encyclopædia of Forms and Precedents, Vol. XII., pp. 464, 465, 645.

(*g*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 359.

(*h*) See titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 16 *et seq.*; FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 81, 92 *et seq.*; and see *ibid.*, p. 97. As to titles commencing with voluntary conveyances, see p. 346, *ante*; as to titles derived under voluntary conveyances, see titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 279, note (*h*); FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 83.

(*i*) See Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 5; see, further, title REVENUE, Vol. XXIV., p. 704, note (*f*); pp. 444, 445, *post*. As to the effect of the receipt formerly indorsed on, but now included in, the deed, see p. 437, *post*.

SECT. 4.
Form of the
Assurance.

Operative
words.

Verbal
description.
and plan.

738. The word "grant" has been described as one of the largest and most beneficial to the purchaser that can be used (*k*), but it is not necessary to use it in order to convey tenements or hereditaments, corporeal or incorporeal (*l*), and the word "convey" is frequently used (*m*).

739. It is usual to describe the property conveyed both by words and by reference to a plan (*n*). It is imprudent to rely upon a plan as the sole description, since slight errors in the drawing may have serious consequences (*o*). A description which is sufficient without reference to a plan may be enough (*p*), but the purchaser, at any rate in simple cases (*q*), can insist on a plan in order to supplement the general description in the conveyance, if the latter is not sufficiently precise. The attaching of a plan to a conveyance does not necessarily warrant its accuracy (*r*).

740. The description of the parcels (*s*) in the conveyance

Parcels.

(*k*) Co. Litt. 301 b. See Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 2, making the word "grant" appropriate, but not essential, to pass all hereditaments, corporeal and incorporeal; and see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 294.

(*l*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 49.

(*m*) See Encyclopædia of Forms and Precedents, Vol. XII., pp. 461, 465, *et passim*. As to assurances by feoffment and livery of seisin, and by bargain and sale and lease and release, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 290 *et seq.*

(*n*) Where a plan is used, a substantive description of the property should be included in the body of the deed or in a schedule, so that the plan should merely assist the description. It is usual and proper to refer to the plan as being by way of identity only, and not as operating to enlarge or restrict the verbal description; see Encyclopædia of Forms and Precedents, Vol. IX., p. 125. Where property is contracted to be bought by a plan, the plan determines the extent of property sold, notwithstanding that particulars subsequently given, purporting to be particulars of the property shown on the plan, are erroneous (*Gordon-Cumming v. Houldsworth*, [1910] A. C. 537 (a Scottish case). As to the admissibility of plans and maps generally, see title EVIDENCE, Vol. XIII., pp. 563, 564.

(*o*) *Llewellyn v. Jersey (Earl)* (1843), 11 M. & W. 183; *Barton v. Dawes* (1850), 10 C. B. 261; *Davis v. Shepherd* (1866), 1 Ch. App. 410; *Thompson v. Hickman*, [1907] 1 Ch. 550; see Dart, Vendors and Purchasers, 7th ed., p. 554; Williams, Vendor and Purchaser, 2nd ed., p. 557; 1 Davidson's Precedents of Forms in Conveyancing, 5th ed., pp. 63, 64, 66. As to when additions to a description which are at variance with it will be rejected in accordance with the rule *falsa demonstratio non nocet*, and when effect will be given to them as words of restriction, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 465 *et seq.*

(*p*) *Re Sparrow and James' Contract* (1902), 79 L. J. (CH.) 491.

(*q*) That is, where the nature of the property does not render the preparation of a plan difficult (*Re Sansom and Narbeth's Contract*, [1910] 1 Ch. 741).

(*r*) *Re Sparrow and James' Contract*, *supra*. The representation of a road on a plan does not necessarily amount to an undertaking that the road will be made (*Heriot's Hospital (Feoffees) v. Gibson* (1814), 2 Dow, 301, H. L.; *Squire v. Campbell* (1836), 1 My. & Cr. 459; *Nurse v. Seymour (Lord)* (1851), 13 Beav. 254, 269).

(*s*) As to parcels, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 465 *et seq.* As to "lands" "tenements," and "hereditaments," see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 156 *et seq.* "Manor" includes the demesne lands of the manor, the freehold of the copyholds and the seignory, and an advowson appendant (*A.-G. v. Stowell* (1835), 1 Y. & C. (EX.) 559; see title COPYHOLDS, Vol. VIII., p. 19). "Land," in the absence of restrictive expressions, means freehold land

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Form of the
Assurance.

should correspond with the description in the contract for sale (t); but, if the language used in the contract does not describe the land with sufficient distinctness, the purchaser is entitled to frame a new description, either by means of a plan or otherwise, so that there can be no doubt as to the effect of the conveyance (u). The purchaser can insist on an appropriate description of the property as at the date of the conveyance, and on the modern description being connected with the old description (v).

Uncertainty
in description.

741. Extrinsic evidence is necessarily admissible to identify the property conveyed, that is, to connect the language of the deed with the particular property (a), but it is not admissible to contradict the description in the deed (b). If, after resort to such evidence as is admissible, there remains an uncertainty as to the property intended to be conveyed and such uncertainty cannot be cured by election, the deed is void (c).

General
words.

742. General words conveying appurtenances, and conveying or creating easements, and the "all estate" clause are generally omitted in reliance upon the statutory provisions (d).

(*Hughes v. Parker* (1841), 8 M. & W. 244; Sugden, Vendors and Purchasers, 14th ed., p. 298), and includes houses and everything permanently affixed (see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 156). As to trees, see title LANDLORD AND TENANT, Vol. XVIII., pp. 429 *et seq.*; as to other expressions, *ibid.*, pp. 411 *et seq.*; and, as to lands occupied with a house, see *Kerford v. Seacombe, Hoylake and Deeside Rail. Co.* (1888), 57 L. J. (CH.) 270. As to the rights of the purchaser in respect of boundary walls, see *Baird v. Bell*, [1898] A. C. 420; title BOUNDARIES, FENCES AND PARTY WALLS, Vol. III., pp. 108 *et seq.* As to minerals, see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 549. As to the soil of highways bounding the premises, see titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 468; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 52; *Central London Railway v. City of London Tax Commissioners*, [1911] 2 Ch. 467, C. A.; affirmed, *sub nom. Land Tax Commissioners v. Central London Railway* (1913), 57 Sol. Jo. 403, H. L.

(t) See *Monighetti v. Wandsworth Borough Council* (1908), 73 J. P. 91.

(u) *Re Sansom and Narbeth's Contract*, [1901] 1 Ch. 741, 747. As to discrepancy between a plan and detailed description, see *Gordon-Cumming v. Houldsworth*, [1910] A. C. 537; note (u), p. 423, *ante*.

(v) *Re Sansom and Narbeth's Contract*, *supra*, at p. 749. Where the description of the parcels appearing in the last abstracted deed is obsolete, it is generally advisable to frame a new description based on a recent survey, and for identification to incorporate both descriptions in the conveyance; see *Encyclopædia of Forms and Precedents*, Vol. IX., p. 124.

(a) *Doe d. Norton v. Webster* (1840), 12 Ad. & El. 442; *Lyle v. Richards* (1866), L. R. 1 H. L. 222; *Fox v. Clarke* (1874), L. R. 9 Q. B. 565, Ex. Ch.; *Plant v. Bourne*, [1897] 2 Ch. 281, C. A.; see titles BOUNDARIES, FENCES, AND PARTY WALLS, Vol. III., p. 139; DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 448. As to the admissibility of acts of user by a grantee from the Crown, see *Van Diemen's Land Co. v. Marine Board of Table Cape* (1905), 22 T. L. R. 114, P. C.

(b) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 444. As to extrinsic evidence generally, see title EVIDENCE, Vol. XIII., pp. 566 *et seq.*

(c) See *Savill Brothers, Ltd. v. Bethell*, [1902] 2 Ch. 523, C. A.; *South Eastern Railway v. Associated Portland Cement Manufacturers* (1900), *Ltd.*, [1910] 1 Ch. 12, C. A.; title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 457, 458.

(d) *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), ss. 6 (1), (2), 63 (1), (2), (3); *Francis v. Minton* (1867), L. R. 2 C. P. 543; see, further, title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 470, 472. As to the construction of general words of description, see *ibid.*, pp. 469, 470. As to the grant of easements, see title LANDLORD AND TENANT, Vol.

743. Exceptions or reservations out of the property conveyed must be specially mentioned (*e*), unless they are implied by law (*f*).

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744. The habendum limits the estate granted (*g*), and mentions any liabilities or incidents subject to which the property is conveyed (*h*). A fee simple may be limited by the words "in fee simple" without the word "heirs" (*i*). On the sale of land subject to a specified incumbrance or lease, the vendor is entitled to have the conveyance framed accordingly (*k*); but he cannot insist on property being conveyed subject to covenants, conditions and restrictions not mentioned in the abstract (*l*), or which, though mentioned in the abstract, were not referred to in the particulars or conditions (*m*).

Exceptions and reservations.

Habendum.

745. The vendor's covenants include covenants for title, express or implied, and any special covenants to suit particular circumstances (*n*).

Vendor's covenants.

The purchaser's covenants include covenants, stipulated for in the contract, which restrict his *prima facie* rights over the property, and also covenants indemnifying the vendor against any incumbrances subject to which it is sold (*o*).

Purchaser's covenants.

Where an executory contract is intended to be carried out by a deed of conveyance, the final contract is that which is contained in the deed, and the executory contract cannot be used for the purpose of enlarging, diminishing, or modifying the latter contract (*p*).

Special covenants.

XVII., pp. 414, 567; *Financial Times v. Bell* (1903), 19 T. L. R. 433 and, generally, see titles EASEMENTS AND PROFITS À PRENDRE, Vol. XI., p. 250; LANDLORD AND TENANT, Vol. XVII., pp. 414 *et seq.*; *Lewis v. Meredith* (1913), 131 L. T. Jo. 569.

(*c*) See, further, title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 470 *et seq.*, and, as to reservations of minerals, compare *Barnard-Argue-Roth-Stearns Oil and Gas Co., Ltd. v. Farquharson*, [1912] A. C. 864, P. C.

(*f*) *E.g.*, where a vendor sells part of his land and retains the remainder, there is an implied reservation of such rights and easements over the part conveyed as are necessary to the enjoyment of the part retained; unless they are easements of necessity they must be expressly reserved; see title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 241, 252, 289.

(*g*) See, further, title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 473 *et seq.* As to words of limitation, and the effect of the absence of proper words, see *Re Whiston's Settlement*, *Lovatt v. Williamson*, [1894] 1 Ch. 661; *Re Buhl and Mitchells and Butlers' Contract*, [1901] 1 Ch. 945; title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 165, 166.

(*h*) See *Encyclopædia of Forms and Precedents*, Vol. XII., pp. 479, 483, 484.

(*i*) *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), s. 51; see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 165, 166; and, as to conveyances to corporations, see *ibid.*, p. 166, note (*p*); and see title CORPORATIONS, Vol. VIII., pp. 271, 372.

(*k*) See *David v. Sabin*, [1893] 1 Ch. 523, C. A.; *Page v. Midland Rail. Co.*, [1894] 1 Ch. 11, C. A.; *May v. Platt*, [1900] 1 Ch. 616; compare *Encyclopædia of Forms and Precedents*, Vol. XII., pp. 479, 558.

(*l*) *Re Monckton and Gilzean* (1884), 27 Ch. D. 555.

(*m*) *Hardman v. Ohild* (1885), 28 Ch. D. 712; *Re Wallis and Barnard's Contract*, [1899] 2 Ch. 515.

(*n*) A purchaser from the Crown cannot require covenants for title; see title CONSTITUTIONAL LAW, Vol. VII., p. 157.

(*o*) As to covenants, see, further, title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 475 *et seq.* As to the liability of a solicitor for allowing his client to enter in ignorance into improper covenants, see *Stannard v. Ullithorne* (1834), 10 Bing. 491; title SOLICITORS.

(*p*) *Leggott v. Barrett* (1880), 15 Ch. D. 306, 309, C. A.; *Re Cooper and Orndace's Contract* (1904), 90 L. T. 258; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 444.

SECT. 4. Accordingly, any obligations of either party which will not be discharged at the time of completion must be provided for by the **Form of the Assurance.** covenants (q).

Covenants
for title.

746. The ordinary covenants for title are for right to convey, for quiet enjoyment, for freedom from incumbrance, and for further assurance. A vendor (r) need not give absolute covenants for the title to the land sold (s), but may limit his liability to the acts or omissions of himself and those claiming by, through, under or in trust for him, and of those who have been in possession since the last sale of the estate (t). The remedy for a breach of such covenants is an action for damages (u).

Implied
covenants
for title.

747. The vendor's qualified covenants for title are, according to the present practice, incorporated in the conveyance by the use of the proper statutory expression. They vary in comprehensiveness according to the character in which the vendor conveys (a).

Covenant
by person
conveying as
"beneficial
owner."

Thus, in a conveyance of freeholds made after the year 1881 for valuable consideration, other than a mortgage, the covenant implied on the part of a vendor who conveys as beneficial owner is that, notwithstanding any act or omission by him, or anyone through whom he derives title otherwise than by purchase for value, he has the right to convey; that the property shall be quietly enjoyed by the grantee and his successors in title, freed and discharged from estates and incumbrances other than those to which the conveyance is expressly made subject; and that the reasonable requirements of the purchaser for the purpose of further assuring the property to him shall be complied with (b).

Person
directing as
"beneficial
owner."

Where a covenant is expressed to be made by a person by

(q) See *Williams v. Morgan* (1850), 15 Q. B. 782; *Teebay v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1883), 24 Ch. D. 572; *Greville v. Hemingway* (1902), 87 L. T. 443, 445.

(r) As to covenants for title by a mortgagor, see title MORTGAGE, Vol. XX., pp. 123, 126, 127; and by a settlor, see title SETTLEMENTS, p. 529, *post*; and, as to covenants for title generally, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 483 *et seq.*; pp. 461 *et seq.*, *post*.

(s) *Church v. Brown* (1808), 15 Ves. 258, 263.

(t) Sugden, Vendors and Purchasers, 14th ed., pp. 574, 599, 605; see *Browning v. Wright* (1799), 2 Bos. & P. 13, 22; *Pickett v. Loggon* (1807), 14 Ves. 215, 239; *David v. Sabin*, [1893] 1 Ch. 523, C. A.

(u) Sugden, Vendors and Purchasers, 14th ed., p. 610; *Jenkins v. Jones* (1882), 9 Q. B. D. 128, C. A.; *Sutton v. Baillie* (1891), 65 L. T. 528 (measure of damages); and see pp. 465 *et seq.*, *post*.

(a) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7; *David v. Sabin*, *supra*. The term "conveyance" includes, *inter alia*, an assignment, appointment, or other assurance, and a covenant to surrender, made by deed on a sale of any property (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 2 (v)). In a voluntary conveyance no covenant is implied by the grantor conveying as "beneficial owner." As to other statutory expressions, see p. 427, *post*; and, as to a conveyance "as settlor," see title SETTLEMENTS, p. 529, *post*.

(b) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7 (1) (A); *David v. Sabin*, *supra*; *Page v. Midland Rail Co.*, [1894] 1 Ch. 11, C. A.; *May v. Platt*, [1900] 1 Ch. 616; *Turner v. Moon*, [1901] 2 Ch. 825; *Great Western Railway v. Fisher*, [1905] 1 Ch. 316; see *Eastwood v. Ashton*, [1913] W. N. 129. A "purchase for value" in the above covenant does not include a conveyance in consideration of marriage (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7 (1) (A)).

direction of another who directs as beneficial owner, the same covenant is implied on the part of the person so directing (c).

748. The covenants implied by statute may be varied or extended (d). Where this is intended, the modifications should be clearly expressed in the conveyance (e). A proviso destroying and not merely qualifying a covenant is void (f).

749. Where a vendor conveys as trustee (g), mortgagee (h), personal representative of a deceased person (i), committee of a lunatic so found (k), or under an order of the court (l), there is implied only a covenant against incumbrances, limited to things done or suffered by the person so conveying, or to which he has been party or privy (m). A trustee who sells as such cannot be compelled to enter into any other covenant (n).

750. Where a tenant for life sells under his statutory powers (o), or trustees sell with his consent, the implied covenants given by the tenant for life are usually limited, as regards the reversion, to his own acts and the acts of persons claiming under him (p); but the mere fact that he conveys as tenant for life in exercise of a power of itself confers no such protection (q).

751. Where the vendors are tenants in common, the covenants on the part of each are usually limited so as to apply only to their respective shares (r). If they are joint tenants, their covenants are sometimes joint and sometimes joint and several (s).

SECT. 4.

Form of the Assurance.

Variation of statutory covenants.

Covenant implied by conveying as "trustee" etc.

Covenants by tenant for life.

Covenants by co-owners.

(c) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7 (2). As to covenants implied where husband and wife convey as beneficial owners, see *ibid.*, s. 7 (3); Wolstenholme, Conveyancing and Settled Land Acts, 10th ed., p. 46.

(d) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7 (7).

(e) See *Page v. Midland Rail. Co.*, [1894] 1 Ch. 11, C. A.; *May v. Platt*, [1900] 1 Ch. 616.

(f) *Walling v. Lewis*, [1911] 1 Ch. 414; and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 457.

(g) See title TRUSTS AND TRUSTEES.

(h) See title MORTGAGE, Vol. XXI., pp. 123, 311.

(i) See title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 238, 296 *et seq.*

(k) See title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 456; *Re Ray (a Person of Unsound Mind)*, [1896] 1 Ch. 468, C. A.

(l) See *Cottrell v. Cottrell* (1866), L. R. 2 Eq. 330.

(m) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7 (1) (F).

(n) *Worley v. Frampton* (1846), 5 Hare, 560, 565; see title TRUSTS AND TRUSTEES. The beneficiaries, however, sometimes join to give the full covenants for title; see p. 416, *ante*; Encyclopædia of Forms and Precedents, Vol. XII., p. 669.

(o) See p. 311, *ante*; title SETTLEMENTS, pp. 652, 653. *post.*

(p) See Encyclopædia of Forms and Precedents, Vol. XII., pp. 421, 498, 635; and, as to the liability of tenants for life to covenant, see, further, *Re London Bridge Acts, Ex parte Clothworkers' Co.* (1842), 13 Sim. 176, 179; *Poulett (Earl) v. Hood* (1868), L. R. 5 Eq. 115; *Re Sawyer and Baring's Contract* (1884), 53 L. J. (CH.) 1104.

(q) *Re Tyrell, Tyrell v. Woodhouse* (1900), 82 L. T. 675.

(r) See Encyclopædia of Forms and Precedents, Vol. XII., pp. 420, 488, 489.

(s) *National Society for the Distribution of Electricity by Secondary Generators v. Gibbs*, [1900] 2 Ch. 280, C. A. (where the contract did not

SECT. 4.

Form of the Assurance.

Covenants by person selling under compulsion.

Covenants as to unpaid consideration ;

Vendor's personal liability ;
succession duty.

Indemnity in respect of restrictive covenants.

752. A vendor selling compulsorily, and not by agreement, under the Lands Clauses Consolidation Act, 1845 (*t*), does not enter into covenants for title (*a*). Upon a sale of land by the promoters of the undertaking the word "grant" implies the usual covenants for title (*b*).

753. Where the consideration is of such a nature that it is not payable on completion of the contract, the purchaser enters into a covenant to pay it, as where a rent charged on the land forms the whole or part of the consideration (*c*).

Where a vendor sells land in respect of which he is personally subject to some liability or burden, the purchaser must covenant to indemnify the vendor against his liability (*d*) : thus, on the sale of an equity of redemption, the purchaser must covenant to indemnify the vendor against the mortgage debt and interest (*e*) ; and on the sale of a reversion the purchaser must covenant to pay the succession duty, unless it has already been compounded for (*f*).

754. Where land is sold subject to restrictive covenants the vendor is entitled to a covenant of indemnity from the purchaser in case of breach (*g*) ; but where a contract for the sale of land makes no mention that the land is subject to a restrictive covenant, the purchaser can insist on a conveyance according to the terms of the contract, and is not bound to have such restrictive covenant inserted in the conveyance (*h*) ; consequently he gives no covenant of indemnity against it. He may, however, be liable to observe it on the ground that he took with notice of its existence (*i*).

disclose their separate interests). See also *Encyclopædia of Forms and Precedents*, Vol. XII., pp. 421, 488, 500 ; *Dart, Vendors and Purchasers*, 7th ed., p. 573. As to the effect of the estates of the covenantors in determining whether covenants are joint or several, see title *DEEDS AND OTHER INSTRUMENTS*, Vol. X., p. 485.

(*t*) 8 & 9 Vict. c. 18.

(*a*) See *Dart, Vendors and Purchasers*, 7th ed., p. 570 ; 2 *Davidson's Precedents in Conveyancing*, Part I., p. 558. *Secus*, where the land is sold under an agreement with the undertakers.

(*b*) *Lands Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 18), s. 132. As to compulsory purchase, see, further, title *COMPULSORY PURCHASE OF LAND AND COMPENSATION*, Vol. VI., p. 5.

(*c*) *Bower v. Cooper* (1843), 2 Harc. 408, 410 ; *Dixon v. Guyfere* (1857), 1 De G. & J. 655 ; see *Remington v. Deverull* (1795), 2 Anst. 550. As to rentcharges generally, see title *RENTCHARGES AND ANNUITIES*, Vol. XXIV., pp. 465 *et seq.*

(*d*) *Moxhay v. Inderwick* (1847), 1 De G. & Sm. 708 ; *Re Poole and Clarke's Contract*, [1904] 2 Ch. 173, C. A. ; compare *Lukey v. Higgs* (1855), 1 Jur. (n. s.) 200.

(*e*) *Waring v. Ward* (1802), 7 Ves. 332, 337 ; *Adair v. Carden* (1892), 29 L. R. Ir. 469 ; *Bridgman v. Daw* (1891), 40 W. R. 253 ; see *Dodson v. Downey*, [1901] 2 Ch. 620 (sale of share in partnership) ; title *MORTGAGE*, Vol. XXI., p. 270.

(*f*) See *Dart, Vendors and Purchasers*, 7th ed., pp. 580, 1234. As to the liability to pay and compounding, see title *ESTATE AND OTHER DEATH DUTIES*, Vol. XIII., p. 295.

(*g*) *Moxhay v. Inderwick*, *supra* ; *Re Poole and Clarke's Contract*, *supra*. As to covenants of indemnity in relation to assignments of leases, see p. 431, *post*.

(*h*) See p. 425, *ante*.

(*i*) *Re Wallis and Barnard's Contract*, [1899] 2 Ch. 515, 522 ; *Re Gloag and Miller's Contract* (1883), 23 Ch. D. 320, 327 ; see, further, p. 455, *post* ; title *EQUITY*, Vol. XIII., pp. 76 *et seq.*, 84 *et seq.* As to restrictive covenants where the land is sold on a building scheme, see pp. 458 *et seq.*, *post*.

Where land having a common title with other land is disposed of to a purchaser, other than a lessee or mortgagee, who does not hold or obtain possession of the documents forming the common title, he may, notwithstanding any stipulation to the contrary, require notice of any provision in his conveyance restrictive of user of, or giving rights over, any other land comprised in the common title to be indorsed on, or annexed to, a document forming part of the common title which is retained by the vendor; but omission to require such indorsement or annexation does not affect the title (*k*).

This rule does not apply to dispositions of registered land (*k*).

755. Where any of the documents of title relate to land of the vendor which is not included in the sale to the purchaser, it is the practice for the vendor to retain these documents and give an acknowledgment in writing of the purchaser's right to production and delivery of copies; and also, where he is not a trustee or mortgagee, an undertaking for safe custody (*l*). Such an acknowledgment and undertaking are binding on the vendor only while he has possession or control of the documents, and are binding on future possessors of the documents during the period of their possession or control (*m*). As a rule, the acknowledgment and undertaking are contained in the conveyance; but, where it is desired to keep the documents to which they relate off the title, they are given by a separate document (*n*). Apart from the purchaser's rights under an acknowledgment, he has an equitable right to the production of documents in the possession of another person which form the common title to their lands (*o*).

SECT. 4.
Form of the Assurance.

Indorsement of notice of restrictive covenants.

Acknowledgment of right to production.

SUB-SECT. 2.—Copyholds.

756. An assurance of copyholds on sale is generally effected by a surrender by the vendor to the lord of the manor to the use of the purchaser, followed by an admittance of the purchaser by the lord (*p*). A copyholder cannot alienate his estate by common law assurance, and an attempt to do so, in the absence of a special custom, gives the lord a right to forfeit the tenement (*q*).

Surrender and admittance.

(*k*) Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 11; and see p. 432, *post*.

(*l*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 9; see p. 338, *ante*. It is the practice for trustees and mortgagees not to give the undertaking (see Wolstenholme, Conveyancing and Settled Land Acts, 10th ed., p. 23; compare *Re Agg-Gardner* (1884), 25 Ch. D. 600); but the correctness of this practice has been questioned; see 37 Sol. Jo. 4, 73, 78.

(*m*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 9 (2), (9); and, generally as to the obligations imposed by an acknowledgment and an undertaking, see *ibid*, s. 9; see also pp. 337, 338, *ante*.

(*n*) This is under hand and requires a 6d. stamp. The statutory acknowledgment takes the place of the former deed of covenant for production; see Dart, Vendors and Purchasers, 7th ed., pp. 157, 577, 696.

(*o*) See *Fain v. Ayers* (1826), 2 Sim. & St. 533; Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, r. 3; p. 338, *ante*; and see titles MORTGAGE, Vol. XXI., p. 205; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 239.

(*p*) For forms of surrender, see Encyclopædia of Forms and Precedents, Vol. V., pp. 204 *et seq.*; of admittances, *ibid*, pp. 214 *et seq.* As to the law relating to surrenders and admittances, see, further, title COPYHOLDS, Vol. VIII., pp. 89 *et seq.*

(*q*) Scriven on Copyholds, 7th ed., p. 208; and see title COPYHOLDS, Vol. VIII., pp. 47, 51.

SECT. 4.

Form of the Assurance.

Covenants for title.

757. Covenants for title cannot be included or implied in a surrender, or entered on the court rolls, and it is the practice to have a separate deed containing or implying them. Such deed may be executed either before or after the surrender. As a rule, the covenants are implied by the use of the statutory words in a deed of covenant to surrender (*r*); but, if they are contained in a deed following the surrender, they must be in the full form, since the statute (*s*) does not then apply (*t*).

Where surrender unnecessary.

758. In certain cases a surrender is unnecessary; thus, where a testator devises copyholds to such uses as his trustee shall appoint, or gives his trustee a mere power of sale (*u*), or where a trustee in bankruptcy is selling copyholds forming part of the bankrupt's estate (*r*), the lord is bound to admit the appointee or purchaser upon payment of a single fine, and without requiring the trustee to be admitted and to surrender.

Tenant for life.

Compulsory sale.

A person exercising the powers of a tenant for life under the Settled Land Acts (*w*) can convey copyholds without a surrender (*x*), and, where copyholds are acquired compulsorily under the Lands Clauses Consolidation Act, 1845, no surrender is required (*x*).

School sites.

759. Under the Schools Sites Act, 1841 (*y*), conveyances of copyholds not exceeding one acre for the purposes of the statute may be made in the statutory form (*a*).

SUB-SECT. 3.—*Leaseholds.*

Recitals in assurance of leaseholds.

760. In an assignment of leaseholds (*b*) it is customary to recite the lease and devolution of title to the vendor, but, where there have been numerous dealings with the property since the granting of the lease, the intermediate dealings are recited generally, and only the ultimate assurance to the vendor is particularly set out (*c*). The

(*r*) Since "a covenant to surrender" is a "conveyance" (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 2 (*v*)), covenants for title are implied by the use of the appropriate words. For forms of covenants to surrender, see *Encyclopædia of Forms and Precedents*, Vol. XII., pp. 806 *et seq.*

(*s*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41). (*t*) *Ibid.*, s. 2 (*v*); see note (*r*), *supra*. For form, see *Encyclopædia of Forms and Precedents*, Vol. XII., p. 937, clause 2a.

(*u*) *Glass v. Richardson* (1852), 2 De G. M. & G. 658, C. A.; *R. v. Wilson* (1862), 3 B. & S. 201; *Re Heathcote and Rawson's Contract* (1913), 108 L. T. 185; see title COPYHOLDS, Vol. VIII., pp. 104, 109. *Secus*, where the land is devised to the trustee (*R. v. Garland* (1870), L. R. 5 Q. B. 209); see title COPYHOLDS, Vol. VIII., p. 103.

(*v*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 50 (4); title COPYHOLDS, Vol. VIII., p. 89.

(*w*) See title SETTLEMENTS, pp. 624 *et seq.*, *post*; Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 20 (3); title COPYHOLDS, Vol. VIII., pp. 104, 108. For form of conveyance, see *Encyclopædia of Forms and Precedents*, Vol. XII., p. 816.

(*x*) 8 & 9 Vict. c. 18, s. 95; see titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 136; COPYHOLDS, Vol. VIII., pp. 29, 45, 129. For form of conveyance, see *Encyclopædia of Forms and Precedents*, Vol. XII., p. 815.

(*y*) 4 & 5 Vict. c. 38.

(*a*) *Ibid.*, s. 10. The Act expressly applies to lands of copyhold tenure (*ibid.*, s. 2); see, generally, title EDUCATION, Vol. XII., pp. 118 *et seq.*

(*b*) As to the assignment of leases generally, see title LANDLORD AND TENANT, Vol. XVIII., pp. 575 *et seq.*

(*c*) For forms of assurance of leaseholds, see *Encyclopædia of Forms and Precedents*, Vol. XII., pp. 831—929.

recitals of the lease should include a *verbatim* description of the parcels as in the lease, and in the operative part these are referred to as "all and singular the hereditaments and premises comprised in and demised by the said lease" (*d*). SECT. 4.
Form of the
Assurance.

761. In a conveyance on sale of leasehold property the same covenants for title as in the case of freeholds are, *mutatis mutandis*, implied by a person conveying as beneficial owner, with an additional covenant that the lease is valid and subsisting, and that the rent has been paid and the covenants performed up to the date of assignment (*e*). In the case of a conveyance of leaseholds by the vendor as trustee, mortgagee, personal representative of a deceased person, committee of a lunatic so found, or under an order of the court, the same statutory covenants are implied as in a similar conveyance of freeholds (*f*). Covenants
for title.

762. Where the vendor, as original lessee, is liable for the payment of rent or the performance of the covenants under the lease, the purchaser expressly covenants for the future to perform and observe the lessee's covenants and to indemnify the vendor against this liability (*g*); and the like covenant is given to a vendor who is assignee of the lease to indemnify him against the covenant into which he entered in the assignment to himself (*h*). Indemnity
against
covenants
of lease.

763. Where part only of the property demised by a lease is sold, the total rent is apportioned by the deed of assignment between the vendor and the purchaser, and both parties enter into mutual covenants for payment of their respective shares, and for performance of the lessee's covenants in the lease (*i*), but the assignee of part becomes liable to distress for the rent of the whole of the premises (*k*). The transaction may also be carried out by way of underlease, in which case the purchaser incurs no liability under the covenants in the head lease (*l*). Assignment
of part of
demised
premises.

764. When leasehold property comprised in one lease is sold in lots, the sale is usually effected by an assignment to the purchaser of the largest lot on trust to grant underleases to other purchasers (*m*). Sale in lots.

765. A purchaser of leasehold land, which is subject to a covenant against assignment without the landlord's licence, cannot Licence to
assign.

(*d*) See Encyclopædia of Forms and Precedents, Vol. XII., pp. 831, 832.

(*e*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7 (1) (B).

(*f*) See p. 427, *ante*.

(*g*) See title LANDLORD AND TENANT, Vol. XVIII., pp. 593, 594; and, as to qualifying the covenant by the use of the word "henceforth," see *ibid.*, p. 594. For a form, see Encyclopædia of Forms and Precedents, Vol. XII., p. 832; and see 56 Sol. Jo. 796.

(*h*) As to the liability of the lessee after assignment, see title LANDLORD AND TENANT, Vol. XVIII., p. 592.

(*i*) For forms of such assignments, see Encyclopædia of Forms and Precedents, Vol. XII., pp. 852, 855, 861, 863.

(*k*) See title LANDLORD AND TENANT, Vol. XVIII., p. 590; and, as to the liabilities of an assignee, generally, see *ibid.*, pp. 588 *et seq.*

(*l*) See *ibid.*, pp. 407, 408.

(*m*) For forms, see Encyclopædia of Forms and Precedents, Vol. XII., pp. 845, 847. Fiduciary owners may sell in this way (*Re Judd and Poland and Skelcher's Contract*, [1906] 1 Ch. 684, C. A.); see title TRUSTS AND TRUSTEES.

SECT. 4. object to the title on the ground that the licence has not been obtained until the date of completion⁽ⁿ⁾; but, if the vendor fails to obtain the licence after making reasonable efforts to do so, the contract for sale is not enforceable^(o).

Form of the Assurance.

If the vendor does not endeavour to procure the lessor's licence, the purchaser is entitled to damages for loss of his bargain^(p).

SUB-SECT. 4.—Registered Land.

Instrument of transfer.

766. Registered land is assured to a purchaser by the execution of an instrument of transfer in the statutory form, followed by registration of the purchaser as proprietor of the land^(q). Under the Land Transfer Act, 1897^(r), the legal estate in land situate in a district where registration of title is compulsory does not pass to a purchaser unless and until he is registered as proprietor^(s).

Conveyance off the register.

767. Where the sale deals with interests which are not for the purpose of registration incumbrances, a conveyance off the register should be taken in addition to the transfer on the register^(t).

Form of transfer :
recitals ;

768. Recitals are not as a rule permitted in a transfer of registered land, but a statement defining the estate of the vendor—for example, that he is seised in fee simple in possession free from incumbrances—may be inserted^(a).

words of
limitation ;
covenants
for title.

Words of limitation sufficient to pass the legal estate, as though the property were unregistered, are usually inserted in the transfer^(b).

The implied statutory covenants for title^(c) may be introduced by the use of the appropriate words^(d); but, in the absence of special agreement, a vendor of land registered with an absolute title need not enter into any covenants for title, and a vendor of land

(n) *Ellis v. Rogers* (1885), 29 Ch. D. 661, C. A. ; see p. 403, *ante*.

(o) *Lehmann v. McArthur* (1868), 3 Ch. App. 496 ; see, further, title LANDLORD AND TENANT, Vol. XVIII., pp. 579 *et seq.*

(p) *Day v. Singleton*, [1899] 2 Ch. 320, C. A. ; see pp. 409 *et seq.*, *ante*.

(q) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), ss. 29—39 ; Land Transfer Rules, 1903, rr. 97—157, 182. As to the method of entering a title on the register, see titles LANDLORD AND TENANT, Vol. XVIII., p. 583 ; REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 314 *et seq.* ; and, as to the effect of a statutory transfer, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 318, 319. As to mines, see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 554. As to covenants for title, see Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 6 (3).

(r) 60 & 61 Vict. c. 65.

(s) *Ibid.*, s. 20 (1) ; Land Transfer Rules, 1903, rr. 68—70 (Stat. R. & O. Rev., Vol. VII., Land (Registration), England, pp. 33, 44) ; altered as regards r. 70, Land Transfer Rules, 1908, IV. (Stat. R. & O. 1908, pp. 425, 431) ; see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 308.

(t) Unless the transaction relates to matters not entered in the register, an instrument off "the register," though sometimes advisable in mortgages, can rarely be required on sales ; see *Encyclopædia of Forms and Precedents* Vol. XII., pp. 139, 140 ; *Williams, Vendor and Purchaser*, 2nd ed., pp. 1200 *et seq.* ; title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 320. For forms of such assurances, see *Encyclopædia of Forms and Precedents*, Vol. XII., pp. 464, 568.

(a) *Encyclopædia of Forms and Precedents*, Vol. XI., p. 362.

(b) See *Encyclopædia of Forms and Precedents*, Vol. XI., p. 362, note (d) ; *Williams, Vendor and Purchaser*, 2nd ed., pp. 1199, 1200.

(c) See *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), s. 7 ; p. 426, *ante*.

(d) Land Transfer Rules, 1903, r. 99 ; see *Encyclopædia of Forms and Precedents*, Vol. XI., p. 323.

registered with a possessory or qualified title need only covenant against estates and interests excluded from the effect of registration, and implied covenants are construed accordingly (e).

SECT. 4.
Form of the Assurance.

SUB-SECT. 5.—Vesting Order.

769. Where the court gives a judgment or makes an order directing the sale of land (f), every person who is entitled to or possessed of the land, or entitled to a contingent interest, or is a party to the proceedings or otherwise bound by the judgment or order, is deemed a trustee within the meaning of the Trustee Act, 1893 (g), and the court may make an order vesting the land in the purchaser (h).

Vesting order consequential on :
order for sale ;

The court may also make a vesting order consequential on a judgment for specific performance of a contract concerning any land (i).

order for specific performance.
Copyholds.

770. A vesting order, made with the consent of the lord of the manor, passes the lands without surrender or admittance (j). The consent of the lord (k) may be given personally in court, or in writing verified by affidavit (l).

SECT. 5.—Costs.

771. In the absence of express stipulation, the purchaser pays the costs of preparing the conveyance (m); of registration of the

Costs payable by purchaser.

(e) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 16 (3). For a form extending covenants for title to rights, liabilities, and interests which are not deemed incumbrances by reason of the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 18, see *Encyclopædia of Forms and Precedents*, Vol. XI., p. 363. As to possessory titles, see title **REAL PROPERTY AND CHATELS REAL**, Vol. XXIV., pp. 313, 314.

(f) As to vesting orders transferring estates to mortgagees, see title **MORTGAGE**, Vol. XXI., pp. 125, 315 *et seq.* As to vesting orders, see, further, Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 135; title **LUNATICS AND PERSONS OF UNSOUND MIND**, Vol. XIX., pp. 454, 455; Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 26—34; titles **INFANTS AND CHILDREN**, Vol. XVII., pp. 52, 83; **TRUSTS AND TRUSTEES**.

(g) 56 & 57 Vict. c. 53.

(h) *Ibid.*, s. 30; Trustee Act, 1893, Amendment Act, 1894 (57 & 58 Vict. c. 10), s. 1; see *Re Montagu, Faber v. Montagu*, [1896] 1 Ch. 549 (estates tail). Or a person may be appointed to convey (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 33); see also *White v. White* (1872), L. R. 15 Eq. 247; note (n), p. 470, *post*. For forms of vesting orders, see Daniell, *Chancery Forms*, 5th ed., p. 1068; 3 Seton, *Judgments and Orders*, 7th ed., p. 1221; see also R. S. C., Ord. 54B, r. 2.

(i) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 31; see title **SPECIFIC PERFORMANCE**.

(j) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 34 (1); see title **COPYHOLDS**, Vol. VIII., p. 88.

(k) *Cooper v. Jones* (1855), 2 Jur. (N. S.) 59.

(l) *Ayles v. Cox, Ex parte Attwood* (1853), 17 Beav. 584; *Bristow v. Booth* (1869), L. R. 5 C. P. 80. For the fines payable to the lord, see also *Paterson v. Paterson* (1866), L. R. 2 Eq. 31. As to vesting orders in lunacy relating to copyholds, see Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 135 (5), (6); title **LUNATICS AND PERSONS OF UNSOUND MIND**, Vol. XIX., p. 455.

(m) *Poole v. Hill* (1840), 6 M. & W. 835; see p. 412, *ante*. As to the costs of making and verifying the abstract, producing deeds not in the vendor's possession etc., see *Re Johnson and Tustin* (1885), 30 Ch. D. 42, C. A.; *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), s. 3 (6); p. 348, *ante*; and of stamping unstamped or insufficiently stamped deeds, p. 338, *ante*; as to solicitors' costs, see title **SOLICITORS**.

SECT. 5.

Costs.

transfer under the Land Transfer Acts, 1875 and 1897 (*n*); of registering* the conveyance in Middlesex or Yorkshire (*o*); of a covenant for or acknowledgment of the right to production of deeds, other than the costs of perusal and execution on behalf of the vendor and other necessary parties (*p*); and the expense of procuring attested copies of documents retained by the vendor (*q*).

Costs payable
by vendor.

772. The expense of the perusal and execution of the conveyance by all necessary conveying parties (*r*); of an acknowledgment by a married woman, and of the certificate of acknowledgment where necessary; of enrolling a conveyance which operates as a disentailing assurance (*s*); of registration of the vendor under the Land Transfer Acts, 1875 and 1897 (*t*), or of procuring a transfer from the registered proprietor to the purchaser (*u*), is borne by the vendor.

Incum-
brances.

773. In the absence of stipulation to the contrary (*a*), the vendor pays the expense of discharging incumbrances or getting in outstanding estates (*b*), or the additional expense occasioned by the incumbrancers, or persons in whom estates are vested, being joined in the conveyance (*c*); but not if the incumbrances are kept alive for the purchaser's protection (*d*).

Copyholds.

774. The fine on admittance to copyholds and the fees on surrender and admittance are paid by the purchaser (*e*); but the vendor pays for his own prior admittance if that is necessary (*f*). An

(*n*) 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65; see p. 432, *ante*.

(*o*) See pp. 441 *et seq.*, *post*; *Mittelholzer v. Pullarton* (1842), 6 Q. B. 989.

(*p*) Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, fourth rule.

(*q*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3 (6); and, as to the right of a purchaser to have such attested copies, see *Boughton v. Jewell* (1808), 15 Ves. 176; as to the former rule as to costs, see *Dure v. Tucker* (1801), 6 Ves. 460; and, as to attested copies as evidence, compare *Doe d. Bacon v. Brydges* (1843), 7 Scott (N. R.), 333, 339; p. 338, *ante*.

(*r*) Sugden, Vendors and Purchasers, 14th ed., p. 561.

(*s*) Davidson, Precedents in Conveyancing, Vol. I., p. 478.

(*t*) 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65.

(*u*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 16 (2).

(*a*) For a form of such conditions, see Encyclopædia of Forms and Precedents, Vol. XII., p. 414; and, for the effect of it, see pp. 336, 337, *ante*.

(*b*) *Esdaile v. Oxenham* (1824), 3 B. & C. 225, 228, 229; *Re Sander and Walford's Contract* (1900), 83 L. T. 316.

(*c*) See Sugden, Vendors and Purchasers, 14th ed., p. 555; Dart, Vendors and Purchasers, 7th ed., p. 723; *Jones v. Lewis* (1847), 1 De G. & Sm. 245; compare *Reeves v. Gill* (1838), 1 Beav. 375.

(*d*) *Cooper v. Cartwright* (1860), John. 679.

(*e*) *Drury v. Man* (1746), 1 Atk. 95; *Bradley v. Munton* (1852), 16 Beav. 294; see *Graham v. Sims* (1801), 1 East, 632; see, further, title COPYHOLDS, Vol. VIII., pp. 28, 63; and see *ibid.*, p. 29, as to fines etc. payable when copyhold land is taken under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18). As to payment by cheque to a deputy steward, see *Bridges v. Garrett* (1870), L. R. 5 C. P. 451, Ex. Ch.

(*f*) *Paramore v. Greenslade* (1853), 1 Sm. & G. 541. A condition that the purchaser shall have a proper conveyance at his own expense does not alter this result and throw on him the expenses incurred by the vendor in qualifying himself to make a surrender (*Whiteley v. Taylor* (1876), 35 L. T. 187). Where the costs of surrender are to be borne by the purchaser, this does not include the costs of a vesting order required to complete the vendor's title (*Bradley v. Munton*, *supra*).

agreement to pay "the costs and charges of admittance" does not include the fine (*g*).

SECT. 5.

Costs.

775. In the case of land purchased under the Lands Clauses Consolidation Act, 1845 (*h*), whether compulsorily or by agreement (*i*), the vendor's and purchaser's costs of conveyance, including getting in outstanding legal estates, terms and interests, and deducing and verifying the title, are paid by the promoters (*k*).

Sale under
Lands Clauses
Act, 1845.

SECT. 6.—Completion, and Payment of Purchase-money.

SUB-SECT. 1.—Execution of the Assurance (*l*).

776. The purchaser cannot insist on the conveyance to him being executed in his presence or in that of his solicitor; but he is entitled, at his own cost, to have the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor (*m*). This rule applies to transfers of registered land (*n*).

Execution by
vendor.

777. A purchaser can require the conveyance to be executed by the vendor and other necessary parties in person where this is practicable (*o*). If the conveyance cannot be executed otherwise than by attorney, it must appear either that the power has not been revoked, or that it is valid in favour of the purchaser notwithstanding any matter which would operate to revoke it (*p*). The power of

In person or
by attorney.

(*g*) *Barrow v. Barrow* (1855), 3 W. R. 587.

(*h*) 8 & 9 Vict. c. 18.

(*i*) See *ibid.*, ss. 80, 82, 85.

(*k*) *Ibid.*, s. 82; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 112 *et seq.* Preliminary expenses and other costs not covered by this provision are usually made the subject of express stipulation; see *Encyclopædia of Forms and Precedents*, Vol. VIII., pp. 79, 83.

(*l*) As to the formalities attending the execution of deeds, see, generally, title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 382 *et seq.*; and, for forms of testimonium and attestation clauses, see *Encyclopædia of Forms and Precedents*, Vol. XIV., pp. 205 *et seq.* As to vesting orders, see p. 433, *ante*. As to the client's right to drafts, see title SOLICITORS, and, as to lien on an uncompleted conveyance, see *Esdaile v. Oxenham* (1824), 3 B. & C. 225; *Oxenham v. Esdaile* (1829), 3 Y. & J. 262; title LIEN, Vol. XIX., pp. 17, 31.

(*m*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 8. The rule only applies to sales made after 1881 (*ibid.*, s. 8 (2)). As to the former law, see *Viney v. Chaplin* (1858), 2 De G. & J. 468, C. A.; *Essex v. Daniell*, *Daniell v. Essex* (1875), L. R. 10 C. P. 538.

(*n*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 9 (1); and, as to execution of instruments of transfer of registered land, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 399; and see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 318.

(*o*) *Mitchel v. Neale* (1755), 2 Ves. Sen. 679, 681; *Noel v. Weston* (1821), Madd. & C. 50; Sugden, Vendors and Purchasers, p. 563; Dart, Vendors and Purchasers, 7th ed., pp. 592, 593. In practice, when a deed has to be executed by attorney, the power of attorney is validated by statute (see p. 436, *post*), and the former objection to such execution has been in consequence diminished.

(*p*) See p. 436, *post*; title AGENCY, Vol. I., pp. 232 *et seq.* As to the form of execution under a power of attorney, see titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 394; LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 456; and see Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 23. As to the need for the power of attorney to be under seal, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 363, 394.

SECT. 6.
Completion
and
Payment of
Purchase-
money.

Power of
attorney,
when
irrevocable.

Proof of non-
revocation of
power, where
necessary.

Execution by
attorney of
married
woman.

Execution
by the
purchaser.

attorney, unless filed at the Central Office (*g*), should be handed over on completion, or the right to production acknowledged (*r*).

778. Where a power of attorney (*a*) is given for valuable consideration, and, in the instrument creating it, is expressed to be irrevocable, acts done under it are validated in favour of a purchaser, and the purchaser is not prejudicially affected by notice of anything done by the donor of the power without the concurrence of the donee, or of the death, marriage, lunacy, unsoundness of mind or bankruptcy of the donor (*b*).

The same rule applies to acts done under a power of attorney, whether given for valuable consideration or not, expressed, in the instrument creating the power, to be irrevocable for a specified time, not exceeding one year from the date of the instrument (*c*).

779. If a power of attorney does not fall within the above statutory rules, a purchaser should require proof that the power at the time of its exercise has not been revoked or suspended, either expressly, or by the death, bankruptcy or lunacy of the donor, and, until satisfied, should not pay over the purchase-money to the attorney (*d*).

780. A married woman, whether an infant or of full age, may by deed executed after the year 1881 appoint an attorney for the purpose of executing any deed which she might herself execute (*e*).

781. Where the conveyance contains any covenants by the purchaser, or any reservation of easements to the vendor, the purchaser should execute the deed (*f*); though, if he accepts the

(*g*) See note (*c*), *infra*.

(*r*) See *Eaton v. Sanxter* (1834), 6 Sim. 517, 519; the power of attorney should be abstracted; see p. 350, *ante*.

(*a*) The limits of the power of attorney must be strictly observed; see title AGENCY, Vol. I., p. 162.

(*b*) Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 8 (1). The statutory rule applies only to powers of attorney created after the 31st December, 1882 (*ibid.*, ss. 1 (2), 8 (2)); see also Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 46, 47; titles AGENCY, Vol. I., pp. 229, 230; DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 394. As to execution of surrenders of copyholds by attorney, see title COPYHOLDS, Vol. VIII., p. 97.

(*c*) Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 9. Powers of attorney may be deposited at the Central Office of the Supreme Court (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 48).

(*d*) See Sugden, Vendors and Purchasers, p. 563; Williams, Vendor and Purchaser, 2nd ed., p. 739; *Wallace v. Cook* (1804), 5 Esp. 117; *Beaufort (Duke) v. Glynn* (1855), 25 L. T. (o. s.) 171; *Re Douglas, Ex parte Snowball* (1872), 7 Ch. App. 534.

(*e*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 40; see also title HUSBAND AND WIFE, Vol. XVI., p. 365. It seems that a married woman cannot, under the statutory power, appoint an attorney to execute a deed which would require to be acknowledged if executed by herself; see Dart, Vendors and Purchasers, 7th ed., p. 592, note (*f*). As to acknowledgments of conveyances by married women, see title HUSBAND AND WIFE, Vol. XVI., pp. 323, 381 *et seq*.

(*f*) The reservation of an easement operates as a grant by the purchaser, and his execution of the deed is necessary to give legal effect to the grant (*Doe d. Douglas v. Lock* (1835), 2 Ad. & El. 705, 743; *Proud v. Bates* (1865), 11 Jur. (N. S.) 441, 443); and see titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 472; LANDLORD AND TENANT, Vol. XVIII., p. 428.

benefit of the conveyance, this, notwithstanding non-execution, imposes on him a liability to give effect to its provisions in favour of the vendor (*g*). A transfer of registered land need not be executed by a purchaser except where an entry is to be placed on the register in derogation of the estate passing to him (*h*).

782. Where a person fails to comply with an order of the court directing him to execute a conveyance, the court may order the conveyance to be executed by a nominee for that purpose, and a conveyance so executed operates as if it had been executed by the person originally directed to execute it (*i*).

SECT. 6:
Completion
and
Payment of
Purchase-
money.

Execution
by person
appointed by
the court.

SUB-SECT. 2.—*Receipt for Purchase-money.*

783. The vendor must either himself give, or procure others to give, a valid receipt for the purchase-money, and his inability to do so is a defect in the title (*k*). Formerly the receipt was indorsed on the deed; but, in a deed executed after the 31st December, 1881, a receipt in the body of a deed is a sufficient discharge to the person making the payment, without any further receipt being indorsed (*l*), and since that date it has been the practice to insert the receipt in the body of the deed immediately after the statement of the payment of the purchase-money (*m*).

Receipt.

A vendor is not bound to accept payment by cheque (*n*).

784. A receipt in the body of a deed executed after the 31st December, 1881, or indorsed thereon, is conclusive evidence of payment in favour of a subsequent purchaser not having notice of non-payment (*o*). But a subsequent purchaser cannot rely upon such

Payment
by cheque.
Receipt in
deed or
indorsed
thereon.

(*g*) *Willson v. Leonard* (1840), 3 Beav. 373; *May v. Belleville*, [1905] 2 Ch. 605; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 401.

(*h*) *E.g.*, where the sale is subject to restrictive conditions (Land Transfer Rules, 1903, r. 153, Sched. I., Form 41 (Stat. R. & O. Rev., Vol. VII., Land (Registration), England, p. 33)). As to a grantee signing the memorial of a deed relating to land in Middlesex, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 302, 303.

(*i*) Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 14; see *Re Edwards, Owen v. Edwards* (1885), 33 W. R. 578; *Howarth v. Howarth* (1836), 11 P. D. 95, C. A.; *Re Cuthcart*, [1893] 1 Ch. 466, C. A.; *Re Lumley*, [1893] W. N. 13; and, as to sales by the court, see, further, pp. 313 *et seq.*, *ante*.

(*k*) *Forbes v. Peacock* (1846), 1 Ph. 717. The bonus payable to a vendor under the Irish Land Act, 1903 (3 Edw. 7, c. 37), s. 48, is not part of the "purchase-money" (*Re Oliver, Ramsden v. Ramsden* (1910), 103 L. T. 422). On a sale by joint vendors, both should join in the receipt; see *Powell v. Brodhurst*, [1901] 2 Ch. 160.

(*l*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 1, 54.

(*m*) A receipt is now seldom indorsed except in the case of corporations, *e.g.*, the Ecclesiastical Commissioners, who use a special form of receipt signed by their authorised agent.

(*n*) See *Clarke v. King* (1826), 2 C. & P. 286; *Blumberg v. Life Interests etc. Corporation*, [1897] 1 Ch. 171; [1898] 1 Ch. 27, C. A.; *Johnston v. Boyes*, [1899] 2 Ch. 73. As to the protection afforded to the vendor, if he accepts a "marked" or "certified" cheque, see titles BANKERS AND BANKING, Vol. I., pp. 806, 607; BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 465; and, as to banker's drafts, see title BANKERS AND BANKING, Vol. I., pp. 602, 612. As to payment to an agent by cheque, see p. 439, *post*.

(*o*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 35. A statement that the money has been paid is not a receipt within

SECT. 6.

Completion
and
Payment of
Purchase-
money.

Receipt of
mortgagee.
Receipt by
trustees.

receipt if he was unaware of its existence (*p*). Absence of a receipt is presumptive evidence of non-payment of the purchase-money and puts a subsequent purchaser upon inquiry as to whether it was paid (*q*).

785. The written receipt of a mortgagee is a sufficient discharge for any money arising under the statutory power of sale, and a person paying the same to the mortgagee is not concerned to inquire whether any money remains due on the mortgage (*r*).

786. A written receipt by a trustee for money payable to him under any trust or power is a sufficient discharge, and exonerates the person making the payment from seeing to its application or being liable for its misapplication (*s*). All who have not disclaimed or retired ought to join (*t*). They may appoint a solicitor (*a*), but not one of themselves, to receive the money (*b*). Where trustees are unable to give a discharge for purchase-money, the money may be paid into court (*c*) or, if the fund is under £500, into a post office savings bank (*d*).

A surviving trustee may exercise the powers of the trustees, and accordingly may give a receipt (*e*).

A purchaser from a tenant for life selling under his statutory power (*f*) is discharged by the receipt in writing of the trustees of the settlement, or, if the settlement empowers one trustee to act, of one trustee or of the personal representatives of the last surviving or continuing trustee (*g*).

787. On a sale of superfluous lands under the Lands Clauses Consolidation Act, 1845 (*h*), a receipt under the common seal of the

Sale of
superfluous
lands.

this provision (*Renner v. Tolley* (1893), 68 L. T. 815). As to the effect of a receipt before and since the statute, see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 464.

(*p*) *Lloyds Bank, Ltd. v. Bullock*, [1896] 2 Ch. 192, 195.

(*q*) *Greenlade v. Dare* (1855), 20 Beav. 284; *Kennedy v. Green* (1834), 3 My. & K. 699. As to the effect of a receipt clause in determining the priority of equitable incumbrances, see title EQUITY, Vol. XIII., p. 81; *ESTOPPEL*, Vol. XIII., p. 387.

(*r*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 22 (1). This rule probably does not apply where the purchaser has notice that no money is due (*Hockey v. Western* (1898), 78 L. T. 1, 5, C. A.); and see title MORTGAGE, Vol. XXI., p. 259.

(*s*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 20 (1); and, as to receipts by trustees, see, further, title TRUSTS AND TRUSTEES.

(*t*) *Lee v. Sankey* (1873), L. R. 15 Eq. 204; see *Hall v. Franck* (1849), 11 Beav. 519; *Locke v. Lomas* (1852), 5 De G. & Sm. 326; *Hope v. Liddell* (No. 1), *Liddell v. Norton* (1855), 21 Beav. 183; *Re Fryer, Martindale v. Picquot* (1857), 3 K. & J. 317; title TRUSTS AND TRUSTEES.

(*a*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 17; see p. 439, *post*.

(*b*) *Re Flower (C.)*, M.P., and Metropolitan Board of Works, *Re Flower (M.) and Same* (1884), 27 Ch. D. 592.

(*c*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 42; see R. S. C., Ord. 54B; Ord. 55, r. 3; *Cox v. Cox* (1855), 1 K. & J. 251.

(*d*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 70; and see title COUNTY COURTS, Vol. VIII., pp. 498, 499.

(*e*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 22; and see title TRUSTS AND TRUSTEES. As to the powers of the personal representatives of a sole trustee or last surviving trustee, see title TRUSTS AND TRUSTEES.

(*f*) See title SETTLEMENTS, pp. 652, 653 *et seq.*, *post*.

(*g*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 30, 40; *Re Garnett Orme and Hargreaves' Contract* (1883), 25 Ch. D. 595; see title SETTLEMENTS, pp. 632, 640, *post*, and see *ibid.*, pp. 642, 643, *post*.

(*h*) 8 & 9 Vict. c. 18.

promoters of the undertakers, if a corporation, or the hands of two of the directors or managers acting by the authority of the promoters, is a sufficient discharge for the purchase-money (i).

SECT. 6.
Completion
and
Payment of
Purchase-
money.

SUB-SECT. 3.—*Payment to Persons Other than the Actual Vendor.*

788. Where the property is subject to incumbrances which are to be discharged out of the purchase-money, the purchaser must pay the proper amounts to the incumbrancers and the balance to the vendor (k). A purchaser who disregards an incumbrance of which he has knowledge, and pays the vendor without the consent of the incumbrancer, is liable to the latter to the extent of such payment (l).

Payment to
incum-
brancers.

789. Where a solicitor (m) produces a deed having in the body thereof or indorsed thereon a receipt for the consideration money or other consideration, and the deed has been executed, or the indorsed receipt signed, by the person entitled to give a receipt, the deed itself authorises payment being made to the solicitor, without his producing any separate authority from the person who executed or signed the deed or receipt (n). This procedure can be adopted also by vendors who are trustees (o).

Payment to
solicitor.

The solicitor producing the deed must be acting for the party to whom the money is expressed to be paid (p), but in the absence of suspicious circumstances the purchaser may assume that the solicitor is so acting (q).

The consideration must be paid in cash, payment by cheque to the statutory agent not being authorised (r), nor is payment by set-off warranted (s).

(i) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 131; see, further, title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 26 *et seq.*

(k) See Sugden, Vendors and Purchasers, 14th ed., p. 552; Dart, Vendors and Purchasers, 7th ed., pp. 836, 837.

(l) Dart, Vendors and Purchasers, 7th ed., pp. 836, 837; see *Rayne v. Baker* (1859), 1 Giff. 241; *Tildesley v. Lodge* (1857), 3 Sm. & G. 543. As to the equitable rights of a person who pays off a mortgage debt, see title MORTGAGE, Vol. XXI., p. 180.

(m) As to whether it is necessary for the solicitor to have a certificate, see *Sparling v. Brereton* (1866), L. R. 2 Eq. 64; title SOLICITORS.

(n) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 56. Prior to this enactment the possession of an executed conveyance with a signed receipt for the consideration money was not sufficient, and a separate written authority was necessary; see *Viney v. Chaplin* (1858), 2 De G. & J. 468, 477, C. A. The statutory rule only applies in cases where consideration is paid or given after 1881 (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 56 (2)).

(o) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 17 (1). Prior to that Act a trustee vendor's solicitor could not receive purchase-money under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 56; see *Re Bellamy and Metropolitan Board of Works* (1883), 24 Ch. D. 387, C. A.; *Re Helking and Merton's Contract*, [1893] 3 Ch. 269, 280, C. A. As to receipts by trustees generally, see p. 438, *ante*; title TRUSTS AND TRUSTEES.

(p) *Day v. Woolwich Equitable Building Society* (1888), 40 Ch. D. 491, 494; but this was questioned in *King v. Smith*, [1900] 2 Ch. 425, 432.

(q) *King v. Smith*, *supra*.

(r) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 56; see *Blumberg v. Life Interests etc. Corporation*, [1897] 1 Ch. 171; *Johnston v. Boyes*, [1899] 2 Ch. 73; title AGENCY, Vol. I., pp. 164, note (d), 165. As to payment to the vendor by cheque, see p. 437, *ante*.

(s) *Coupe v. Collyer* (1890), 62 L. T. 927. As to set-off generally, see title SET-OFF AND COUNTERCLAIM, pp. 481 *et seq.*, *post*.

SECT. 6.
Completion
and
Payment of
Purchase-
money.

Payment
to agent.

Assurance to
charitable
uses.

Assurance
under the
Metropolitan
Paving Act,
1817.

Copyholds
under Lands
Clauses Con-
solidation
Act, 1845.

Disentailing
assurances.

790. Apart from the statutory provisions as to solicitors just referred to, payment should only be made to the vendor's agent when he produces a special authority to receive it (*t*).

SECT. 7.—Other Formalities (*u*).

SUB-SECT. 1.—Enrolment.

791. On a purchase of land for charitable uses the assurance must, with certain exceptions (*v*), be enrolled in the Central Office of the Supreme Court within six months after its execution (*w*).

792. An assurance made by a person under disability under the Metropolitan Paving Act, 1817 (*a*), must be enrolled in the Central Office of the Supreme Court (*b*).

793. An assurance of lands of copyhold or customary tenure under the Lands Clauses Consolidation Act, 1845 (*c*), must be enrolled on the court rolls of the manor (*d*).

794. Where an assurance of freehold land, made by a vendor who is tenant in tail, is intended to bar the entail and pass an estate in fee simple, it must be enrolled, by either vendor or purchaser, within six months after being executed by the vendor (*e*), in the

(*t*) See Sugden, Vendors and Purchasers, 14th ed., p. 667; title AGENCY, Vol. I., pp. 165, 210. Where the purchase is completed by the vendor's attorney acting under a power of attorney, the power will usually authorise payment of the purchase-money to him (see Encyclopædia of Forms and Precedents, Vol. I., pp. 380, 382), and if it is valid for the purpose of conveyance (see p. 436, *ante*), it is valid also for the purpose of payment. It may be that a purchaser making a payment to an attorney is also protected by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 47, against a revocation of the power of which he is not aware, but the language of this statutory provision seems to indicate that it operates only in favour of the attorney himself.

(*u*) Whenever an assurance is made under statutory powers, the statute must be referred to for any necessary formalities: see, for example, titles AGRICULTURE, Vol. I., pp. 347 *et seq.*; BURIAL AND CREMATION, Vol. III., pp. 436, 438, 441, 443, 460 *et seq.*, 506 *et seq.*; COMMONS AND RIGHTS OF COMMON, Vol. IV., p. 600; COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 50 *et seq.*, 62 *et seq.*; ECCLESIASTICAL LAW, Vol. XI., pp. 723 *et seq.*; EDUCATION, Vol. XII., pp. 118 *et seq.*; INFANTS AND CHILDREN, Vol. XVII., p. 81; OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., pp. 585, 586; SETTLEMENTS, pp. 638 *et seq.*, *post*. As to a conveyance under the Recreation Grounds Act, 1859 (22 Vict. c. 27), see title OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., p. 591; as to vesting of property under the Town Gardens Protection Act, 1863, see title OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., p. 595; as to assurances by an infant of gavelkind land, see title INFANTS AND CHILDREN, Vol. XVII., pp. 80, 81; as to sales by or to persons having special capacity, see pp. 308 *et seq.*, *ante*.

(*v*) As to the excepted cases, see title CHARITIES, Vol. IV., pp. 132, 133; ECCLESIASTICAL LAW, Vol. XI., pp. 721, 722; see also title OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., pp. 580, 581, 591, 597, 604.

(*w*) See title CHARITIES, Vol. IV., p. 131.

(*a*) 57 Geo. 3, c. xxix., known as Michael Angelo Taylor's Act; see titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 8, 172; HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 201.

(*b*) Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.), s. 81; R. S. C., Ord. 61, r. 9.

(*c*) 8 & 9 Vict. c. 18.

(*d*) *Ibid.*, ss. 95—97; see title COPYHOLDS, Vol. VIII., p. 129.

(*e*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 41; see title

Central Office (*f*). This rule does not apply in the case of a tenant in tail in possession, or the owner of a base fee in possession, who is selling under the powers conferred by the Settled Land Acts (*g*); and it does not apply to copyhold lands. A deed barring an estate tail in copyholds must be entered on the court rolls of the manor within six months after execution (*h*), but need not be enrolled in the Central Office (*i*).

SECT. 7.
Other For-
malities.

795. Upon a sale of lands of the Crown or the Duchies of Lancaster or Cornwall, the assurance must be enrolled in the Land Revenue or Duchy Office within six months of its execution (*k*). Crown and
Duchy lands.

SUB-SECT. 2.—*Registration of Deeds.*

(i.) *Middlesex.*

796. An assurance on sale of any legal or equitable interest in land in the county of Middlesex (*l*), with certain exceptions referred to later, should be registered (*m*) at the Office of Land Registry (*n*). The registration is effected by registering a memorial Registration
in Middlesex.

REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 256. As to the enrolment of the consent of the protector of the settlement when given by separate deed, see *ibid.*, p. 258; and, as to the confirmation of voidable assurances by a tenant in tail, see *ibid.*, pp. 263, 264.

(*f*) R. S. C., Ord. 61, r. 9.

(*g*) See Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58 (1); see title SETTLEMENTS, p. 627, *post*. As to the Settled Land Acts, see title SETTLEMENTS, p. 624, note (*e*), *post*.

(*h*) *Gibbons v. Snape* (1863), 1 De G. J. & Sm. 621, C. A.; *Green v. Paterson* (1886), 32 Ch. D. 95, C. A.; and see title COPYHOLDS, Vol. VIII., p. 72.

(*i*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 50, 54.

(*k*) As to Crown lands, see title CONSTITUTIONAL LAW, Vol. VII., p. 171; as to lands of the Duchy of Lancaster, *ibid.*, p. 238; of the Duchy of Cornwall, *ibid.*, p. 254. Assignments of leases of Crown lands are now exempt from enrolment (see *ibid.*, p. 174).

(*l*) As to the area of the county of Middlesex for the purpose of the Middlesex Registry Acts, see Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 95 (2).

(*m*) Middlesex Registry Act, 1708 (7 Anne, c. 20), s. 1. The enactment speaks of "deeds, conveyances, and wills." The term "conveyance" denotes an instrument which carries from one person to another an interest in land (*Credland v. Potter* (1874), 10 Ch. App. 8), but does not include an Act of Parliament or an adjudication order in bankruptcy (*Re Calcott and Elwin's Contract*, [1898] 2 Ch. 460, C. A.; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 88). The instrument is usually under seal (see *Hunter v. Kennedy* (1850), 1 I. Ch. R. 148, 225), but this is not necessary to entitle it to registration (*Neve v. Pennell*, *Hunt v. Neve* (1863), 2 Hem. & M. 170). As to registration of leases and assignments of leases, see title LANDLORD AND TENANT, Vol. XVIII., pp. 401, 472, 583; of mortgages, title MORTGAGE, Vol. XXI., pp. 86, 87; of vesting declarations, Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 12; title TRUSTS AND TRUSTEES; of wills, Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 8; title WILLS; Dart, Vendors and Purchasers, 7th ed., p. 702; and generally as to the registration of deeds, title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 301 *et seq.* As to the rules applicable to the registration of memorials, see Encyclopædia of Forms and Precedents, Vol. XI., pp. 273 *et seq.*

(*n*) The Middlesex Registry is transferred to the Land Registry (Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 Vict. c. 64), s. 1).

SECT. 7.
Other Formalities.

Rectification
of register.

Exemptions
from
registration.

of the instrument (o). Registration is not compulsory, and omission to register does not in any way invalidate the instrument as an assurance (p); but it exposes the purchaser to the risk of being postponed to a subsequent purchaser or mortgagee, who takes without notice and registers first (q).

The court has jurisdiction to order the rectification of the register (r).

797. The provisions of the Middlesex Registry Act, 1708 (s), do not apply to copyholds (t); to lands registered under the Land Transfer Acts (u), save as regards estates or interests excepted from the effect of registration under a possessory or qualified title, or an unregistered reversion on a registered leasehold title, or dealings with incumbrances created prior to the registration of the land (a); to Crown lands in England or Wales affected by any deed to which the Commissioners of Woods and Forests are parties, and which has been enrolled in the office of Land Revenues, Records and Enrolments (b); or to instruments made after the 30th July, 1900 (c), which may be registered under the Land Charges Registration and Searches Act, 1888 (d), or the Land Charges Act, 1900 (e).

(o) See title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 302.

(p) *Re O'Byrne's Estate, Ex parte Hawes* (1885), 15 L. R. Ir. 373, C. A.

(q) See title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 303; and, as to priority as affected by registration, see title MORTGAGE, Vol. XXI., pp. 334 *et seq.*, and cases there cited; see also *Martinez v. Cooper* (1826), 2 Russ. 198; *Greaves v. Tofield* (1880), 14 Ch. D. 563, C. A. A conveyance of land compulsorily acquired under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), should be registered; see Dart, Vendors and Purchasers, 7th ed., p. 700.

(r) See Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 Vict. c. 64), s. 1, which appears to apply to the Middlesex Deeds Register the powers of rectification existing under the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 95 (*Stephenson v. Yorke*, [1900] 1 Ch. 505); and see Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 7 (2).

(s) 7 Anne, c. 20.

(t) *Ibid.*, s. 1. But an enfranchisement deed of copyholds should be registered (*R. v. Registrar of Deeds for County of Middlesex* (1888), 21 Q. B. D. 555, C. A.). As to leases of copyholds, see title LANDLORD AND TENANT, Vol. XVIII., p. 401, note (l); Dart, Vendors and Purchasers, 7th ed., p. 699. It is usual to register all instruments relating to copyholds which are not entered on the court rolls; see Rigge on Registration (1798), p. 88, n.; *Encyclopædia of Forms and Precedents*, Vol. XI., p. 268.

(u) Land Transfer Acts, 1875 (38 & 39 Vict. c. 87), s. 127; 1897 (60 & 61 Vict. c. 65); see also Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 Vict. c. 64), Sched. I. (14). Where land in Middlesex which is outside the compulsory area (see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 308) is removed from the Land Register, it reverts to the jurisdiction of the Middlesex Deeds Registry (Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 17 (3)).

(a) *Ibid.*, Sched. I., amending the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 127; see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 311 *et seq.*, 320, 321.

(b) Crown Lands Act, 1853 (16 & 17 Vict. c. 56), s. 6; see title CONSTITUTIONAL LAW, Vol. VII., p. 174.

(c) The date of the passing of the Land Charges Act, 1900 (63 & 64 Vict. c. 26).

(d) 51 & 52 Vict. c. 51; see pp. 358 *et seq.*, *ante*.

(e) 63 & 64 Vict. c. 26, s. 4; see pp. 358 *et seq.*, *ante*.

(ii.) *Yorkshire.*

SECT. 7.

Other Formalities.

Registration in Yorkshire.

798. An assurance (*f*) on sale of land in any of the three ridings of Yorkshire (*g*) should be registered (*h*). The registration is effected by presenting a memorial for enrolment (*i*). Omission to register postpones the purchaser to a subsequent purchaser or incumbrancer who registers first, even though such subsequent purchaser or incumbrancer takes with notice. Except in the case of fraud the register is conclusive as to priority (*k*).

799. There are the same exemptions (*l*) as in the case of lands in Middlesex (*m*) as regards land registered under the Land Transfer Acts, 1875 and 1897 (*n*), Crown lands, and instruments capable of registration under the Land Charges Registration and Searches Act, 1888 (*o*), and the Land Charges Act, 1900 (*p*).

Exemptions from registration.

(iii.) *Lands in the Bedford Level.*

800. An assurance on sale of land subject to the Bedford Level Act, 1663 (*q*), should be registered in the register kept at the office of the Bedford Level Corporation at Ely. Omission to register does not render the conveyance invalid as between the parties to it (*r*),

Bedford Level.

(*f*) "Assurance" includes, *inter alia*, conveyance (Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 3), but not an agreement for the sale of land (*Rodger v. Harrison*, [1893] 1 Q. B. 161, C. A.). As to mortgages, see title MORTGAGES, Vol. XXI., pp. 336 *et seq.*; and, as to wills, see Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 8; title WILLS. As to registration of deeds in Yorkshire generally, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 304 *et seq.*

(*g*) See Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 3. As to the earlier Yorkshire Registries Acts for the different ridings, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 304, note (*f*); Encyclopædia of Forms and Precedents, Vol. XI., p. 275.

(*h*) Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 4. As to registration of leases and assignments, see title LANDLORD AND TENANT, Vol. XVIII., pp. 401, 583; of mortgages, title MORTGAGE, Vol. XXI., p. 87; of vesting declarations, Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 12; title TRUSTS AND TRUSTEES; of wills, Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 8; title WILLS; and see note (*f*). *supra*.

(*i*) See title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 305 *et seq.* For the practice as to registration, see *ibid.*; Encyclopædia of Forms and Precedents, Vol. XI., pp. 275 *et seq.*

(*k*) See titles MORTGAGE, Vol. XXI., pp. 336 *et seq.*; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 306; and, as to persons claiming under assurances duly registered, see Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 17. Apparently registration does not give priority over equities which are not capable of registration (*White v. Neaylon* (1886), 11 App. Cas. 171, P. C., on the South Australian Registration Act of 1842 (5 Vict. No. 8), s. 3); but compare *Battison v. Hobson*, [1896] 2 Ch. 403; *Marks v. Whiteley*, [1912] 1 Ch. 735, 757. As to the protection afforded to a purchaser by a caveat, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 307.

(*l*) See also titles LANDLORD AND TENANT, Vol. XVIII., p. 583; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 305.

(*m*) See p. 442, *ante*; and, as to Crown lands, see also Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 30.

(*n*) 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65, Sched. I.; see p. 442, *ante*.

(*o*) 51 & 52 Vict. c. 51; see pp. 358 *et seq.*, *ante*.

(*p*) 63 & 64 Vict. c. 26, s. 4; see pp. 358 *et seq.*, *ante*.

(*q*) 15 Car. 2, c. 17; see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 307.

(*r*) *Willis v. Brown* (1839), 10 Sim. 127.

SECT. 7.
Other Formalities.

but it seems that it may postpone the purchaser to subsequent incumbrancers who register before him (*s*).

SUB-SECT. 3.—Notices (*a*).

On purchase
of equitable
estates.

801. On the purchase of an equitable estate in land, the priority of a purchaser does not depend on his giving notice of his purchase to the trustees, mortgagees, or other persons in whom the legal estate is vested (*b*). But notice is advisable in order to prevent the legal estate being acquired for value without notice of the purchaser's equitable title (*c*).

On purchase
of equity of
redemption.

802. On the purchase of an equity of redemption in land the purchaser should inquire of the mortgagee as to the amount due to him on the mortgage, and should give him notice of the conveyance of the equity in order to prevent him from tacking a subsequent advance to the original mortgage (*d*).

On purchase
of legal
remainder.

803. On the purchase of a remainder the purchaser should give notice of the transaction to the trustees of the settlement for the purpose of the Settled Land Acts (*e*), or, if there are none, to the tenant for life or the ordinary trustees, so as in the event of a sale by the tenant for life under his statutory power and his subsequent death to prevent the proceeds being paid to the remainderman (*f*).

SUB-SECT. 4.—Stamps.

Rate of duty.

804. A conveyance on sale (*g*) must be stamped at double the rate set out in the subjoined scale (*h*); but the single rate applies

(*s*) *Hodson v. Sharpe* (1808), 10 East, 350; title LANDLORD AND TENANT, Vol. XVIII., p. 401, note (*l*); and see *Encyclopædia of Forms and Precedents*, Vol. XI., pp. 278 *et seq.* As to the effect of non-registration, see, further, title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 307.

(*a*) As to notice to be given by a mortgagee before exercising his statutory power of sale, see title MORTGAGE, Vol. XXI., pp. 251, 253; and by a tenant for life before selling under the Settled Land Acts, see Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 45 (1); title SETTLEMENTS, pp. 638 *et seq.*, *post*.

(*b*) The doctrine of notice, applicable to equitable interests in trust funds and to choses in action, does not apply to land; see title EQUIT, Vol. XIII., pp. 79, 80. As to the priorities of persons interested in land, see *ibid.*; title MORTGAGE, Vol. XXI., pp. 327 *et seq.* Where title deeds are retained by the vendor, notice of the conveyance to the purchaser should, by arrangement, be indorsed on one of the principal deeds, though the purchaser cannot, in the absence of agreement, insist on this (*Dart, Vendors and Purchasers*, 7th ed., p. 712). But the purchaser can insist on notice of covenants in the conveyance to him restricting the use of land retained by the vendor being indorsed upon or annexed to one of the common title deeds (Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 11).

(*c*) See *Dart, Vendors and Purchasers*, 7th ed., pp. 107, 1193.

(*d*) As to the doctrine of tacking, see title MORTGAGE, Vol. XXI., pp. 330 *et seq.* As to the risks to a purchaser of an equity of redemption arising from the doctrine of the consolidation of mortgages, see *ibid.*, p. 208; *Davidson, Precedents in Conveyancing*, Vol. II., Part II., pp. 288 *et seq.*

(*e*) See title SETTLEMENTS, p. 624, note (*e*), *post*.

(*f*) See *Wheelwright v. Walker* (1883), 23 Ch. D. 752; and, as to a sale by the tenant for life overriding the estates of incumbrancers of the remainderman, see *Re Davies and Kent's Contract*, [1910] 2 Ch. 35, C. A.; and see, generally, title SETTLEMENTS, pp. 638 *et seq.*, *post*.

(*g*) As to the meaning of "conveyance on sale," see p. 445, *post*.

(*h*) For note (*h*), see p. 445, *post*.

where the amount or value of the consideration for the sale does not exceed £500, and the instrument contains a statement certifying that the transaction thereby effected does not form part of a larger transaction, or of a series of transactions, the aggregate value of which exceeds £500 (i).

SECT. 7.
Other For-
malities.

805. A "conveyance on sale" chargeable with stamp duty (k) includes every instrument, and every decree or order of any court or of any commissioners, including a foreclosure order (l), whereby any property (m) or any estate or interest in any property, upon

Meaning of
"conveyance
on sale."

Where a conveyance relates to several distinct matters, it must be charged with duty in respect of each matter (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 4; see title REVENUE, Vol. XXIV., pp. 707 *et seq.*); but an instrument relating to several distinct copyhold tenements, in respect whereof several fines are payable, is not on that account to be charged more than once with duty (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 65 (1)).

(h) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 73. With certain exceptions the same rate is payable on voluntary assurances *inter vivos* upon the value of the property transferred (*ibid.*, s. 74). A conveyance made for effectuating an appointment of a new trustee, or the retirement of a trustee although no new trustee is appointed, is liable to a fixed duty of 10s. (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 62; Finance Act, 1902 (2 Edw. 7, c. 7), s. 9; Finance (1909-10), Act, 1910 (10 Edw. 7, c. 8), s. 74 (6)). The scale referred to in the text is contained in the Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., and is as follows:—

Where the amount or value of the consideration for				£	s.	d.
the sale does not exceed £5				.	0	0 6
Exceeds	£5 and does not exceed	£10	.	.	0	1 0
"	£10	"	"	£15	.	0 1 6
"	£15	"	"	£20	.	0 2 0
"	£20	"	"	£25	.	0 2 6
"	£25	"	"	£50	.	0 5 0
"	£50	"	"	£75	.	0 7 6
"	£75	"	"	£100	.	0 10 0
"	£100	"	"	£125	.	0 12 6
"	£125	"	"	£150	.	0 15 0
"	£150	"	"	£175	.	0 17 6
"	£175	"	"	£200	.	1 0 0
"	£200	"	"	£225	.	1 2 6
"	£225	"	"	£250	.	1 5 0
"	£250	"	"	£275	.	1 7 6
"	£275	"	"	£300	.	1 10 0
"	£300					

For every £50, and also for any fractional part of £50

of such amount or value 0 5 0

All the facts and circumstances affecting the liability to duty or the amount must be stated in the conveyance (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 5; see title REVENUE, Vol. XXIV., p. 704).

(i) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 73. For a form of such declaration, see Moore's Practical Forms, 5th ed., p. 514.

(k) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1, Sched. I.

(l) Finance Act, 1898 (61 & 62 Vict. c. 10), s. 6. Where a decree or order states the value of the property, the statement is conclusive for the purpose of determining the rate of duty (*ibid.*, s. 6 (a)); and the payment of *ad valorem* duty on such decree or order exempts any conveyance following upon it (*ibid.*, s. 6 (b)); see, further, title MORTGAGE, Vol. XXI., p. 291.

(m) "Property" is that which belongs to a person exclusively of others, and can be the subject of bargain and sale to another (*Potter v. Inland Revenue Commissioners* (1854), 10 Exch. 147, 156). An exclusive right to use a patent (see *Smelting Co. of Australia v. Inland Revenue Commissioners*, [1897] 1 Q. B. 175, C. A.; compare *Limmer Asphalte Paving Co.*

SECT. 7.
Other Formalities.

the sale thereof, is transferred to or vested in a purchaser, or any other person on his behalf or by his direction (*n*). It does not include a conveyance of foreign property executed abroad, notwithstanding that the consideration is payable within the United Kingdom (*o*).

An amalgamation of the undertaking of two companies (*p*), or an exchange by a shareholder of shares in one company for shares in another (*q*), or the conversion of a partnership into a limited company (*r*), or an assignment of a share in partnership assets upon a dissolution (*s*), may be a conveyance on sale for the purpose of stamp duty.

A conveyance made by a mortgagor to a mortgagee pursuant to a foreclosure order is a conveyance on sale (*a*), but not a conveyance by way of family arrangement (*b*), or on a partition (*c*).

Fixtures.

806. Fixtures and standing timber pass by the conveyance without mention (*d*), but the amount of their valuation must be included in the statement of the consideration.

Chattels
passing by
delivery.

The *ad valorem* stamp is not payable in respect of chattels passing by delivery (*e*), such as loose plant or machinery, unless they are assigned by the deed. Where the chattels have not been delivered before the execution of the conveyance, a recital that they have been sold may operate as an assurance of them so as to attract *ad valorem*

v. Inland Revenue Commissioners (1872), L. R. 7 Exch. 211; *Heap v. Harley* (1889), 42 Ch. D. 461, C. A.), and the goodwill of a business (*Potter v. Inland Revenue Commissioners* (1854), 10 Exch. 147; *Brooke (Benjamin) & Co. v. Inland Revenue Commissioners*, [1896] 2 Q. B. 356; compare *Arundell v. Bell* (1883), 52 L. J. (CH.) 537, C. A.), are "property"; but not a licence to erect a building unless coupled with a grant (*River Thames Conservators v. Inland Revenue Commissioners* (1886), 18 Q. B. D. 279) or a policy of insurance where no loss has occurred (*Blandy v. Herbert* (1829), 9 B. & C. 396; compare *Caldwell v. Dawson* (1850), 5 Exch. 1).

(*n*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 54.

(*o*) *Maple & Co. (Paris) v. Inland Revenue Commissioners*, [1906] 2 K. B. 834, C. A.

(*p*) *Furness Rail. Co. v. Inland Revenue Commissioners* (1864), 10 Jur. (N. S.) 1133; *Great Western Rail. Co. v. Inland Revenue Commissioners*, [1894] 1 Q. B. 507, C. A.

(*q*) *Coats v. Inland Revenue Commissioners*, [1897] 2 Q. B. 423, C. A.

(*r*) *Foster (John) & Sons v. Inland Revenue Commissioners*, [1894] 1 Q. B. 516, C. A.; see also *Chesterfield Brewery Co. v. Inland Revenue Commissioners*, [1899] 2 Q. B. 7.

(*s*) *Potter v. Inland Revenue Commissioners*, *supra*; *Christie v. Inland Revenue Commissioners* (1866), L. R. 2 Exch. 46.

(*a*) *Huntington v. Inland Revenue Commissioners*, [1896] 1 Q. B. 422; see p. 445, *ante*; title MORTGAGE, Vol. XXI., p. 291.

(*b*) *Bristol (Marquess) v. Inland Revenue Commissioners*, [1901] 2 K. B. 336 (where, however, the transaction was held to be a sale); see *Denn v. Manifold v. Diamond* (1825), 4 B. & C. 243; *Wigmore v. Joyce* (1848), 13 L. R. Ir. 164; *Christie v. Inland Revenue Commissioners*, *supra*, at p. 51. As to family arrangements generally, see title FAMILY ARRANGEMENTS, Vol. XIV., pp. 539 *et seq.*

(*c*) See titles PARTITION, Vol. XXI., p. 824; REVENUE, Vol. XXIV., p. 728.

(*d*) As to fixtures, see title LANDLORD AND TENANT, Vol. XVIII., pp. 416 *et seq.*; as to timber, see *ibid.*, pp. 429 *et seq.*

(*e*) See Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 59; see title SALE OF GOODS, pp. 165, 166, *ante*.

duty (*f*). The safer way is to apportion the consideration in the agreement, and make no mention of the chattels in the conveyance; if such apportionment has not been made, they should be delivered before execution of the conveyance, and a recital to that effect inserted (*g*).

SECT. 7.
Other Formalities.

807. Goodwill attached to premises, if not mentioned, passes by the conveyance (*h*), but if sold separately stamp duty is payable upon the contract (*i*).

Goodwill.

808. A conveyance made partly in consideration of a covenant by the purchaser to make, or of his having previously made, any substantial improvement of or addition to the property conveyed, or of any covenant relating to the subject-matter of the conveyance, is not chargeable with any duty in respect of such further consideration (*k*).

Covenant relating to subject-matter.

809. Where the consideration includes any stock or marketable security, the conveyance is charged with *ad valorem* duty in respect of the value of the stock or security (*l*), the value for this purpose being the value, at the date of the instrument, of the stock or security according to the average price thereof (*m*). Where the security is not a marketable security, the conveyance is charged with *ad valorem* duty in respect of the amount due on the date thereof for principal and interest upon the security (*n*).

Stock or securities.

810. Where the consideration, or part of it, consists of money payable periodically for a definite period not exceeding twenty years, so that the total amount payable can be previously ascertained, *ad valorem* duty is calculated on such total amount (*o*). Where the

Periodical payments.

(*f*) *Horsfall v. Hey* (1848), 2 Exch. 778; *Garnett v. Inland Revenue Commissioners* (1899), 81 L. T. 633.

(*g*) The property has then passed by the delivery, and neither the recital nor the receipt can operate as an assurance (*Ramsay v. Margrett*, [1894] 2 Q. B. 18, 24, C. A.; compare *Re Magnus, Ex parte Salaman*, [1910] W. N. 205, C. A.). Where possession has not been given a receipt may be an assurance: see title BILLS OF SALE, Vol. III., p. 9.

(*h*) See *Re Kitchin, Ex parte Punnett* (1880), 16 Ch. D. 226, C. A.; *Potter v. Inland Revenue Commissioners* (1854), 10 Exch. 147.

(*i*) *West London Syndicate v. Inland Revenue Commissioners*, [1898] 2 Q. B. 507, 513, C. A.; Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 59 (1); but not where the goodwill is incident to premises situate abroad (*Inland Revenue Commissioners v. Muller & Co.'s Margarine, Ltd.*, [1901] A. C. 217). As to goodwill generally, see titles PARTNERSHIP, Vol. XXII., pp. 104 *et seq.*; TRADE AND TRADE UNIONS. A conveyance of a patent, however, does not escape duty on the ground that it is only used abroad (*Smelting Co. of Australia v. Inland Revenue Commissioners*, [1897] 1 Q. B. 175, C. A.; *Urban v. Inland Revenue Commissioners* (1912), 29 T. L. R. 141; (1913), *Times*, 22nd April, C. A.; see title PATENTS AND INVENTIONS, Vol. XXII., p. 184, note (*f*)).

(*k*) Finance Act, 1900 (63 & 64 Vict. c. 7), s. 10.

(*l*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 55 (1).

(*m*) *Ibid.*, s. 6; see *Foster (John) & Sons v. Inland Revenue Commissioners*, [1894] 1 Q. B. 516, C. A. As to the expression "marketable security," see title REVENUE, Vol. XXIV., p. 728. Where there is no market price ascertainable, the value should be based upon the average of the latest private transactions, or, if there have been no dealings, should be taken at par, in the absence of reliable evidence to the contrary (*Alpe, Law of Stamp Duties*, 12th ed., p. 19).

(*n*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 55 (2). "Stock" includes "shares" (*ibid.*, s. 122).

(*o*) *Ibid.*, s. 56 (1).

**SECT. 7.
Other Formalities.**

Instrument securing periodical payments.

Contemporaneous mortgage.

Conveyance of equity of redemption.

Liability to rentcharge etc.

periodical payments are to extend beyond a period of twenty years or in perpetuity, or for an indefinite period not terminable with life, the conveyance is charged with duty calculated on the total amount which will or may become payable during the period of twenty years from the date of the instrument (*p*). Where the money is payable during a life or lives, the duty is calculated on the amount which will or may become payable during a period of twelve years from the date of the instrument (*q*).

The conveyance is not liable to further duty in respect of any provision contained in the conveyance for securing the periodical payments; and a separate instrument made for securing the periodical payments is not chargeable with any higher duty than 10s. (*r*).

Where the purchase-money or any part of it is left on loan and secured by a mortgage, the conveyance and mortgage are both chargeable, since the transaction operates as a payment and advance (*s*).

811. Where the conveyance is made in consideration, wholly or in part, of a debt due to the purchaser, or subject, either certainly or contingently, to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money or stock is deemed the whole or part, as the case may be, of the consideration in respect whereof *ad valorem* duty is chargeable (*t*). Hence, upon a conveyance of an equity of redemption, the stamp duty is payable on the aggregate of the mortgage debt and the purchase price (*u*).

812. *Ad valorem* duty is not payable in respect of an existing rentcharge or rent subject to which land is sold (*a*); but, where land is sold subject to an annual payment to the vendors, who undertake to pay the tithe, the annual payment forms part of the consideration (*b*).

(*p*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 56 (2); see *Underground Electric Railways v. Inland Revenue Commissioners*, [1906] A. C. 21.

(*q*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 56 (3).

(*r*) *Ibid.*, s. 56 (4); see *Limmer Asphalt Paving Co. v. Inland Revenue Commissioners* (1872), L. R. 7 Exch. 211.

(*s*) See title REVENUE, Vol. XXIV., pp. 707 *et seq.* For a form of such a conveyance, see *Encyclopædia of Forms and Precedents*, Vol. VIII., p. 605.

(*t*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 57. For examples of conveyances in consideration of liability in respect of stock, see *Furness Rail. Co. v. Inland Revenue Commissioners* (1864), 10 Jur. (N. S.) 1133; *Great Western Rail. Co. v. Inland Revenue Commissioners*, [1894] 1 Q. B. 507, C. A.; *Coats v. Inland Revenue Commissioners*, [1897] 2 Q. B. 423, C. A.; and in consideration of debts, see *Scottish Equitable Life Assurance Society v. Inland Revenue Commissioners* (1894), 22 R. (Ct. of Sess.) 85 (where a right of redemption was renounced); *Inland Revenue Commissioners v. North British Rail. Co.* (1901), 4 F. (Ct. of Sess.) 27 (where the duty was held to be chargeable irrespective of whether the debt was good or bad).

(*u*) *Mortimore v. Inland Revenue Commissioners* (1864), 2 H. & C. 838 (where the mortgage debt was only payable contingently); *Inland Revenue Commissioners v. City of Glasgow Bank (Liquidators)* (1881), 8 R. (Ct. of Sess.) 389; *Huntington v. Inland Revenue Commissioners*, [1896] 1 Q. B. 422 (conveyance in pursuance of foreclosure order; see p. 445, *ante*). As to the stamp duty on a transfer of mortgage, see title MORTGAGE, Vol. XXI., p. 174, and on a reconveyance, see *ibid.*, p. 315.

(*a*) See *Swayne v. Inland Revenue Commissioners*, [1899] 1 Q. B. 335.

(*b*) *Martin v. Inland Revenue Commissioners* (1904), 91 L. T. 453.

813. Where property contracted to be sold for one consideration is conveyed to the purchaser in separate parcels by different instruments, the consideration is apportionable as the parties think fit; but a distinct consideration for each separate part must be set forth in each instrument, and the duty must be paid in respect of each conveyance accordingly (c).

SMOT. 7.
Other For-
malities.

Conveyance
of separate
parcels by
different
instruments.

Conveyance
of parts of
property to
several
persons.

Where the contract is for sale at one consideration to two or more persons jointly, or to a person purchasing on behalf of several, and the property is conveyed in separate parcels and for distinct considerations to the several persons interested, each conveyance is chargeable in respect of the part of the consideration therein specified (d).

814. Where there are several instruments for completing the title of the purchaser, the principal conveyance alone is chargeable with *ad valorem* duty; the other instruments are charged with the appropriate duty for which they may be liable, not exceeding the *ad valorem* duty payable in respect of the principal instrument (e). Except where the property is copyhold, the parties may determine which is the principal instrument (f). A conveyance confirming a properly stamped conveyance, which for some reason is inoperative, is not the principal instrument in the transaction (g).

Where there
are several
instruments.

Where any copyhold or customary estate is conveyed by deed, no surrender being necessary, the deed is deemed the "principal instrument" (h). In other cases the surrender or grant, if made out of court, or the memorandum thereof and the copy of court roll of the surrender or grant, if made in court, is the principal instrument (i).

Copyholds.

(c) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 58 (1). It seems that this would constitute a "series of transactions" within the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 73; see p. 445, *ante*.

(d) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 58 (2); and see note (c), *supra*.

(e) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 58 (3).

(f) *Ibid.*, s. 61 (2). As to copyholds, see the text, *infra*.

(g) *Doc d. Priest v. Weston* (1841), 2 Q. B. 249. The deed of confirmation should be stamped with a 10s. stamp, or the *ad valorem* duty originally payable, whichever is less (*ibid.*).

(h) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 61 (1) (a). As to stamp duties, generally, see title REVENUE, Vol. XXIV., pp. 700 *et seq.*

(i) *Ibid.*, s. 61 (1) (b). When a conveyance of freeholds and a covenant to surrender copyholds are included in the same instrument, the consideration should be apportioned; *ad valorem* duty is then charged on the freeholds and 10s. on the covenant to surrender. But in practice the additional 10s. is not charged if there is a contemporaneous surrender stamped with *ad valorem* duty; see Alpe, *Law of Stamp Duties*, 12th ed., pp. 133, 134. If the interest in the copyholds is equitable only, it is transferred by the covenant to surrender, which is then chargeable with *ad valorem* duty (*ibid.*). If the surrender is made out of court, the surrender or a memorandum thereof is stamped, and the steward should place a certificate that it is duly stamped on the copy of court roll of the surrender, and also in the margin of the entry in the court rolls. If the surrender is made in court, the copy of court roll of the surrender is stamped, and the steward should place a like certificate in the margin of the entry in the court rolls. The copy of court roll of the surrender and the entry in the court rolls are then admissible as evidence, although not themselves stamped (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 65 (2), (3)). As to requirements as to stamping, see, further, title COPYHOLDS, Vol. VIII., pp. 17, 63, 105; Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 66—68; title REVENUE, Vol. XXIV., pp. 703 *et seq.*

SECT. 7.

Other Formalities.

Conveyance to sub-purchaser.

815. Where a conveyance is made direct to a sub-purchaser, the duty payable is calculated in respect of the consideration moving from the sub-purchaser (*k*). The same rule applies where there are several sub-purchasers, no regard being paid to the value of the original consideration (*l*). Where any sub-purchaser takes an actual conveyance of the interest of his immediate vendor, which is stamped with *ad valorem* duty on the consideration moving from him, any subsequent conveyance made to him by the original vendor is chargeable with a duty of 10s., or *ad valorem* if the latter duty is less than 10s. (*m*).

Conveyance of equitable interests.

816. Where a conveyance on sale of an equitable estate or interest in land is made in pursuance of a written contract, the *ad valorem* duty is payable on the contract and no further duty is payable on the conveyance (*n*).

Stamp duty in cases of property vested by statute or purchased under statutory power.

817. Where, by virtue of a statute, either (1) property is vested by way of sale in any person, or (2) any person is authorised to purchase property, such person must, within three months after the passing of the statute, or the date of vesting, whichever is later, or after the completion of the purchase, as the case may be, produce to the Inland Revenue Commissioners a King's Printer's copy (*o*) of the statute, or some instrument relating to the vesting in the first case, or in the second case the conveyance, duly stamped. In default of production, the duty and interest at the rate of 5 per cent. per annum from the passing of the statute, date of vesting or completion, as the case may be, becomes a Crown debt (*p*).

Increment value duty.

818. Increment value duty (*q*) is assessed by the Inland Revenue Commissioners and paid by the transferor on any transfer on sale of the fee simple of any land or of any interest in land (*r*).

The conveyance must be stamped before completion either (1) with a stamp denoting that the increment value duty has been assessed by the Commissioners and paid, or (2) with a stamp

(*k*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 58 (4).

(*l*) *Ibid.*, s. 58 (5).

(*m*) *Ibid.*, s. 58 (6).

(*n*) *Ibid.*, s. 59 (1). The conveyance is either stamped with a denoting stamp, or the *ad valorem* duty is transferred to it (*ibid.*, s. 59 (3)). If the agreement has been adjudicated, the stamp on the conveyance will show this; and see *Farmer & Co. v. Inland Revenue Commissioners*, [1898] 2 Q. B. 141; *West London Syndicate v. Inland Revenue Commissioners*, [1898] 2 Q. B. 507, C. A. As to denoting and adjudication stamps, see title REVENUE, Vol. XXIV., pp. 716, 717.

(*o*) As to King's Printer's copies, see title EVIDENCE, Vol. XIII. p. 525.

(*p*) Finance Act, 1895 (58 & 59 Vict. c. 16), s. 12. This provision applies to personalty as well as realty; see *Eastbourne Corporation v. A.-G.*, [1904] A. C. 155.

(*q*) As to the meaning, incidence of, and exemptions from increment value duty, see Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), ss. 1-12; title REVENUE, Vol. XXIV., pp. 557 *et seq.*

(*r*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 4 (1). On the occasion of a sale of the fee simple the duty is at the rate of £1 for every complete £5 of the increment value of the land accruing after 30th April, 1909, so far as it has not been paid on any previous occasion (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 1). The Commissioners give credit for the amount of duty paid on previous occasions (*ibid.*, s. 3 (1)), or deemed to have been paid, *e.g.*, duties remitted (*ibid.*, s. 3 (5)), or duties assessed (*ibid.*, s. 4 (4)), or assessed on account delivered (*ibid.*, s. 6 (4)).

denoting that all particulars have been delivered to the Commissioners which in their opinion are necessary for the purpose of enabling them to assess the duty, and that security has been given for the payment of duty in any case where the Commissioners have required security, or (9) with a stamp denoting that upon the occasion in question no increment value duty was payable (s). In practice the conveyance bears a stamp of the second kind.

SECT. 7.
Other Formalities.

819. Certain conveyances are by statute exempted from stamp duty (t).

Exemptions from stamp duty.

Part IX.—Position of the Parties after Completion.

SECT. 1.—*Benefits Enjoyed with the Property Sold.*

SUB-SECT. 1.—*Rents and Profits.*

820. After completion of the purchase by payment of the purchase-money (u) and conveyance of the property, the purchaser becomes entitled to exercise, in place of the vendor, all such rights of ownership as are incident to the estate conveyed, subject, however, to any reservations and liabilities to which it was subject before completion or which are created by the conveyance (u).

Purchaser's rights after completion.

821. If the land sold is in the occupation of a tenant, attornment by the tenant is not necessary to give effect to the conveyance of the reversion (b), but notice of the conveyance should be given to him in order to prevent any further payment of rent to the vendor (c). The purchaser, as owner of the reversion, can recover

Rights against tenant.

(s) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 4 (3).

(t) See title REVENUE, Vol. XXIV., pp. 722, 723; such as conveyances relating to estates of bankrupts (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 144; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 323, 324); conveyances made in pursuance of or to carry into effect the Barracks Act, 1890 (53 & 54 Vict. c. 25) (see *ibid.*, s. 11); and certain Military and Militia Acts (see Military Forces Localization Act, 1872 (35 & 36 Vict. c. 68), s. 12; Militia Law Amendment (England and Wales) Act, 1854 (17 & 18 Vict. c. 105), s. 20); certain conveyances under the Land Tax Redemption Acts, 1802 (42 Geo. 3, c. 116), ss. 68, 81, 107, 173; 1805 (45 Geo. 3, c. 77), s. 1; certain instruments of transfer under the Land Transfer Acts, 1875 (38 & 39 Vict. c. 87), s. 111; 1897 (60 & 61 Vict. c. 65), s. 22; and the Land Transfer Rules, 1903, rr. 121, 123, 124, 125.

(u) As to the lien of the vendor for purchase-money when this is not paid on conveyance, see p. 306, *ante*; title LIEN, Vol. XIX., pp. 15, 27, 30.

(a) As to the rights of an owner in fee simple, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 156, 167. As to the incidents of copyhold tenure, see title COPYHOLDS, Vol. VIII., pp. 1 *et seq.*; and, as to leaseholds, see title LANDLORD AND TENANT, Vol. XVIII., pp. 515 *et seq.*

(b) Stat. (1705) 4 & 5 Anne, c. 3, s. 9; see title LANDLORD AND TENANT, Vol. XVIII., p. 595.

(c) Such payment does not prejudice the tenant before he has received notice of the assignment of the reversion; see title LANDLORD AND TENANT, Vol. XVIII., p. 595.

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by distress rent which accrues due after the conveyance (*d*), and where the lease is by deed he can sue on the covenant for payment of rent (*e*). Where the tenancy is not created by deed, the mere conveyance does not, it seems, vest in the purchaser the right to sue for the rent as such (*f*), but if he in fact receives payment of rent from the tenant, a new agreement for tenancy on the same terms as the old agreement is usually implied (*g*).

**Apportion-
ment of rent.**

822. Where the property sold is only part of the demised premises, the conveyance effects a severance of the reversion, and the rent can be apportioned between the part conveyed to the purchaser and the remainder of the premises (*h*). Usually, on a sale by auction, the particulars show how the rent is to be apportioned and make the apportionment binding between vendor and purchaser; but in order that the apportionment may be binding on the tenant it should be made with his consent or by judicial process (*i*).

**Notice of
tenant's
interest.**

823. The purchaser has, from the fact of the tenant's occupation, notice of his interest whatever it may be (*k*), and he takes, accordingly, subject to the tenant's rights, including not only those which arise out of the tenancy (*l*), but also those to which the tenant is entitled under any collateral or subsequent agreement, such as an agreement for purchase (*m*), and he must give effect to such rights (*n*).

(*d*) See title DISTRESS, Vol. XI., pp. 115 *et seq.*; and, as to reservation of rent, see title LANDLORD AND TENANT, Vol. XVIII., pp. 467, 468; and compare Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 10.

(*e*) Probably he can sue at common law, but at any rate he can sue under stat. (1540) 32 Hen. 8, c. 34, s. 1; see title LANDLORD AND TENANT, Vol. XVIII., p. 586. He cannot sue for rent due before the assignment; see *ibid.*, p. 597.

(*f*) See *ibid.*, p. 586; *Manchester Brewery v. Coombs*, [1901] 2 Ch. 608. If the tenancy agreement contains an undertaking on behalf of the landlord and his assigns for quiet enjoyment, the occupation of the tenant under the assignee is permissive, and the assignee may recover in use and occupation (*Standen v. Christmas* (1847), 10 Q. B. 135); and, as to the action for use and occupation, see title LANDLORD AND TENANT, Vol. XVIII., pp. 486 *et seq.*

(*g*) *Buckworth v. Simpson* (1835), 1 Cr. M. & R. 834; *Cornish v. Stubbs* (1870), L. R. 5 C. P. 334, 339; see title LANDLORD AND TENANT, Vol. XVIII., p. 587; and as to estoppel as between the grantee of the reversion and the tenant by payment of rent, see title ESTOPPEL, Vol. XIII., pp. 402 *et seq.*

(*h*) As to apportionment of rent, see title LANDLORD AND TENANT, Vol. XVIII., p. 484; and Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 10, under which rent goes with the reversionary estate in the land notwithstanding severance of that estate. On a sale by auction the apportionment is usually specified in the particulars, and the purchaser is required to accept it.

(*i*) See *Walters v. Maunde* (1820), 1 Jac. & W. 181; title LANDLORD AND TENANT, Vol. XVIII., p. 484; see also pp. 335, 374, *ante*. As to the effect of particular conditions of sale, see pp. 317 *et seq.*, *ante*.

(*k*) *Daniels v. Davison* (1811), 17 Ves. 433; *Meux v. Maltby* (1818), 2 Swan. 277, 281; *Lewis v. Stephenson* (1898), 67 L. J. (Q. B.) 296; see title EQUIT, Vol. XIII., p. 87, note (*k*); and, as to notice generally, see *ibid.*, pp. 84 *et seq.*; as to inquiries of the tenant, see p. 363, *ante*.

(*l*) *Taylor v. Stibbert* (1794), 2 Ves. 437.

(*m*) *Daniels v. Davison* (1809), 16 Ves. 249, 254; or an agreement for

(*n*) For note (*n*), see p. 453, *post*.

824. If the tenant has been paying rent to a person claiming adversely to the vendor, the fact of the tenancy is not notice of such adverse claimant's title (*o*). The purchaser is, as between himself and the adverse claimant, not bound to inquire to whom rent has been paid (*p*). If, however, the purchaser makes the inquiry and finds that rent is being paid to an adverse claimant, this gives the purchaser notice of his rights (*q*), though, for this purpose, notice is not imputed from the circumstance that the rents are being paid to an estate agent (*r*).

SECT. 1.
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Notice of
adverse
claims.

SUB-SECT. 2.—Right to Enforce Covenants.

(i.) Covenants in Leases.

825. Where the property sold is subject to a lease, and the lease is by deed (*s*) the purchaser, as assignee of the reversion, is entitled by statute (*t*) to enforce the lessee's covenants so far as these touch or concern the land (*a*), and he can take advantage of the conditions contained in the lease (*b*). As regards the covenants, he can only sue for damages for breaches committed after the

Covenants
running
with the
reversion.

sale of timber (*Allen v. Anthony* (1816), 1 Mer. 282). *Daniels v. Davison* (1811), 17 Ves. 433, has, however, been described as an extreme case (*Jones v. Smith* (1841), 1 Hare, 43, 62).

(*n*) *Barnhart v. Greenshields* (1853), 9 Moo. P. C. C. 18: "The possession of the tenant is notice that he has some interest in the land, and a purchaser, having notice of that fact, is bound, according to the ordinary rule, either to inquire what that interest is, or to give effect to it whatever it may be" (*ibid.*, at p. 32); *Bailey v. Richardson* (1852), 9 Hare, 734; *James v. Lichfield* (1869), L. R. 9 Eq. 51; *Carroll v. Keayes*, *Keayes v. Carroll* (1873), 8 I. R. Eq. 97, C. A. Possession is *prima facie* evidence of seisin in fee, and hence the fact of occupation is notice of the possibility of an estate in fee simple (*Jones v. Smith*, *supra*, at p. 60).

(*o*) *Barnhart v. Greenshields*, *supra*, at p. 34; *Hunt v. Luck*, [1902] 1 Ch. 428, 432, C. A., overruling the *dictum* of JESSEL, M.R., *contra*, in *Mumford v. Stohwasser* (1874), L. R. 18 Eq. 556, at p. 562; and see title EQUIT, Vol. XIII., p. 87, note (*k*).

(*p*) But if the purchaser knows that the rents are being paid to a person other than the vendor as trustee, he must inquire for whom the trustee receives them (*Knight v. Bowyer* (1858), 2 De G. & J. 421, C. A.).

(*q*) *Bailey v. Richardson*, *supra*; *Barnhart v. Greenshields*, *supra*; *Hunt v. Luck*, *supra*, at p. 433.

(*r*) *Hunt v. Luck*, *supra*.

(*s*) *Standen v. Christmas* (1847), 10 Q. B. 135; and see title LANDLORD AND TENANT, Vol. XVIII., p. 586. It is the same if there is an agreement for a lease which can be specifically enforced, and under which a lease by deed would be granted; see title LANDLORD AND TENANT, Vol. XVIII., p. 586, note (*s*).

(*t*) Stat. (1540) 32 Hen. 8, c. 34, s. 1. The statute annexes a privity of contract to the privity of estate existing between the assignee of the reversion and the lessee (*Bickford v. Parson* (1848), 5 C. B. 920); see also Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 10.

(*a*) As to covenants which touch or concern the land, so as to run with the reversion and the term respectively, see title LANDLORD AND TENANT, Vol. XVIII., pp. 584 *et seq.* Notice of the assignment is not essential to enable the assignee to sue for breach of covenant (see *Sealcock v. Harston* (1875), 1 C. P. D. 106), though notice under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14, must usually be given before enforcing a forfeiture; see title LANDLORD AND TENANT, Vol. XVIII., pp. 539 *et seq.*

(*b*) *Ibid.*, p. 595.

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assignment (c), and, where the assignment was before the 1st January, 1912 (d), he is under a similar restriction as regards re-entry for forfeiture for breach of covenant or condition (e); but, under an assignment since the 31st December, 1911, he can take advantage of a right of re-entry which has arisen before the assignment (f).

The purchaser also becomes liable to the obligations of the lessor's covenants (g), though this does not release the lessor (h).

Where the tenancy was not created by deed the purchaser is not, by virtue of the conveyance to him, entitled to enforce the tenant's stipulations, nor is he liable under the landlord's stipulations, unless by receipt of rent or otherwise a new tenancy on the old terms can be implied (i).

Severance of
reversion.

826. Where the assignment to the purchaser comprises only part of the demised premises, so that the reversion on the term is severed, the purchaser is entitled to enforce the covenants and take advantage of the conditions so far as they relate to the land assigned (k).

(ii.) *Restrictive Covenants.*

Covenants
as to user.

827. Upon the sale of land the purchaser is frequently required to enter into covenants, either positive or negative, affecting the enjoyment of the land or of neighbouring premises: a covenant to lay out money in maintaining roads is a positive covenant of this character; a covenant not to use a house as a shop is a negative or restrictive covenant. These covenants are binding as between the covenantor and covenantee as the immediate contracting parties: whether they are binding as between other parties depends on the form of the proceedings to enforce them and on the circumstances of the case (l).

(c) See title LANDLORD AND TENANT, Vol. XVIII., p. 597. But he may sue in respect of a continuing breach; see *Martyn v. Williams* (1857), 1 H. & N. 817.

(d) The date of commencement of the Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37); see *ibid.*, s. 16.

(e) See title LANDLORD AND TENANT, Vol. XVIII., p. 535, note (r).

(f) Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 2 (1): unless it has been waived or released before the assignment (*ibid.*, s. 2 (2)).

(g) Stat. (1540) 32 Hen. 8, c. 34, s. 2; see title LANDLORD AND TENANT, Vol. XVIII., p. 587. As to covenants to renew, see *ibid.*, pp. 393, 461 *et seq.* Stat. (1540) 32 Hen. 8, c. 34, s. 2, does not apply to an option to purchase so as to make the liability to perform it run with the reversion (*Woodall v. Clifton*, [1905] 2 Ch. 257, C. A.); and, see titles LANDLORD AND TENANT, Vol. XVIII., p. 391; PERPETUITIES, Vol. XXII., p. 320.

(h) See title LANDLORD AND TENANT, Vol. XVIII., p. 597.

(i) *Ibid.*, pp. 586, 587; and, as to right to sue for rent, see p. 452, *ante*.

(k) This is so under stat. (1540) 32 Hen. 8, c. 34, s. 1, as regards covenants, but not as regards conditions. These were extinguished by severance, unless the severance took place by act of law (*Dumpor's Case* (1603), 4 Co. Rep. 119 b; 1 Smith, L. C., 11th ed., p. 32). Conditions were saved on severance by act of the parties by the Law of Property Amendment Act, 1869 (22 & 23 Vict. c. 35), s. 3, as regards the severed parts of rent legally apportioned; and, in the case of leases made since the 31st December, 1881, conditions are saved on severance generally by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 12; and see title LANDLORD AND TENANT, Vol. XVIII., pp. 596, 597.

(l) Compare titles CONTRACT, Vol. VII., p. 504; LANDLORD AND TENANT,

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The question may arise (1) between the vendor and persons claiming under him by devolution on death on the one side, and the original purchaser of the land and persons claiming under him on the other; and (2) between purchasers of different parts of the land of the vendor or persons claiming under them respectively (*m*). As regards the covenantor, it has to be considered whether the burden of the covenant passes to persons claiming under him; as regards the covenantee, whether the benefit of the covenant passes (*n*).

828. The burden of a covenant relating to the use or enjoyment of land (*o*) does not, save in cases arising between landlord and tenant (*p*), run with the land at law (*q*); and, where the covenant is positive in substance, and can only be complied with by the expenditure of money, the burden does not run with the land in equity (*r*). But where the covenant is in substance negative (*s*), it creates an equitable interest in the land in the nature of a negative easement, and this, like other equitable interests, is binding on subsequent owners of the land until there is an owner who obtains the legal estate for value and without notice of the covenant (*t*). An assignee

Burden of
covenant.

Effect on
subsequent
owners.

Vol. XVIII., pp. 584 *et seq.* The existence of restrictive covenants, unless provided for in the contract, forms an objection to the title and in general enables the purchaser to rescind (*Phillip v. Caldcleugh* (1868), L. R. 4 Q. B. 159; see *Bristow v. Wood* (1844), 1 Coll. 480; p. 402, *ante*).

(*m*) Compare title EQUITY, Vol. XIII., p. 101.

(*n*) Compare *ibid.*, p. 102.

(*o*) As to the production of title deeds and covenants for title, see pp. 337, 338, 429, *ante*, pp. 461 *et seq.*, note (*l*), 464, *post*.

(*p*) See p. 453, *ante*; titles CONTRACT, Vol. VII., p. 504; EQUITY, Vol. XIII., p. 100; LANDLORD AND TENANT, Vol. XVIII., pp. 584 *et seq.*

(*q*) *Austerberry v. Oldham Corporation* (1885), 29 Ch. D. 750, C. A., overruling *Cooke v. Chilcott* (1876), 3 Ch. D. 694; compare *Haywood v. Brunswick Building Society* (1881), 8 Q. B. D. 403, 409, C. A.; see titles EQUITY, Vol. XIII., p. 100; RENTCHARGES AND ANNUITIES, Vol. XXIV., pp. 517, 518; compare title LANDLORD AND TENANT, Vol. XVIII., p. 584.

(*r*) *Haywood v. Brunswick Building Society*, *supra*.

(*s*) A covenant, though positive in form, is treated as implying a negative if this is essential in order to carry out the intention of the parties; see titles EQUITY, Vol. XIII., p. 50; INJUNCTION, Vol. XVII., pp. 243 *et seq.*; *London and South Western Rail. Co. v. Gomm* (1882), 20 Ch. D. 562, 583, C. A.; *Olegg v. Hands* (1890), 44 Ch. D. 503, 519, C. A.; see *Holford v. Acton Urban Council*, [1898] 2 Ch. 240. A covenant to use land only for the erection of shops is not implied from a statement that it is adapted for that purpose (*Holford v. Acton Urban Council*, *supra*).

(*t*) See *Tulk v. Moxhay* (1848), 2 Ph. 774, where it was held that the restrictive covenant bound the subsequent owner of the land on the ground that he took with notice. But according to the later doctrine, the covenant creates an interest in the land which binds every owner until the legal estate is obtained without notice; see *London and South Western Rail. Co. v. Gomm*, *supra*, per JESSEL, M.R., at p. 583; *Rogers v. Hosegood*, [1900] 2 Ch. 388, 406, C. A.; *Osborne v. Bradley*, [1903] 2 Ch. 446, 451; *Re Nisbet and Potts' Contract*, [1905] 1 Ch. 391; affirmed, [1906] 1 Ch. 386, C. A.; title EQUITY, Vol. XIII., p. 100; compare title EASEMENTS AND PROFITS A PRENDRE, Vol. XI., pp. 247, 248. The same rule applies where the vendor has imposed the restriction on himself (*Mann v. Stephens* (1846), 15 Sim. 377). It is, for the purpose of this doctrine, immaterial that the burden of the covenant does not run with the land at law (*Renals v. Cowlishaw* (1878), 9 Ch. D. 125, 129). A restrictive covenant, since it creates an immediate interest in the land, is not

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**Nature of
restrictive
covenants.
Personal
covenants.**

**Benefit of
the covenant
at law ;**

with notice is in the same position as a party to the covenant, and a breach by him will be restrained by injunction without proof of substantial damage (*u*).

829. Covenants restricting the user of land (*v*) may be entered into (1) for the vendor's personal benefit only ; (2) for the benefit of the vendor or his successors in title as the owners of particular property ; and (3) as part of a building scheme (*w*).

The rule just stated (*x*) only applies where the covenant is of the second or third kind. It does not apply where the covenant is a mere personal covenant, collateral to—that is, having no necessary connexion with—the conveyance to the purchaser ; and, while such a covenant is enforceable by the vendor and his personal representatives against the original purchaser, it is not enforceable against a subsequent purchaser who was no party to the deed (*y*). A covenant entered into with a vendor who is selling the whole of his estate in the neighbourhood to a single purchaser is of this kind, and the vendor or his personal representatives cannot enforce it against sub-purchasers (*z*).

830. Where a covenant is not merely personal to the covenantee, the benefit of it can run at law with land retained by the vendor and subsequently disposed of by him (*a*). For this purpose the

obnoxious to the rule against perpetuities (*London and South Western Rail. Co. v. Gomm* (1882), 20 Ch. D. 562, C. A.) ; and see title PERPETUITIES, Vol. XXII., p. 299.

(*u*) *Richards v. Revitt* (1877), 7 Ch. D. 224 : see title INJUNCTION, Vol. XVII., pp. 238, 241.

(*v*) As to the construction of such covenants, see *Wright v. Berry* (1903), 19 T. L. R. 259, C. A. (use for private residences only) ; *White v. Pollard* (1908), 52 Sol. Jo. 748 (not to use as place of business) ; *Abbey v. Gutteres* (1911), 55 So. Jo. 364 (to keep windows obscured) ; *Webb v. Fagotti Brothers* (1898), 79 L. T. 683, C. A. (not to use as licensed premises) ; *Patching v. Dubbins* (1853), Kay, 1 ; *Manners (Lord) v. Johnson* (1875), 1 Ch. D. 673 (against erection of buildings) ; *Collins v. Castle* (1887), 36 Ch. D. 243 (as to value of buildings) ; *Kimber v. Admans*, [1900] 1 Ch. 412, C. A. ; *Ilford Park Estates, Ltd. v. Jacobs*, [1903] 2 Ch. 522 (as to number of houses) ; *Deane v. Ramsgate Corporation* (1892), 8 T. L. R. 199, C. A. ; *Keith v. Twentieth Century Club* (1904), 90 L. T. 775 (as to maintenance and use of garden) ; *Reading Industrial Co-operative Society v. Palmer*, [1912] 2 Ch. 42 (as to approval of plans by vendor's surveyor and payment of his fees). The word "adjoining" will, according to the object of the covenant, be construed to mean actually touching (*Vale & Sons v. Moorgate Street and Broad Street Buildings, Ltd.* (1899), 80 L. T. 487 ; *Ind, Coops & Co. v. Hamblin* (1900), 84 L. T. 168, C. A.), or neighbouring (*Cave v. Horsell*, [1912] 3 K. B. 533, C. A. ; see 56 Sol. Jo. 700). As to the construction of covenants against causing a nuisance or annoyance, or against carrying on trades, see title LANDLORD and TENANT, Vol. XVIII., pp. 516 *et seq.* As to a covenant being too vague to be enforced, see *Taylor v. Gilbertson* (1854), 2 Drew, 391.

(*w*) See *Osborne v. Bradley*, [1903] 2 Ch. 446, *per* FARWELL, J., at p. 450 ; title EQUIT, Vol. XIII., pp. 101, 102. As to the effect of such a scheme in exempting land from undeveloped land duty, see title REVENUE, Vol. XXIV., p. 577.

(*x*) See p. 455, *ante*.

(*y*) Similarly, the covenant may be a personal covenant binding the purchaser only (*Re Fawcett and Holmes' Contract* (1889), 42 Ch. D. 150, C. A.).

(*z*) *Formby v. Barker*, [1903] 2 Ch. 539, C. A.

(*a*) *Austerberry v. Oldham Corporation* (1885), 29 Ch. D. 750, C. A. ; *Rogers v. Hosegood*, [1900] 2 Ch. 388, 404, C. A. ; see *Spencer's Case*

vendor, as covenantee, must have the legal estate in the land; the covenant must "touch or concern"—that is, must be for the advantage of—the land (*b*); and the vendor's successor in title who claims the benefit of the covenant must hold under the same legal title as the vendor (*c*).

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In equity this tracing of the legal title is unnecessary: it is sufficient for the claimant to show that he is entitled to the benefit of the covenant (*d*). This he can do, where there is no common building scheme, by showing (1) that the benefit of the covenant is in equity annexed to and is part of his land; or (2) that on his purchase of the land he also purchased, as a distinct matter, the benefit of the covenant. Where various plots of land have been purchased under a common building scheme, the purchaser of each plot takes, as regards the purchasers of the other plots, with the rights and subject to the liabilities defined by the scheme (*e*).

in equity.

831. Where a vendor, who has taken from a purchaser a restrictive covenant for the benefit of the whole or some part of the land retained by the vendor, subsequently conveys the whole of such land to a second purchaser, the benefit of the covenant passes with the land, and the covenant is enforceable by injunction at the suit of the second purchaser against the first (*f*). The benefit of the covenant is annexed either to the whole or part of the land, and hence it passes by the conveyance of the whole.

Conveyance
of whole
of land
retained.

832. Where a vendor who has taken a restrictive covenant subsequently conveys part of the land retained by him, it must be ascertained whether the benefit of the covenant has, at the time of such later conveyance, become annexed to the part of the land comprised in it (*g*). This annexation may take place at the time of the original conveyance, and may result either from the express words of that conveyance (*h*), or from the circumstances attending

Conveyance
of part of
land retained.

Covenant
annexed.

(1583), 5 Co. Rep. 16 a, seventh resolution, at fo. 17 b; 1 Smith, L. C., 11th ed., p. 55; see also *Ohelsham and Woldingham Association, Ltd. v. Hayward* (1911), 76 J. P. 52 (a county court case). The benefit may run with the land of the covenantee notwithstanding that the burden does not run with the land of the covenantor (*Rogers v. Hosegood*, [1900] 2 Ch. 388, C. A., per FARWELL, J., at p. 395); see title EQUITY, Vol. XIII., p. 100. A restrictive covenant in a disposition of settled property made under a power enures for the benefit of all parties coming in under the settlement, including appointees under a power of sale and exchange (*Child v. Douglas* (1854), Kay, 560, 569). As to the rights of parties coming in under a settlement generally, see title SETTLEMENTS, pp. 570 *et seq.*, 585 *et seq.*, *post*.

(*b*) See *Austerberry v. Oldham Corporation* (1885), 29 Ch. D. 750, C. A. and, as to what covenants are capable of running with land, see title LANDLORD AND TENANT, Vol. XVII., pp. 584 *et seq.*

(*c*) *Webb v. Russell* (1789), 3 Term Rep. 393; *Rogers v. Hosegood*, *supra*.

(*d*) *Rogers v. Hosegood*, *supra*.

(*e*) See *Reid v. Bickerstaff*, [1909] 2 Ch. 305, C. A., per COZENS-HARDY, M. R., at pp. 319, 320; title EQUITY, Vol. XIII., p. 101. As to a common building scheme, see p. 458, *post*.

(*f*) See *Renals v. Cowlishaw* (1878), 9 Ch. D. 125, 130; *Whatman v. Gibson* (1838), 9 Sim. 196; *Child v. Douglas* (1854), Kay, 560, 572; and see title INJUNCTION, Vol. XVII., pp. 241, 242.

(*g*) *Rogers v. Hosegood*, *supra*.

(*h*) See *Rogers v. Hosegood*, *supra*, where the covenant was expressed to be for the benefit of the vendors, their heirs and assigns and others claiming

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it(i); or it may be the effect of some subsequent instrument executed by the vendor(k). When the benefit of the covenant has been once annexed to a particular piece of land, it constitutes an equitable interest in the land and passes by assignment of the land. It follows that it runs with the land, not on the ground of notice(l), or on the ground that a subsequent purchaser has expressly bought it(m), but because it inheres in or is annexed to the land which he has bought(n).

Covenant
not annexed.

Where the benefit of the covenant has not, at the time of the later sale, been annexed to the land comprised in the later conveyance, it does not pass unless the later purchaser is aware of its existence and obtains an assignment of it as part of his purchase(o).

Building
scheme.

833. The mutual rights of the owners of neighbouring plots of land frequently depend upon the existence of a common building scheme. The chief elements in such a scheme are (p) —

(1) A common vendor under whom the various owners derive title;

(2) A scheme relating to a defined area which the vendor intends to sell in lots, containing restrictions which are to be imposed on all the lots and though, perhaps, varying in details as to particular lots, are framed upon some general plan of development (q);

under them all or any of the vendors' lands adjoining or near to the premises conveyed. Under these words, the benefit of the covenant was annexed to all the adjoining or neighbouring lands retained, and hence it passed on a subsequent conveyance of part of them. Where the covenant is to be annexed to part only of the land, that part must be sufficiently defined (*Renals v. Cowlishaw* (1879), 11 Ch. D. 866, 868, C. A.).

(i) *Rogers v. Hosegood*, [1900] 2 Ch. 388, 408. C. A.

(k) It is sufficient if the benefit of the covenant has been annexed to the land at the date of the later conveyance (*Reid v. Bickerstaff*, [1909] 2 Ch. 305, C. A., per COZENS-HARDY, M.R., at p. 320).

(l) Hence it is immaterial that the subsequent purchaser is not aware of the existence of the covenant (*Rogers v. Hosegood*, *supra*); he takes the rights incident to the land which he buys (*Child v. Douglas* (1854), Kay, 560, 571).

(m) *Rogers v. Hosegood*, *supra*, at p. 407.

(n) But it does not run if the terms or circumstances of the second conveyance show that the benefit of the covenant was not to pass; see *Rogers v. Hosegood*, *supra*, at p. 408.

(o) *Renals v. Cowlishaw* (1878), 9 Ch. D. 125, 130; affirmed (1879), 11 Ch. D. 866, C. A.; *Rogers v. Hosegood*, *supra*, at p. 407; *Reid v. Bickerstaff*, *supra*, at p. 320; see *Keates v. Lyon* (1869), 4 Ch. App. 218.

(p) See *Elliston v. Reacher*, [1908] 2 Ch. 374, per PARKER, J., at p. 384; S. C., [1908] 2 Ch. 665, C. A.; *Reid v. Bickerstaff*, *supra*, per COZENS-HARDY, M.R., at p. 319; and, as to building schemes, see also *Child v. Douglas*, *supra*; *Keates v. Lyon*, *supra*; *Brown v. Inskip* (1884), Cab. & El. 231; *Tucker v. Vowles*, [1893] 1 Ch. 195; *Tindall v. Castle* (1893), 3 R. 418; *Davis v. Leicester Corporation*, [1894] 2 Ch. 208, C. A.; *Nalder and Collyer's Brewery Co. v. Harman* (1900), 83 L. T. 257, C. A.; *Osborne v. Bradley*, [1903] 2 Ch. 446, 454; compare *Coles v. Sims* (1853), Kay, 56; *Western v. MacDermott* (1866), 2 Ch. App. 72; and see title EQUIT, Vol. XIII., pp. 101, 102.

(q) It is essential that the area within which the scheme is to operate should be definite, and that the nature of the obligations imposed, though varying among themselves, should be definite, so that each party may

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scheme.

(3) An intention on the vendor's part that the restrictions shall be for the benefit of all the lots (r) ;

(4) An intention on the part of the original purchasers to take the benefit of the restrictions (s).

Such a scheme constitutes a local law for the area over which it extends (t), and has the practical effect of rendering each purchaser and his successors in title subject to the restrictions, and of conferring upon them the benefits of the scheme, as between themselves and all other purchasers and their respective successors in title, and, unless the vendor expressly reserves the right of exempting any lots that may remain unsold, it also renders him and future purchasers of such lots equally liable. The result is sometimes made clearer by requiring the purchasers to execute a deed of mutual covenants expressly giving to each the benefit, and imposing on each the liability, of the restrictions (u). This, however, is not essential. The conveyance to each should be made subject to the

know with certainty what his rights and obligations are, and against and by whom such rights and obligations may be enforced (*Reid v. Bickerstaff*, [1909] 2 Ch. 305, C. A.; see *Renals v. Cowlishaw* (1879), 11 Ch. D. 866, 868, C. A.; *Osborne v. Bradley*, [1903] 2 Ch. 446, 453).

(r) The vendor's object in imposing the restrictions must in general be gathered from all the circumstances of the case, including in particular the nature of the restrictions. If a general observance of the restrictions is in fact calculated to enhance the value of the lots offered for sale, it is an easy inference that the vendor intended the restriction to be for the benefit of all lots. This inference is not rebutted by the circumstance that he retains other land which will share in the enhanced value. The intention of the vendor to annex the benefit of the covenants to the land may be inferred with regard both to the lots sold and the land retained (see *Elliston v. Reacher*, [1908] 2 Ch. 374, 385; affirmed, [1908] 2 Ch. 665, C. A. (deed of covenant showing the necessary intention engrossed but not executed); see *ibid.*, at pp. 390, 392, 672); it is not rebutted by the circumstance that the vendor reserves to himself power to dispense with the restrictions as regards lots which are not sold. This is a circumstance to be taken into consideration in determining whether the benefit of the restrictions is annexed to the various lots, but it is not important (*ibid.*, at pp. 389, 672). Apart from such express power and any exercise of it, the vendor is himself bound by the scheme (*Mackenzie v. Childers* (1889), 43 Ch. D. 265; *Re Birmingham and District Land Co. and Allday*, [1893] 1 Ch. 342; compare *Whitehouse v. Hugh*, [1906] 2 Ch. 283, C. A.); and, as to reservation of power to alter the scheme, see *A.-G. v. Richmond Corporation* (1903), 89 L. T. 700.

(s) This fourth point requires that the purchasers should have notice of the facts involved in the first three points. Without notice, the fourth point cannot be established; with notice, it usually follows from the first three (*Elliston v. Reacher*, [1908] 2 Ch. 374, 385). The doctrine rests upon the implication of covenants between the purchasers *inter se*, and the implication cannot be made in the absence of knowledge. An inference that a purchaser intended to enter into an indeterminate number of covenants with unknown persons should not be drawn (*Osborne v. Bradley*, *supra*, at p. 455).

(t) *Reid v. Bickerstaff*, *supra*.

(u) See *Whatman v. Gibson* (1838), 9 Sim. 196; *Renals v. Cowlishaw* (1878), 9 Ch. D. 125, 129. Where a deed is prepared, a person who takes the benefit of it is bound by the restrictions contained in it, though he does not execute it (*Formby v. Barker*, [1903] 2 Ch. 539, 549, C. A.; *Elliston v. Reacher*, [1908] 2 Ch. 665, 669, C. A.; see Co. Litt. 230 b). For a form of such a deed, see *Encyclopædia of Forms and Precedents*, Vol. XII p. 753.

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restrictions (a), but the title of each to the benefit of the covenants is sufficiently established wherever the above four points exist (b). If the purchases are simultaneous, it is possible to imply a mutual contract under which the benefit of the covenants is annexed to each plot of land (c) and thereafter passes upon a conveyance of the plot without express mention in accordance with the principle already stated (d). But the purchases need not be simultaneous (e), and the circumstances may exclude the possibility of such a contract. It is sufficient to say that the community of interest where lands are purchased under a building scheme imports in equity the reciprocity of obligation which is in fact contemplated by each original purchaser at the time of his own purchase (f).

**Purchasers
under
common
vendor.**

834. Although neighbouring lands are not, in terms, sold under a common building scheme, yet, if the vendor puts each purchaser under the same restrictive covenants, and the purchasers are aware of their common liability, the result is the same as where the purchases are under a building scheme. The purchasers, as regards each other, come under reciprocal obligations and are entitled to reciprocal rights, and they are able to enforce these rights in equity without making the vendor a party (g).

The same result follows even though the various purchasers are unaware of the restrictions imposed on the others, if the benefit of the restrictions was in fact annexed by the common vendor to the various plots (h); but, if the covenants were imposed

(a) For forms of conveyances subject to restrictive covenants, see *Encyclopædia of Forms and Precedents*, Vol. XII., pp. 732 *et seq.*

(b) *Elliston v. Reacher*, [1908], 2 Ch. 374, 385.

(c) *Kenals v. Cowlishaw* (1878), 9 Ch. D. 125, *per* HALL, V.-C., at p. 129; affirmed (1879), 11 Ch. D. 866, C. A.

(d) See p. 458, *ante*; *Rogers v. Hosegood*, [1900] 2 Ch. 388, 408, C. A.

(e) *Elliston v. Reacher*, *supra*, at p. 385. Where an estate is sold in lots at successive sales under a building scheme, a purchaser can only enforce the restrictions against property shown as lotted in the plan and subject to the restrictions at the sale at which he purchases (*Rowell v. Satchell*, [1903] 2 Ch. 212).

(f) *Spicer v. Martin* (1888), 14 App. Cas. 12, *per* Lord MACNAGHTEN, at p. 25; *Elliston v. Reacher*, *supra*, at p. 385; see *Eastwood v. Lever* (1863), 4 De G. J. & Sm. 114, C. A.; title EVIDENCE, Vol. XIII., p. 567, note (j). But where a covenant refers to the consent of the vendor and his "assigns," this does not include all subsequent purchasers and lessees of any part of the estate (*Everett v. Remington*, [1892] 3 Ch. 148).

(g) *Whaiman v. Gibson* (1838), 9 Sim. 196; *Child v. Douglas* (1854), Kay, 560, 570. The question whether this result is intended is one of fact to be decided on the ordinary rules of evidence; but it is usually inferred under the circumstances stated; see *Nottingham Patent Brick and Tile Co. v. Butler* (1886), 16 Q. B. D. 778, C. A., *per* Lord ESHER, M.R., at p. 784: "If it is found that it was the intention that the purchasers should be bound by the covenants *inter se*, a Court of Equity will, in favour of any one of the purchasers, insist upon the performance of the covenants by any other of them, and will do so under such circumstances, without introducing the vendor into the matter." It is not, however, essential that a subsequent purchaser should enter into the covenant: without his doing so the benefit of the first purchaser's covenant may be annexed to the land retained by the vendor and pass to a subsequent purchaser of the whole or part (*Child v. Douglas*, *supra*, at p. 569); and see p. 457, *ante*.

(h) See p. 457, *ante*.

by the vendor for his own benefit only, a purchaser cannot sue in respect of a breach by another purchaser (*i*).

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835. In all the above cases, where the benefit of the covenant passes to the various purchasers, one purchaser can sue another without making the remaining purchasers parties (*k*).

836. Where the vendor takes a covenant for his own benefit merely (*l*), he is the only person entitled to enforce it, and the fact that he has acquiesced in an unsubstantial infringement of it does not prevent his suing in respect of a substantial infringement (*m*). Where, under a building scheme or otherwise, the benefit of the covenant is vested in a number of owners (*n*), any one of these may release his right to enforce the covenant (*o*), or may lose his right to enforce it by acquiescing in systematic breaches (*p*). Moreover, if the character of the estate has undergone so complete a change that the covenant is no longer capable of attaining the object for which it was imposed, it ceases to be enforceable (*q*); but the covenant is not waived or extinguished by the covenantee allowing it to be relaxed in a remote part of the estate where the relaxation does not affect its general character (*r*).

Parties to
action.
Extinction
of covenants.

(iii.) *Covenants for Title.*

837. In the conveyance of the property the vendor usually enters into covenants for title (*s*). This is in pursuance of his obliga-

Protection
afforded.

(*i*) *Master v. Hansard* (1876), 4 Ch. D. 718, C. A.; *Sheppard v. Gilmore* (1887), 57 L. J. (Ch.) 6; compare *Keates v. Lyon* (1869), 4 Ch. App. 218; see p. 456, *ante*.

(*k*) *Western v. MacDermott* (1866), 2 Ch. App. 72, 76. As to parties to actions generally, see title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 99 *et seq*. The action is usually brought in the Chancery Division.

(*l*) See p. 456, *ante*.

(*m*) *Richards v. Revitt* (1877), 7 Ch. D. 224; *Osborne v. Bradley*, [1903] 2 Ch. 446, 456.

(*n*) See pp. 458 *et seq.*, *ante*.

(*o*) As to presumption of release, see title EQUITY, Vol. XIII., p. 102.

(*p*) *Peek v. Matthews* (1867), L. R. 3 Eq. 515; *Sayers v. Collyer* (1884), 28 Ch. D. 103, C. A. But acquiescence implies knowledge, and breaches of covenant on a remote part of the estate do not establish acquiescence on the part of the plaintiff without proof that he was aware of them (*Knight v. Simmonds*, [1890] 2 Ch. 291, C. A.); nor is a plaintiff prevented from suing because he has acquiesced in, or been himself a party to, slight breaches (*Western v. MacDermott*, *supra*; *Jackson v. Winnifrith* (1882), 47 L. T. 243; *Chitty v. Bray* (1883), 48 L. T. 860; *Hooper v. Bromet* (1903), 89 L. T. 37). A sub-purchaser is not necessarily prevented from suing because his vendor has committed a breach of covenant in another part of the lot (*Rowell v. Satchell*, [1903] 2 Ch. 212). As to acquiescence generally, see title EQUITY, Vol. XIII., pp. 166 *et seq*.

(*q*) *Bedford (Duke) v. British Museum (Trustees)* (1822), 2 My. & K. 552; *Knight v. Simmonds*, *supra*; compare *Pulcynne v. France* (1912), 57 Sol. J. 173, C. A.; and see title EQUITY, Vol. XIII., p. 102.

(*r*) *German v. Chapman* (1877), 7 Ch. D. 271, C. A.

(*s*) See pp. 338, 339, 426, 430 *et seq.*, *ante*. The fact that the vendor cannot show a complete chain of previous covenants for title is not an objection to his title (*Re Scott and Alvarez's Contract*, *Scott v. Alvarez*, [1895] 1 Ch. 596, 606, C. A.). The care with which titles are investigated makes it very unusual for a purchaser to require to sue on the covenant, and it has been said that more value is attached to covenants for title than

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tion to give a title clear of defects and incumbrances, unless otherwise provided by the contract (*t*). While the contract remains executory, the purchaser can decline to complete unless a proper title is made out (*a*); but, after the property has been conveyed and the purchaser has accepted the conveyance and taken possession, the vendor becomes absolutely entitled to the purchase-money. The purchaser cannot, on the ground of adverse claims, recover money which has been paid or detain money unpaid, but he must rely on the covenants for title (*b*). In the absence of covenants, or so far as these do not apply, he is without remedy (*c*), except in case of fraud (*d*).

Covenants
for title.

838. The usual covenants for title given on a sale of freeholds or copyholds by a beneficial owner (*e*) are : for right to convey ; for

they are worth (3 Preston, Abstracts of Title, p. 57; Dart, Vendors and Purchasers, 7th ed., p. 566). Hence there are but few decisions on the effect of such covenants. In the United States it is different, and "the American reports are proportionally as full of cases upon the subject of covenants for title as the Year Books were with cases upon the subject of warranty" (Rawle, Covenants for Title, 5th ed., s. 17).

(*t*) See p. 341, *ante*. An agreement to sell the fee simple, free from incumbrances, carries with it the right of the purchaser to proper covenants (*Church v. Brown* (1808), 15 Ves. 258, 263).

(*a*) See p. 342, *ante*.

(*b*) See *Maynard's (Serjeant) Case* (1676), Freem. (CH.) 1; S. C., *sub nom. Maynard v. Moseley*, Cas. temp. Finch, 288; 3 Swan. 651, 653, where the point as to detention of unpaid purchase-money was left open:—"He that purchases land without any covenants or warranties against prior titles . . . if the land be afterwards evicted by an eigne title, can never exhibit a bill in equity to have his purchase-money again on that account; possibly there may be equity to stop the payment of such purchase-money as is behindhand" (*Maynard v. Moseley*, *supra*, as reported at 3 Swan. 651, 655). But it seems to be settled that the purchaser can neither recover purchase-money paid (*Bree v. Holbech* (1781), 2 Doug. (K. B.) 654; *Urmston v. Fute* (1794), 4 Cru. Dig., title xxxii., Deeds, ch. xxv., s. 92; Sugden, Vendors and Purchasers, 14th ed., p. 549; *Wakeman v. Rutland (Duchess)* (1796), 3 Ves. 233, 235; *Craig v. Hopkins* (1732), Mor. Dict. 16,623; *Clare v. Lamb* (1875), L. R. 10 C. P. 334), nor detain purchase-money unpaid (see *Thomas v. Powell* (1794), 2 Cox, Eq. Cas. 394, where the court declined to prevent payment out of court on the ground of an adverse claim; Sugden, Vendors and Purchasers, 14th ed., p. 551; Rawle, Covenants for Title, 5th ed., s. 321). But probably he can apply unpaid purchase-money in discharging incumbrances which the vendor should have cleared; see *Tourville v. Naish* (1734), 3 P. Wms. 307; *Lacey v. Ingle* (1847), 2 Ph. 413; Sugden, Vendors and Purchasers, 14th ed., p. 552; and compare *Miller v. Pridden* (1856), 3 Jur. (N. S.) 78.

(*c*) *Bree v. Holbech* (1781), 2 Doug. (K. B.) 654; *Wakeman v. Rutland (Duchess)* (1796), 3 Ves. 233, 235. The purchaser takes the conveyance at his own risk, and upon eviction cannot recover the purchase-money on the ground of failure of consideration; but he has been allowed to do so where the purchase has been completed without conveyance (*Cripps v. Reade* (1796), 6 Term Rep. 606, where, on a sale of leaseholds, the lease was handed over without assignment); see *Johnson v. Johnson* (1802), 3 Bos. & P. 162; and compare *Awbry v. Keen* (1687), 1 Vern. 472. On the sale of a shop the purchaser cannot be required to erase the vendor's name (*Townsend v. Jarman*, [1900] 2 Ch. 698, 702); and see title TRADE AND TRADE UNIONS.

(*d*) See *Bree v. Holbech*, *supra*; *Edwards v. M'Leay* (1815), Coop. G. 308; *Hitchcock v. Giddings* (1817), 4 Price, 135; *Clare v. Lamb* (1875), L. R. 10 C. P. 334; Co. Litt. 384 a, note (at end); and, as to rescission even after completion, in cases of fraud, see pp. 471 *et seq.*, *post*.

(*e*) The covenants for title are the modern equivalent for the old

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quiet enjoyment; for freedom from incumbrances; and for further assurance (*f*). If the property is leasehold, the vendor also covenants that the lease is valid and subsisting, and that the rent and lessee's covenants have been paid and performed to date (*g*). But the covenants are not absolute; they are limited to defects arising since the last purchase for value (*h*). If the vendor is a

express and implied warranties; or, as they were otherwise called, warranties in deed and warranties in law (see Littleton's Tenures, ss. 697 *et seq.*; Co. Litt. 365 a). An express warranty was created only by the word "warrant" or its Latin equivalent (Littleton's Tenures, s. 733; Co. Litt. 384 a). An implied warranty arose from the word "grant"; and before the statute *Quia Emptores* (1290), 18 Edw. 1, c. 1 (see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 144, 145), it was incident to the tenure between grantor and grantee; it bound the heirs of the grantor, and was not excluded by an express qualified warranty; after the statute it was not incident to tenure, and was confined to the life of the donor; see Co. Litt. 384 a, note (1); Rawle, Covenants for Title, 5th ed., s. 6. This implied warranty was abolished by the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 4; see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 481. As to the covenant formerly implied from the words "grant, bargain, and sell" in Yorkshire, see *ibid.*, note (*m*). Covenants for title came into use at an early date: formerly they included, in addition to those mentioned in the text, a covenant for seisin, and there are decisions on this and the other covenants in the reports of the sixteenth and early part of the seventeenth centuries: see on the covenant for seisin, *Gray v. Briscoe* (1607), Noy, 142; *Muscot v. Ballet* (1615), Cro. Jac. 369; for right to demise, *Bradshaw's Case* (1612), 9 Co. Rep. 60 b; quiet enjoyment on sale of copyhold land, *Grenelife v. W*— (1538), Dyer, 42 a, and in leases, *Mountford v. Catesby* (1573), Dyer, 328 a; *Noke v. Auder* (1595), Cro. Eliz. 373; *Woodroff v. Greenwood* (1596), Cro. Eliz. 518; *Corus v. —* (1597), Cro. Eliz. 544; *Penning v. Plat (Lady)* (1615), Cro. Jac. 383; against incumbrances, *Briscoe v. King* (1611), Cro. Jac. 281; for further assurance, *Boulney v. Curleys* (1610), Cro. Jac. 251; *Briscoe v. King*, *supra*; see Rawle, Covenants for Title, 5th ed., s. 13.

(*f*) See 2 Davidson, Precedents in Conveyancing, 4th ed., p. 191; Dart, Vendors and Purchasers, 7th ed., p. 567; see, further, pp. 426 (freehold), 430 (copyholds), 431 (leaseholds), 432 (registered land), *ante*. The old covenant for seisin probably fell into disuse because, when limitations to uses to bar dower became prevalent, conveyances were ordinarily made under powers operating by virtue of the Statute of Uses (27 Hen. 8, c. 10) (Rawle, Covenants for Title, 5th ed., s. 20). Its place was at one time taken by a covenant that the power under which the vendor conveyed was well created and in force; but this is implied in the covenant for right to convey and has been abandoned (2 Davidson, Precedents in Conveyancing, 4th ed., p. 192). The covenant against incumbrances is not an independent covenant, but is prefaced by the words "and that," and follows the covenant for quiet enjoyment; see p. 466, *post*.

(*g*) 2 Davidson, Precedents in Conveyancing, 4th ed., p. 214; see *Coates v. Collins* (1871), L. R. 7 Q. B. 144, Ex. Ch.; title LANDLORD AND TENANT, Vol. XVIII., p. 461; see also p. 431, *ante*.

(*h*) See *Browning v. Wright* (1799), 2 Bos. & P. 13, 22; *Thackeray v. Wood* (1865), 6 B. & S. 766, 773, Ex. Ch.; Sugden, Vendors and Purchasers, 14th ed., p. 574; 2 Davidson, Precedents in Conveyancing, 4th ed., p. 192; Dart, Vendors and Purchasers, 7th ed., pp. 567, 568. For this purpose a settlement on marriage is not treated as made for value; the vendor claiming under such a settlement covenants against the acts of the settlor and his representatives (Dart, Vendors and Purchasers, 7th ed., p. 568), and this is the effect of the covenants implied by statute; see note (*b*), p. 426, *ante*. Where the covenants in the conveyance are not in accordance with the contract, the conveyance may be rectified (*Stait v. Fenner*, [1912] 2 Ch. 504, 518; see p. 470, *post*). As to when qualifying words will be extended to all the covenants for title, or limited to those in which they immediately occur, see title DEEDS AND OTHER INSTRUMENTS, Vol. X.,

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trustee (i) or mortgagee (k), he only gives a covenant against incumbrances created by himself (i). It is now the practice not to give full express covenants, but to rely on the covenants implied by statute from the use of the words "beneficial owner," "trustee," "personal representative," and "mortgagee" (l).

839. The covenant for right to convey is a covenant for title; the covenant for quiet enjoyment is a covenant relating to possession (m); this distinction affects both the date when the covenant

p. 483; and, as to the liability of the vendor in respect of interests created without his knowledge by a person claiming under him, see *David v. Sabin*, [1893] 1 Ch. 523, C. A. As to purchase by a lessee, see *Paton v. Brebner* (1819), 1 Bl. 42, 69, H. L.

(i) *Worley v. Frampton* (1846), 5 Hare, 560, 566; see *Staines v. Morris* (1812), 1 Ves. & B. 8; *Copper Mining Co. v. Beach* (1823), 13 Beav. 478; *Hodges v. Blagrove* (1854), 18 Beav. 404; *Hare v. Burges* (1857), 4 K. & J. 45, 57 (the last three being cases on the form of a lease to be granted by trustees in pursuance of a testator's covenant for perpetual renewal); 2 Davidson, *Precedents in Conveyancing*, 4th ed., p. 261, note (n); Dart, *Vendors and Purchasers*, 7th ed., pp. 573, 575. It has been said to be the practice of conveyancers to make all the *cestuis que trust*, whose shares of the purchase-money are considerable, join in covenants for title according to their respective interests (Sugden, *Vendors and Purchasers*, 14th ed., p. 574). But this has been described as an oppressive practice, and has not been adopted on sales by the court (*Cottrell v. Cottrell* (1666), L. R. 2 Eq. 330, 333); and, now that trustees can give a receipt for the purchase-money, so that the beneficiaries are not parties to the contract for sale or its execution, it seems safe to say that no covenants from them can be required; see Dart, *Vendors and Purchasers*, 7th ed., p. 569; Williams, *Vendor and Purchaser*, 2nd ed., p. 657. In practice, covenants by the beneficiaries are expressly excluded by the conditions of sale; see pp. 338, 339, *ante*. A tenant for life directing trustees to sell under a power, or himself selling under his statutory power or other power, must give covenants for title (*Re London Bridge Acts, Ex parte Clothworkers' Co.* (1842), 13 Sim. 176; *Poulett (Earl) v. Hood* (1868), L. R. 5 Eq. 115; *Re Sawyers and Baring's Contract* (1884), 53 L. J. (Ch.) 1104), but in practice his covenants are limited, as regards the remainder in fee, to the acts and defaults of himself and his heirs and persons claiming under or in trust for him (Dart, *Vendors and Purchasers*, 7th ed., p. 571; Williams, *Vendor and Purchaser*, 2nd ed., p. 656); and see p. 427, *ante*.

(k) 2 Davidson, *Precedents in Conveyancing*, 4th ed., p. 296, note (c).

(l) *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), s. 7 (1); see p. 426, *ante*. The benefit of the implied covenants is annexed to and goes with the estate or interest of the implied covenantee (*Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), s. 7 (6)). The benefit of an express covenant for title runs at law where there is privity of estate (*Middlemore v. Goodale* (1638), Cro. Car. 503; *Campbell v. Lewis* (1820), 3 B. & Ald. 392). The extent to which an acknowledgment of right to production binds subsequent owners is defined by the *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), s. 9 (2); see p. 429, *ante*. As to express covenants for production, see Sugden, *Vendors and Purchasers*, 14th ed., p. 453.

(m) See *Howell v. Richards* (1809), 11 East, 633, 642. The covenant for right to convey is in this respect on the same footing as the former covenants for seisin and for the validity of a power (see notes (e), (f), pp. 462, 463, *ante*); for the early recognition of the distinction between covenants for title and possession, see *Gregory v. Mayo* (1677), 3 Keb. 744, 755. A covenant for seisin was treated as a covenant for lawful seisin, and was equivalent to a covenant for right to convey the estate expressed to be conveyed (*Nervin v. Munns* (1582), 3 Lev. 46; *Gray v. Briscoe* (1607), Noy, 142; *Cookes v. Fowns* (1661), 1 Keb. 95; *Browning v. Wright* (1799), 2 Bos. & P. 13, 27). In certain of the American States the covenant for seisin has been held to be satisfied by an actual, though tortious, seisin; see the grounds of this discussed in Rawls, *Covenants for Title*, 5th ed., ss. 42 *et seq.*

is broken and the measure of damages. A covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey (*n*), and it is broken by the existence of an adverse right such as a right of way (*o*), or any outstanding interest, charge, or claim (*p*) which may prevent the purchaser from enjoying this estate (*q*). Hence the covenant for right to convey is not a continuing covenant, but is broken once and for all at the time of the conveyance if there is then a defect in title which prevents the vendor from conveying the estate which he purports to convey (*r*); and consequently time begins to run forthwith against an action for breach of the covenant (*s*).

SECT. 1.
Benefits
Enjoyed
with the
Property
Sold.

840. The measure of damages is the difference between the value of the property as expressed to be conveyed and its value at that time as the vendor had power to convey it (*t*). Hence the purchaser, if he loses the land, can only recover the amount of the purchase-money and not the value of subsequent improvements (*a*).

Measure of
damages.

The purchaser can sue on the covenant, notwithstanding that the defect in title is disclosed by a recital in the conveyance (*b*).

Defect dis-
closed by
recital.

(*n*) *Howell v. Richards* (1809), 11 East, 633, 642; the covenant will not be qualified so as to extend to less than the interest expressed to be conveyed, unless such qualification is clearly indicated (*May v. Platt*, [1900] 1 Ch. 616, explaining *Delmer v. McCabe* (1863), 14 I. C. L. R. 377).

(*o*) *Turner v. Moon*, [1901] 2 Ch. 825; *Great Western Railway v. Fisher*, [1905] 1 Ch. 316, 321. Apparently such a right would not have been a breach of a covenant for seisin, though it might be a breach of a covenant against incumbrances (see Rawle, *Covenants for Title*, 5th ed., s. 59).

(*p*) See Williams, *Vendor and Purchaser*, 2nd ed., p. 1139.

(*q*) Under the old practice it was sufficient in an action on the covenant to allege generally that the grantor had not right to convey (*Bradshaw's Case* (1612), 9 Co. Rep. 60 b; S. C., *sub nom. Salman v. Bradshaw*, Cro. Jac. 304; *Muscot v. Ballet* (1615), Cro. Jac. 369; 2 Wms. Saund. 181, note (10); and see pleadings in *Thackeray v. Wood* (1864), 5 B. & S. 325; affirmed (1865), 6 B. & S. 766, Ex. Ch.); but it would now be proper to allege the facts constituting the breach; see title PLEADING, Vol. XXII., pp. 422, 423.

(*r*) *Turner v. Moon*, *supra*. The judgment of Lord ELLENBOROUGH, C.J., in *Kingdon v. Nottle* (1815), 4 M. & S. 53, appears to be *contra*; but see this explained in *Spoor v. Green* (1874), L. R. 9 Exch. 99, *per* BRAMWELL, B., at p. 111: "It is not what is called a continuing breach, any more than not paying money is a continuing breach. The covenant remains broken indeed, but broken once for all."

(*s*) *Spoor v. Green*, *supra*; see title LIMITATION OF ACTIONS, Vol. XIX., p. 78.

(*t*) *Turner v. Moon*, *supra*; see *Gray v. Briscoe* (1607), Noy, 142 (copyhold conveyed as freehold; damages, the difference between values of copyhold and freehold land); compare *Wace v. Bickerton* (1850), 3 De G. & Sm. 751; and see *Eastwood v. Ashton*, [1913] W. N. 129. The value of the property as expressed to be conveyed is usually the amount of the purchase-money stated in the conveyance; but this is not so if the purchase-money does not correspond to the actual value; see *Jenkins v. Jones* (1882), 9 Q. B. D. 128, C. A. As to conditions providing for compensation for misdescription, see pp. 328 *et seq.*, *ante*.

(*a*) Rawle, *Covenants for Title*, 5th ed., s. 158.

(*b*) *Page v. Midland Rail. Co.*, [1894] 1 Ch. 11, C. A.; *Great Western Railway v. Fisher*, *supra*, at p. 322; and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 482, note (*d*). Generally, mere notice to the purchaser of a defect in title does not bar his right to recover (*Levett v. Witherington* (1687), 1 Lut. 317).

SMOT. 1.
Benefits
Enjoyed
with the
Property
Sold.

Quiet enjoy-
 ment, free
 from incum-
 brances.

841. The covenant for quiet enjoyment is a future covenant (c); and when, according to the usual practice, the covenant against incumbrances follows as part of it (d), this also is future; the two are, in effect, a single covenant that the covenantee shall enjoy free from incumbrances (e). Consequently there is no breach of the covenant until the covenantee is disturbed in his enjoyment (f). The covenant for quiet enjoyment is usually limited to lawful disturbance by the covenantor or any person claiming under or in trust for him (g); it is not broken by claims under title paramount to that of the covenantor, or by tortious acts other than those of the covenantor himself (h). Being a future covenant, the damages seem to be measured by the loss to the covenantee when the disturbance takes place; thus, in case of eviction, they include the value of improvements which he has made (i).

(c) See *Ireland v. Bircham* (1835), 2 Scott, 207.

(d) See note (f), p. 463, *ante*.

(e) See *Vane v. Barnard* (Lord) (1708), Gilb. (CH.) 6, 7; Rawle, Covenants for Title, 5th ed., s. 70, p. 87, note (1). There is a lack of authority in the English reports as to what are incumbrances within the meaning of the covenant; the American authorities are numerous; see Rawle, Covenants for Title, 5th ed., ss. 75 *et seq.* An incumbrance has been defined to be "every right to or interest in the land which may subsist in third persons, to the diminution in the value of the land, but consistent with the passing of the fee by the conveyance" (*ibid.*, s. 75). This would include a mortgage, charge, or lien; an easement; and a subsisting term, unless in the last case the real subject of purchase was the reversion on the term (*ibid.*, s. 78; and, as to a term, see *Haverington's Case* (1586), Owen, 6; *Anon.* (1586), Moore (K. B.), 249); probably also it would include a restrictive covenant; see *Cato v. Thompson* (1882), 9 Q. B. D. 616, 618, C. A.; *Ellis v. Rogers* (1885), 29 Ch. D. 661, 665, C. A.; compare *Phillips v. Caldwell* (1868), L. R. 4 Q. B. 159, 163. But the mere existence of an incumbrance does not give a right to sue under this covenant; there must be interruption of enjoyment by claim under it (*Notledge v. Dering*, *Raban v. Dering*, [1909] 2 Ch. 647, 656; [1910] 1 Ch. 297, C. A.). See also *Re Martin, Ex parte Dixon v. Tucker* (1912), 106 L. T. 381.

(f) While the covenant for right to convey is a covenant for title (see p. 464, *ante*), that for quiet enjoyment is an assurance against disturbance consequent upon a defective title (*Howell v. Richards* (1809), 11 East, 633, 641; compare title LIMITATION OF ACTIONS, Vol. XIX., p. 78).

(g) As to the effect of a covenant for quiet enjoyment, and the matters which constitute a breach of the covenant, see titles LANDLORD AND TENANT, Vol. XVIII., pp. 524 *et seq.*, 527 *et seq.*; MINES, MINERALS, AND QUARRIES, Vol. XX., p. 551; *Young v. Raincock* (1849), 7 C. B. 310; *Browne v. Flower*, [1911] 1 Ch. 219. A judgment which does not interfere with the possession is not a breach (*Howard v. Mailland* (1883), 11 Q. B. D. 695, C. A.; compare *Hunt v. Danvers* (1680), T. Raym. 370). As to arrears of ground rent, see *Howes v. Brushfield* (1803), 3 East, 491, and the comments thereon in Sugden, Vendors and Purchasers, 14th ed., p. 602; and as to disturbance under title paramount, see also *Woodhouse v. Jenkins* (1832), 9 Bing. 431. After conveyance the court does not necessarily interfere by injunction to prevent illegal distress by the vendor on the tenants (*Drake v. West* (1853), 22 L. J. (CH.) 375). In an action on the covenant for quiet enjoyment the plaintiff must allege the facts constituting the disturbance, and that the disturbance was lawful, with sufficient particularity to show the breach of covenant (*Foster v. Pierson* (1792), 4 Term Rep. 617; 2 Wms. Saund. 181, note (10)).

(h) See title LANDLORD AND TENANT, Vol. XVIII., pp. 524, 525.

(i) This is in accordance with the ordinary rule as to damages, and is supported by *Bunny v. Hopkinson* (1859), 27 Beav. 565; see *Rolph v. Crouch* (1867), L. R. 3 Exch. 44; compare *Duckworth v. Ewart* (1864), 10 Jur. (N. S.) 214; see also 2 Williams, Vendor and Purchaser, 2nd ed.,

SECT. 1.
Benefits
Enjoyed
with the
Property
Sold.

Further
 assurance.

842. Under the covenant for further assurance the vendor is bound to do such further acts for the purpose of perfecting the purchaser's title as the latter may reasonably require (*k*) and the vendor can properly do (*l*). The purchaser should tender a draft of the further conveyance to which he considers that he is entitled (*m*), and should tender or offer to pay the vendor's costs (*n*). The vendor is entitled to a reasonable time to procure professional assistance (*o*). If the conveyance is proper and he declines to execute it or to do any act which the purchaser can properly require, this constitutes a breach of the covenant (*p*). The purchaser cannot, by means of

p. 1156. In America different rules have prevailed in different States; the damages for eviction being in most States limited to the original purchase-money and interest, but in others extending to the value of the land at the time of eviction (Rawle, *Covenants for Title*, 5th ed., ss. 163 *et seq.*). A lessee, in case of eviction, recovers under the covenant for quiet enjoyment the value of the term to him; see title LANDLORD AND TENANT, Vol. XVIII., pp. 529, 530; Rawle, *Covenants for Title*, 5th ed., s. 169, where the result is explained on grounds peculiar to leases; but the construction of the covenant should be the same whether it is in a lease or a conveyance on sale; and the rule as to leases supports the statement in the text. Where the improvements effected by the purchaser are in pursuance of the contract of sale, *e.g.*, where he erects houses out of which the vendor is to receive a rent, there is additional reason for including in the damages the value of the buildings (Rawle, *Covenants for Title*, 5th ed., s. 170). In the absence of evidence of increase of value, the damages are the original value (*Jenkins v. Jones* (1882), 9 Q. B. D. 128, C. A.). Upon a covenant against incumbrances the purchaser, if he has paid off a mortgage or charge, or bought in an easement, can recover the amount so paid and any expenses which he has incurred; but until he has incurred some loss, it seems that he cannot sue on the covenant, since, according to the English form, the covenant is a future covenant; see p. 466, *ante*; Rawle, *Covenants for Title*, ss. 188 *et seq.* The damages may include the costs of litigation upon an adverse claim (*Sutton v. Baillie* (1891), 65 L. T. 528; see title LANDLORD AND TENANT, Vol. XVIII., p. 530; Dart, *Vendors and Purchasers*, 7th ed., pp. 800 *et seq.*).

(*k*) See Rawle, *Covenants for Title*, 5th ed., s. 99. Such acts include the removal of a judgment if charged on the land, or other incumbrance (*King v. Jones* (1814), 5 Taunt. 418; *Re Jones, Farrington v. Forrester*, [1893] 2 Ch. 461, 471); and, as to request for further assurance, see *Bennet's Case* (1582), Cro. Eliz. 9; *Nash v. Aston* (1682), T. Jo. 195; and compare *Blicke v. Dymoke* (1824), 2 Bing. 105. The assurance must be necessary (*Warn v. Bickford* (1819), 7 Price, 550; (1821) 9 Price, 43), and the execution of it possible (*Pet and Cally's Case* (1589), 1 Leon. 304 (party insane); *Nash v. Aston* (1682), T. Jo. 195).

(*l*) See *Heath v. Crealock* (1874), 10 Ch. App. 22, 31.

(*m*) Dart, *Vendors and Purchasers*, 7th ed., p. 797. The draft is usually settled by counsel and accompanied by counsel's opinion as to the necessity and propriety of the further assurance, though this is not necessary (*Blicke v. Dymoke, supra*). Under the early form of covenant, the covenant was to make such assurance as the purchaser's counsel should advise (*Rosewell's Case* (1593), 5 Co. Rep. 19 b; *Bennet's Case* (1852), Cro. Eliz. 9; *Baker v. Bulstrode* (1673), 2 Lev. 95; *Lassels v. Catterton* (1670), 1 Mod. Rep. 67). As to the preparation of the conveyance, see, further, pp. 412 *et seq.*, *ante*.

(*n*) Dart, *Vendors and Purchasers*, 7th ed., p. 797. As to conditions dealing with the costs of conveyance, see pp. 336, 337, *ante*.

(*o*) *Bennet's Case, supra*.

(*p*) Rawle, *Covenants for Title*, 5th ed., s. 99. In an action on the covenant, the facts showing the necessity and propriety for the further assurance, and the defendant's refusal to execute it, should be alleged. As to pleadings in such an action under the old system, see *King v. Jones, supra*; *Blicke v. Dymoke, supra*.

**Sect. 1.
Benefits
Enjoyed
with the
Property
Sold.**

**Remedy on
covenant.**

the covenant for further assurance, obtain a greater estate than that which was the subject of the original conveyance (*q*); though, if the vendor's title was defective, the vendor may be required to assure an estate which he has got in since, whether by descent or devise (*r*), or by purchase (*s*).

The purchaser can either bring an action for breach of the covenant for further assurance, or can sue for specific performance (*t*). In the former case the damages are the loss arising to the purchaser from the neglect to execute the assurance. If this results in his being evicted, the loss is the amount of the purchase-money (*a*). In the event of the vendor's bankruptcy, specific performance of the covenant can be enforced against his trustee in bankruptcy, against the vendor himself after his discharge,

(*q*) *Davis v. Tollemache* (1856), 2 Jur. (N. S.) 1181. "The covenant for further assurance in a deed is a covenant intended to give full effect and operation to the estate and interest conveyed by the deed" (*ibid.*, *per* STUART, V.-C., at p. 1185).

(*r*) *Smith v. Baker* (1842), 1 Y. & C. Ch. Cas. 223.

(*s*) See *Taylor v. Debar* (or *Dabar*) (1676), 1 Cas. in Ch. 274; 2 Cas. in Ch. 212; Sugden, Vendors and Purchasers, 14th ed., p. 612. The purchaser is, it seems, under the same liability in equity, even apart from a covenant for further assurance (*Noel v. Bewley* (1829), 3 Sim. 103); and see titles EQUITY, Vol. XIII., p. 104, note (*f*); ESTOPPEL, Vol. XIII., p. 373, note (*a*). Where, however, the covenant for further assurance is, with the other covenants, limited in the usual way to the acts of the vendor and his predecessors since the last sale, the vendor can, it seems, only be required to assure an after-acquired estate which is necessary to satisfy this limited covenant (Rawle, Covenants for Title, 5th ed., s. 104). Formerly a purchaser might require a husband who had sold his wife's land to levy a fine (*Boulney v. Curteys* (1610), Cro. Jac. 251; *Middlemore v. Goodale* (1638), Cro. Car. 503; *King v. Jones* (1814), 5 Taunt. 418, *per* HEATH, J., at p. 427), and, if she would not consent, he might be sent to prison (*Hall v. Hardy* (1733), 3 P. Wms. 187, 189). But this has been doubted (*Ortread* (or *Outtram*) *v. Round* (1717), 4 Vin. Abr., Baron and Feme, p. 203, pl. 4; *Emery v. Wase* (1803), 8 Ves. 505). A vendor, tenant in tail, who has conveyed a base fee may be required to turn it into a fee simple (*Bankes v. Small* (1887), 36 Ch. D. 716, C. A.; see titles REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 262, note (*n*); SPECIFIC PERFORMANCE). Probably a purchaser who has not obtained the title deeds cannot obtain a covenant for production under the covenant for further assurance, but his equity or right to production is usually sufficient without a covenant (*Hallett v. Middleton* (1826), 1 Russ. 243; *Fain v. Ayers* (1826), 2 Sim. & St. 533; p. 429, *ante*). He can, however, if necessary, obtain a duplicate of his own conveyance (*Napper v. Allington* (Lord) (1700), 1 Eq. Cas. Abr. 166, pl. 4; Dart, Vendors and Purchasers, 7th ed., p. 796). As to loss of title deeds, see *Bennett v. Ingoldsby* (1676), Cas. temp. Finch, 262; title MORTGAGE, Vol. XXI., p. 208. The deed of further assurance should not itself contain additional covenants of title by the vendor (*Coles v. Kinder* (1620), Cro. Jac. 571; *Lassels v. Catterton* (1670), 1 Mod. Rep. 67; Sugden, Vendors and Purchasers, 14th ed., p. 615).

(*t*) See Sugden, Vendors and Purchasers, 14th ed., p. 612; title SPECIFIC PERFORMANCE.

(*a*) See *King v. Jones* (1814), 5 Taunt. 418; but, since there is no breach till the refusal to execute the further assurance, the damages may, perhaps, be the value of the land at this time; see p. 466, *ante*. The action may be brought at once upon breach of covenant, but it is better to wait till the ultimate damage has been sustained, provided the statutory limit is not exceeded (*King v. Jones*, *supra*, at p. 428). As to the Statutes of Limitation generally, see title LIMITATION OF ACTIONS, Vol. XIX., pp. 33 *et seq.*

and also against his assigns, except such as take the legal estate for value without notice (b).

843. The burden of the covenants for title falls upon the covenantor—usually the vendor—personally, and after his death is enforceable, like any other liability, against his estate (c). The benefit of the covenant runs with the estate of the purchaser, and the covenant is enforceable by subsequent purchasers, provided they take that estate (d). This is so in the case of the express covenants for title (e), and the same rule is applied by statute to the covenants implied by the use of the statutory words (f). Apparently the statutory covenants given on the conveyance of an equitable estate run with that estate; but the express covenants for title only run with the legal estate, and the equitable owner must rely on his right to sue in the name of the covenantee or his assigns (g). If on a subsequent sale the land has been subdivided, a purchaser of part of the land, who takes the estate of the

SECT. I.
Benefits
Enjoyed
with the
Property
Sold.

Devolution
of covenants
for title.

(b) *Pye v. Daubuz* (1792), 3 Bro. C. C. 595; *Re Phelps, Ex parte Fripp* (1846), De G. 293; see *Davis v. Tollemache* (1856), 2 Jur. (N. S.) 1181; compare *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769, 777, 781, C. A. (covenant to settle after-acquired property); affirmed, *sub nom. Clough v. Samuel*, [1905] A. C. 442.

(c) *Dart, Vendors and Purchasers*, 7th ed., p. 785; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 305. If the vendor becomes bankrupt, the liability is provable in the bankruptcy, and if not proved will be discharged; see *Hardy v. Fothergill* (1888), 13 App. Cas. 351. *Davis v. Tollemache*, *supra*, at p. 1185, on this point is not now law; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 199; and, as to the covenant for further assurance, see p. 467, *ante*.

(d) Where the original conveyance has been obtained by fraud, an assignee for value without notice of the fraud can sue on the covenants for title, although the original covenantee could not do so (*David v. Sabin* [1893] 1 Ch. 523, C. A.).

(e) *Middlemore v. Goodale* (1638), Cro. Car. 503; *King v. Jones*, *supra* (covenant for further assurance); *Campbell v. Lewis* (1820), 3 B. & Ald. 392 (covenant for quiet enjoyment); see *Noke v. Awder* (1595), Cro. Eliz. 373, 436. As to copyholds, see *Riddell v. Riddell* (1835), 7 Sim. 529, 535. The covenantee should, however, have an estate in the land at the time of the covenant (*Dart, Vendors and Purchasers*, 7th ed., p. 787). As to the necessity for the subsequent purchaser taking the estate of the original covenantee so as to create the privity of estate which enables the covenant to run with the land, see *Roach v. Wadham* (1805), 6 East, 289; *Onward Building Society v. Smithson*, [1893] 1 Ch. 1, C. A.; compare *Webb v. Russell* (1789), 3 Term Rep. 393, 402. Where the original conveyance is to a grantee to uses, the covenants should be made with him, and they then follow the uses (1 Williams, *Vendor and Purchaser*, 2nd ed., p. 660). But it is not essential that the covenantor should himself have an estate in the land; hence, covenants for title entered into by a person who is not a conveying party run with the land, provided there is privity of estate between the successive owners (*Fakenham's Case* (1368), Y. B. 42 Edw. 3, fo. 3, pl. 14, cited Co. Litt. 385 a; Third Report of Real Property Commissioners, p. 52; *Dart, Vendors and Purchasers*, 7th ed., p. 786; see, *contra*, Sugden, *Vendors and Purchasers*, 14th ed., p. 386).

(f) *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), s. 7. The benefit of the implied covenant "shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested" (*ibid.*, s. 7 (6); *David v. Sabin*, *supra*).

(g) See 1 Williams, *Vendor and Purchaser*, 2nd ed., p. 661; *Rogers v. Hosegood*, [1900] 2 Ch. 388, 404, C. A.

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Benefits
Enjoyed
with the
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original purchaser in that part, is entitled to sue on the covenants in respect of his part (*h*); and similarly a subsequent owner of part of the original estate—such as a life estate (*i*), or an undivided share (*k*)—can sue. Where the covenant for right to convey has been broken, and the original covenantee has not sued on it, his successors in title may do so notwithstanding that it is not a continuing covenant (*l*).

SECT. 2.—Rectification.

Mistake.

844. Where, owing to mutual mistake (*m*), the conveyance does not operate to carry out the intentions of the parties, as where, for example, the land conveyed is less (*n*) or more (*o*) than was comprised in the contract, or there is an error in the limitations (*p*), or the vendor's covenants for title are wider than the contracting parties intended (*q*), or there has been a common mistake in the description of an easement (*r*), or a covenant has been inserted to which the parties had not agreed (*s*), the court, upon sufficient evidence of the mistake (*t*), will rectify the conveyance (*a*), and will

(*h*) *Twynam v. Pickard* (1818), 2 B. & Ald. 105; *Rogers v. Hosegood*, [1900] 2 Ch. 388, 396, C. A. The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7, cited in note (*f*), p. 469, *ante*, is declaratory of the law.

(*i*) *Noble v. Cass* (1828), 2 Sim. 343.

(*k*) *Badeley v. Vigurs* (1854), 4 E. & B. 71.

(*l*) *Kingdon v. Nottle* (1815), 4 M. & S. 53; explained in *Spoor v. Green* (1874), L. R. 9 Exch. 99, 111; see p. 465, *ante*.

(*m*) *May v. Platt*, [1900] 1 Ch. 616, 623; see *Sluck v. Hancock* (1912), 107 L. T. 14. Where the conveyance is not in accordance with the contract, it seems that the mistake of one party is sufficient (*Ellis v. Hills and Brighton and Preston A. B. C. Permanent Benefit Building Society* (1892), 67 L. T. 287). As to mistake generally, see title **MISTAKE**, Vol. XXI., pp. 1 *et seq.*; as to rectification, see *ibid.*, pp. 9 note (*e*), 11 *et seq.*; title **SETTLEMENTS**, pp. 545, 546, *post*. Cases of rectification usually arise on settlements. As to conditions relating to misdescription, see pp. 328 *et seq.*, *ante*.

(*n*) *White v. White* (1872), L. R. 15 Eq. 247, where it was held that the order for rectification was sufficient to pass the legal estate in the additional land, without a further conveyance. As to vesting orders, see p. 433, *ante*.

(*o*) *Beaumont v. Bramley* (1822), Turn. & R. 41; *Exeter (Marquis) v. Exeter (Marchioness)* (1838), 3 My. & Cr. 321; *Mortimer v. Shortall* (1842), 2 Dr. & War. 363; *Beale v. Kyte*, [1907] 1 Ch. 564; see *Tyler v. Beversham* (1874), Cas. temp. Finch, 80; *Thomas v. Davis* (1757), 1 Dick. 301; *Leuty v. Hillas* (1858), 2 De G. & J. 110.

(*p*) *Re Bird's Trusts* (1876), 3 Ch. D. 214; *Hanley v. Pearson* (1879), 13 Ch. D. 545; see *Re Tringham's Trusts*, *Tringham v. Greenhill*, [1904] 2 Ch. 487; and, as to limitations in equity, compare *Ethel and Mitchells and Butlers' Contract*, [1901] 1 Ch. 945; title **EQUITY**, Vol. XIII., p. 95, note (*c*).

(*q*) *Coldoot v. Hill* (1662), 1 Cas. in Ch. 15; *Feilder v. Studley* (1674), Cas. temp. Finch, 90; *Stait v. Fenner*, [1912] 2 Ch. 504, 516, 519; *Fenner v. McNab* (1912), 107 L. T. 124.

(*r*) *Cowen v. Truefitt, Ltd.*, [1899] 2 Ch. 309, C. A.

(*s*) *Rob v. Butterwick* (1816), 2 Price, 190, where the court ordered a fresh conveyance to be executed without the covenant objected to.

(*t*) For this purpose parol evidence is admissible (*May v. Platt*, *supra*, at p. 621). But if the contract is embodied in a written agreement, the court does not admit parol evidence to show that the written agreement did not express the real intention of the parties (*ibid.*; *Thompson v. Hickman*, [1907] 1 Ch. 550, 561); and see, generally, title **EVIDENCE**, Vol. XIII., p. 568.

(*a*) *Ellis v. Hills and Brighton and Preston A. B. C. Permanent Benefit Building Society*, *supra*.

direct that a copy of the order to rectify be indorsed on the conveyance (b). The claim to rectification must be made promptly on the mistake being discovered (c).

SECT. 2.
Rectifica-
tion.

SECT. 3.—*Rescission.*

845. After completion of the contract, the transaction is at an end as between vendor and purchaser, and, as a general rule, no action, either at law or in equity, can be maintained by either party against the other for damages or compensation on account of errors as to quantity or quality of the property sold, unless such error amounts to a breach of some contract or warranty contained in the conveyance itself, or unless some fraud has been practised on the purchaser (d).

In general
completion
is final.

846. If, however, the transaction has been induced by fraud, or misrepresentation amounting to fraud (e), or by mutual mistake of a fundamental character (f), the court will order a reconveyance of

Fraud or
fundamental
mistake.

(b) *White v. White* (1872), L. R. 15 Eq. 247. The court may in a proper case treat the instrument as though already rectified; see title EQUITY, Vol. XIII., p. 62, note (r).

(c) *Beale v. Kyte*, [1907] 1 Ch. 564, questioning *Bloomer v. Spittle* (1872), L. R. 13 Eq. 427; see, further, title EQUITY, Vol. XIII., pp. 166 *et seq.*

(d) *Joliffe v. Baker* (1883), 11 Q. B. D. 255, 267, 269. But the purchaser can be compelled to restore land in excess of that purported to be conveyed to him, notwithstanding that the error has arisen through the vendor's failure to mark out plots (*Mariott v. Reid* (1900), 82 L. T. 369); and, where the contract provides for compensation, this stipulation is not discharged by the conveyance, and compensation can be recovered even after conveyance (see p. 331, *ante*), and, after conveyance, damages can be recovered for breach of a collateral stipulation, such as an agreement to finish a house (*Saunders v. Cockrill* (1902), 87 L. T. 30).

(e) *Bree v. Holbeck* (1781), 2 Doug. (K. B.) 654; *Berry v. Armistead* (1836), 2 Keen, 221; *Wilde v. Gibson* (1848), 1 H. L. Cas. 605, 633; *Brownlie v. Campbell* (1880), 5 App. Cas. 925, *per* Lord SELBORNE, L.C., at p. 937; *Joliffe v. Baker*, *supra*, at pp. 267, 269. It is fraud if the vendor knows and conceals a fact material to the validity of the title (*Edwards v. M'Leay* (1815), Coop. G. 308; on appeal (1818), 2 Swan. 287). Where a vendor made a misstatement as to a matter which he should have investigated—e.g., that copyhold land was freehold—this was held to be legal fraud which entitled the purchaser to rescind after conveyance (*Hart v. Swaine* (1877), 7 Ch. D. 42); but probably there must be actual fraud (*Derry v. Peck* (1889), 14 App. Cas. 337; and see *Soper v. Arnold* (1887), 37 Ch. D. 96, 102, C. A.). The plaintiff cannot obtain rescission if he was from the commencement cognisant of the matters complained of (see *Vigers v. Pike* (1842), 8 Cl. & Fin. 562, 650, H. L.). As to misrepresentation giving a right to rescission of the contract, see *Gibson v. D'Este* (1843), 2 Y. & C. Ch. Cas. 542, 581; *Smith v. Harrison* (1857), 3 Jur. (N. S.) 287; *Tidbitts v. Boulter* (1895), 73 L. T. 534; and see pp. 297 *et seq.*, *ante*; as to mistake, see *Hodson v. Thetard* (1907), 51 Sol. Jo. 482. As to misrepresentation and fraud and mistake generally, see titles MISREPRESENTATION AND FRAUD, Vol. XX., pp. 653 *et seq.* (*ibid.*, p. 745 (as to sales by the court)); MISTAKE, Vol. XXI., pp. 1 *et seq.*

(f) *Brownlie v. Campbell*, *supra*; *Debenham v. Sawbridge*, [1901] 2 Ch. 98. Where, for example, it is discovered after completion that the property belonged to the purchaser (*Bingham v. Bingham* (1748), 1 Ves. Sen. 126); or that at the time of completion it had ceased to exist (*Hitchcock v. Giddings* (1817), 4 Price, 135; see *Jones v. Olifford* (1876), 3 Ch. D. 779, compare *Okill v. Whittaker* (1847), 2 Ph. 338; *Re Tyrell, Tyrell v. Woodhouse* (1900), 82 L. T. 675).

SECT. 3. the land sold (g), and repayment of the purchase-money with
Rescission. interest at 4 per cent. from the date of payment (h). The pur-
 chaser will be entitled to the costs, charges and expenses incident
 to the purchase and conveyance, including the costs of investi-
veyance. gating the title (i), and the costs of the action to set aside the
 conveyance (k).

**Accounts
 against
 purchaser.**

847. The purchaser must account for rents and profits, and, if he has been in possession, is charged with an occupation rent (l); and, if the rents and profits exceed the interest, and there are special circumstances to justify this course, the account is directed to be taken with periodical rests (m). Credit is given to the purchaser for substantial repairs and lasting improvements (n), and he is debited with deterioration (o).

**When
 rescission
 allowed.**

848. The claim to rescind must be made within a reasonable time (p), and before the interests of third parties have intervened (q). Moreover, it must be possible for the parties to the contract to be restored to their original position; the purchaser to receive back his purchase-money (r), and the vendor to receive back the property unimpaired (s). Depreciation when caused by the

(g) *Edwards v. M'Leay* (1818), 2 Swan. 287. As to rescission after conveyance in cases of fraud, see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 741, note (m), 742, notes (n), (o); in cases of mistake, title MISTAKE, Vol. XXI., p. 19. As to setting aside a conveyance in cases of undue influence, see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 103 *et seq.*; and see title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 547.

(h) *Hart v. Swains* (1877), 7 Ch. D. 42; compare title MONEY AND MONEY-LENDING, Vol. XXI., p. 42.

(i) *Edwards v. M'Leay*, *supra*, at p. 289.

(k) *Berry v. Armistead* (1836), 2 Keen, 221.

(l) *Donovan v. Fricker* (1821), Jac. 165; *Trevelyan v. White* (1839), 1 Beav. 588; *Gresley v. Mousley* (1859), 4 De G. & J. 78, C. A.; *Haygarth v. Wearing* (1871), L. R. 12 Eq. 320; and see p. 373, *ante*. But, except, perhaps, where there has been fraud on the part of the purchaser, the account is not taken on the footing of wilful default; see *Howell v. Howell* (1837), 2 My. & Cr. 478; *Parkinson v. Hanbury* (1867), L. R. 2 H. L. 1, 14; *contra*, *Adams v. Swarder* (1863), 2 De G. J. & Sm. 44, 61, C. A., although this seems to be overruled; and see title MORTGAGE, Vol. XXI., p. 200.

(m) *Donovan v. Fricker*, *supra*; *Neesom v. Clarkson* (1845), 4 Haro. 97, 105; see *Frees v. Coke* (1871), 6 Ch. App. 645, 651; and, as to taking accounts with rests, see title MORTGAGE, Vol. XXI., pp. 220 *et seq.* Interest on rents and profits is not charged (*Silkstone and Haigh Moor Coal Co. v. Edey*, [1900] 1 Ch. 167).

(n) *Trevelyan v. White* (1839), 1 Beav. 588; *Neesom v. Clarkson*, *supra*. Old buildings, if incapable of repair, are valued as old materials; but otherwise as buildings standing (*Robinson v. Ridley* (1821), Madd. & G. 2).

(o) *Ex parte Bennett* (1805), 10 Ves. 380, 400.

(p) See title EQUIT, Vol. XIII., pp. 172 *et seq.*

(q) In this respect the principle is the same as where rescission of an executory contract is sought; see *Clough v. London and North Western Rail. Co.* (1871), L. R. 7 Exch. 26, 35, Ex. Ch. The conveyance, like the contract, is valid until the injured party elects to avoid it; see *United Shoe Machinery Co. of Canada v. Brunet*, [1909] A. C. 330, 337, P. C.; title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 738 *et seq.*

(r) *Debenham v. Sawbridge*, [1901] 2 Ch. 98.

(s) *Clarke v. Dickson* (1858), E. B. & E. 148, 154, 155; *Western Bank of Scotland v. Addie*, *Addie v. Western Bank of Scotland* (1867), L. R. 1 Sc. & Div. 145, 159, 165; *Urquhart v. Macpherson* (1878), 3 App. Cas.

vendor himself is no bar to rescission (*t*), nor where it can be made good by compensation (*u*).

The contract cannot, however, be rescinded in part and stand good for the residue: if it cannot be rescinded as a whole, it cannot be rescinded at all (*a*).

SMOZ. 3.
Rescission.

Extent of
rescission.

849. A right to rescind a sale or purchase of land may be enforced by the personal representatives of the contracting party, or his trustee in bankruptcy (*b*), and, in the case of the vendor, by his devisee (*c*), or an assignee of his whole interest in the land (*d*). Parties.

Conversely, a right of rescission may be exercised against the devisees or representatives (*e*), the assigns, other than those purchasing for value without notice (*f*), or the trustee in bankruptcy (*g*) of the opposite party.

831, 837, P. C. ; *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, 1278 ; *Rees v. De Bernardy*, [1896] 2 Ch. 437, 446. If the right of rescission cannot be exercised, the injured party must have recourse to his remedy in damages in an action of deceit.

(*t*) See *Phosphate Sewage Co. v. Hartmont* (1877), 5 Ch. D. 394, C. A. ; *Rees v. De Bernardy*, *supra*, at p. 446.

(*u*) *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, 456, C. A.

(*a*) *Sheffield Nickel Co. v. Unwin* (1877), 2 Q. B. D. 214, 223. As to the form and extent of relief by rescission generally, see title MISREPRESENTATION AND FRAUD, Vol. XX., pp. 742 *et seq.*

(*b*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 ; and, as to rights of action vesting under that provision in the trustee in bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 133 *et seq.*

(*c*) See *Stump v. Gaby* (1852), 2 De G. M. & G. 623, 630 ; *Gresley v. Mousley* (1859), 4 De G. & J. 78, C. A.

(*d*) See title EQUIT, Vol. XIII., p. 90 ; and, as to assignment of rights of action, see title CHOSSES IN ACTION, Vol. IV., p. 402 ; *Defries v. Milne*, [1913] 1 Ch. 98, C. A.

(*e*) *Trevelyan v. White* (1839), 1 Beav. 588 ; *Charter v. Trevelyan* (1844), 11 Cl. & Fin. 714, H. L. ; *Bridgeman v. Green* (1757), Wilm. 58, 64, 65 ; *Huguenin v. Baseley* (1807), 14 Ves. 273, 289.

(*f*) *Trevelyan v. White*, *supra* ; *Charter v. Trevelyan*, *supra*.

(*g*) As to goods, see *Re Shackleton, Ex parte Whittaker* (1875), 10 Ch. App. 446 ; *Re Eastgate, Ex parte Ward*, [1905] 1 K. B. 465 ; *Tilley v. Bowman, Ltd.* [1910] 1 K. B. 745 ; title SALE OF GOODS, note (*l*), p. 196, *ante*.

SALFORD HUNDRED COURT.

See COURTS ; INTERPLEADER.

SALMON.

See FISHING.

SALVAGE.

See ADMIRALTY; LIEN; PRIZE LAW AND JURISDICTION; SHIPPING
AND NAVIGATION; SOLICITORS.

SANITATION.

See LOCAL GOVERNMENT; NUISANCE; PUBLIC HEALTH AND LOCAL
ADMINISTRATION; SEWERS AND DRAINS.

SATISFACTION.

See CONTRACT; JUDGMENTS AND ORDERS; MORTGAGE; REAL
PROPERTY AND CHATTELS REAL.

SATISFACTION IN EQUITY.

See EQUITY; WILLS.

SATISFIED TERMS.

See REAL PROPERTY AND CHATTELS REAL.

SAVINGS BANKS.

See BANKERS AND BANKING.

SCANDALUM MAGNATUM.

See LIBEL AND SLANDER.

SCAVENGING.

See PUBLIC HEALTH AND LOCAL ADMINISTRATION.

SCHEME.

See CHARITIES.

SCHEME OF ARRANGEMENT.

See BANKRUPTCY AND INSOLVENCY ; COMPANIES ; RAILWAYS AND
CANALS.

SCHOOLS AND SCHOOLMASTERS.

See EDUCATION.

SCIENTER.

See ANIMALS.

SCIENTIFIC INSTITUTIONS.

See LITERARY AND SCIENTIFIC INSTITUTIONS.

SCIRE FACIAS.

See CROWN PRACTICE.

SCOTTISH PEERS.

See CONSTITUTIONAL LAW ; PARLIAMENT ; PEERAGES AND DIGNITIES.

SCULPTURE.

See COPYRIGHT AND LITERARY PROPERTY.

SEA AND SEASHORE.

See BOUNDARIES, FENCES, AND PARTY WALLS ; WATERS AND
WATERCOURSES.

SEAL FISHERIES.

See FISHERIES.

SEALING.

See CONTRACTS; DEEDS AND OTHER INSTRUMENTS.

SEAMEN.

See ADMIRALTY; MASTER AND SERVANT; SHIPPING AND NAVIGATION.

SEARCH WARRANT.

See CRIMINAL LAW AND PROCEDURE; POLICE.

SEARCHES.

See SALE OF LAND.

SECONDARY.

See SHERIFFS AND BAILIFFS.

SECRET COMMISSIONS.

See AGENCY; BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS;
CRIMINAL LAW AND PROCEDURE.

SECRETARIES OF STATE.

See CONSTITUTIONAL LAW.

SECURED CREDITOR.

See BANKRUPTCY AND INSOLVENCY; EXECUTORS AND ADMINISTRATORS.

SECURITY FOR COSTS.

See COUNTY COURTS; COURTS; PARLIAMENT; PRACTICE AND
PROCEDURE.

SEDITION.

See CONSTITUTIONAL LAW; CRIMINAL LAW AND PROCEDURE.

SEDUCTION.

See CRIMINAL LAW AND PROCEDURE; MASTER AND SERVANT.

SEEDS.

See AGRICULTURE.

SEISIN.

See REAL PROPERTY AND CHATTELS REAL.

SELECT COMMITTEE.

See PARLIAMENT.

SELECT VESTRY.

See ECCLESIASTICAL LAW.

SELF-DEFENCE.

See CRIMINAL LAW AND PROCEDURE.

SEPARATE ESTATE OF MARRIED WOMEN.

See HUSBAND AND WIFE; PERSONAL PROPERTY; REAL PROPERTY
AND CHATTELS REAL.

SEPARATION.

See HUSBAND AND WIFE.

SEQUESTRATION.

See ECCLESIASTICAL LAW; EXECUTION.

SERVICE, CONTRACTS OF.

See CRIMINAL LAW AND PROCEDURE; MASTER AND SERVANT.

SERVICE OF PROCESS.

See ADMIRALTY; BANKRUPTCY AND INSOLVENCY; COMPANIES; CONFLICT OF LAWS; COUNTY COURTS; COURTS; CROWN PRACTICE; EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE; LIMITATION OF ACTIONS; MAGISTRATES; MAYOR'S COURT, LONDON; PARLIAMENT; PRACTICE AND PROCEDURE.

SERVITUDES.

See EASEMENTS AND PROFITS À PRENDRE.

SESSIONS.

See COURTS; INTOXICATING LIQUORS; MAGISTRATES.

SESSIONS OF PARLIAMENT.

See PARLIAMENT.

SET-OFF AND COUNTERCLAIM.

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NOTE.—*This Title has been revised by the Editors, and the law since the Judicature Acts as to the right of set-off is stated more narrowly than in the Author's original article.*

<i>For Action</i> - - - -	<i>See title</i>	ACTION.
<i>Administration</i> - - - -	"	EXECUTORS AND ADMINISTRATORS.
<i>Assignee of Debt</i> - - - -	"	CHOSSES IN ACTION.
<i>Auctioneers</i> - - - -	"	AUCTION AND AUCTIONEERS.
<i>Bankruptcy</i> - - - -	"	BANKRUPTCY AND INSOLVENCY.
<i>Choses in Action</i> - - - -	"	CHOSSES IN ACTION.
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<i>Contract, Discharge of</i> - - - -	"	CONTRACT.
<i>Counterclaim in Admiralty</i> - - - -	"	ADMIRALTY.
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<i>Deduction from Price</i> - - - -	"	SALE OF GOODS.
<i>Equitable Set-off</i> - - - -	"	EQUITY.
<i>Equity, Principles of</i> - - - -	"	EQUITY.
<i>Executors and Administrators</i> - - - -	"	EXECUTORS AND ADMINISTRATORS.
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<i>Landlord and Tenant</i> - - - -	"	LANDLORD AND TENANT.
<i>Mortgage</i> - - - -	"	MORTGAGE.
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<i>Practice and Procedure</i> - - - -	"	COUNTY COURTS; COURTS; MAYOR'S COURT, LONDON; PRACTICE AND PROCEDURE.
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<i>Set-off in Equity</i> - - - -	"	EQUITY.
<i>Solicitors</i> - - - -	"	SOLICITORS.
<i>Sureties</i> - - - -	"	GUARANTEE.
<i>Trustees</i> - - - -	"	TRUSTS AND TRUSTEES.
<i>Winding-up of Companies</i> - - - -	"	COMPANIES.

Part I.—Definition and Nature.

Set-off.

850. When A. has a claim for a sum of money against B. and B. has a cross-claim for a sum of money against A., such that B. is by law to the extent of his cross-claim entitled to be absolved from payment of A.'s claim, and to plead his cross-claim as a defence to an action by A. for the enforcement of his claim, then B. is said to have to the extent of his cross-claim a right of set-off against A.

PART I.
Definition
and
Nature.

851. When A. has a claim of any kind against B. and brings an action to enforce such claim, and B. has a cross-claim of any kind against A. which by law he is entitled to raise and have disposed of in the action brought by A., then B. is said to have a right of counterclaim (a).

Counterclaim.

852. Set-off is a ground of defence. If established it affords an answer to the plaintiff's claim wholly or *pro tanto*. Counterclaim, as distinguished from set-off, affords no defence to the plaintiff's claim, but is a weapon of offence which enables a defendant to enforce a claim against the plaintiff as effectually as in an independent action (b).

Distinction
between set-
off and
counterclaim.

853. Set-off is entirely distinct from payment. Payment is satisfaction of a claim made by or on behalf of a person against whom the claim is brought. The person paying makes performance of the obligation in respect of which the claim arises, which thereby

Distinction
between set-
off and pay-
ment.

(a) Before the Judicature Acts (see title COURTS, Vol. IX., p. 51, note (g)), set-off was confined to money claims, liquidated or unliquidated, and was subject to many technical restrictions; see p. 489, *post*. As to whether the Judicature Acts and the Rules of the Supreme Court have made any difference in this respect, see p. 491, *post*. Counterclaim is not so confined. Any claim in respect of which the defendant could bring an independent action against the plaintiff can be enforced by counterclaim, subject only to the limitation that it must be such as can conveniently be tried with the plaintiff's claim; see p. 514, *post*. Thus, not only claims for money, but other claims—for example, a claim for an injunction or for specific performance or for a declaration—may be the subject of a counterclaim. It follows that most claims which can be made the subject of a set-off can also be made the subject of a counterclaim, but the converse proposition does not hold good; see note (f), p. 484, and pp. 491, 492, *post*.

(b) "Set-off and counterclaim may be, and commonly are, essentially different; and it becomes necessary, therefore, to see in each case whether a counterclaim amounts in effect to no more than a set-off, or whether it is in effect a cross-action. . . . The effect of these two modes of proceeding must, therefore, be sought in the statutes by which they were introduced, and in their results; and when these are looked at, it will be seen how essentially these two forms of procedure differ. By the Statutes of Set-off this plea is available only where the claims on both sides are in respect of liquidated debts, or money demands which can be readily and without difficulty ascertained. The plea can only be used in the way of defence to the plaintiff's action, as a shield, not as a sword. Though the defendant succeeded in proving a debt exceeding the plaintiff's demand, he was not entitled to recover the excess; the effect was only to defeat the plaintiff's action, the same as though the debt proved had been equal to the amount of the claim established by the plaintiff, and no more. . . . In a case of set-off, the claim being for liquidated damages, its existence and its amount must be taken to be known to the plaintiff, who should have given credit for it in his action against the defendant. This reasoning does not apply to a counterclaim, the effect of which, as distinguished from a mere set-off, is altogether different. It is, as I have already pointed out, to all intents and purposes an action by the defendant against the plaintiff. It is not confined to debts or liquidated damages. It is not even necessary that the claim should be analogous to that of the plaintiff. A claim founded on tort may be opposed to one founded on contract, or *vice versa*. But the most striking difference is that the counterclaim operates not merely as a defence, as does the set-off, but in all respects as an independent action by the defendant against the plaintiff" (*Stooke v. Taylor* (1880) 5 Q. B. D. 569, *per* COCKBURN, C.J., at pp. 575, 576).

PART I.
Definition
and
Nature.

becomes extinguished. Set-off exempts a person entitled thereto from making any satisfaction of a claim brought against him, or of so much of the claim as equals the amount which he is entitled to set off, and thus to the extent of his set-off he is discharged from performance of the obligation in respect of which the claim arises (c).

Pleading
payment and
set-off.

854. Where there has been payment, the party against whom the claim is brought pleads payment or accord and satisfaction (d), which in effect alleges that the claim no longer exists. A plea of set-off, on the other hand, in effect admits the existence of the claim, and sets up a cross-claim as being ground on which the person against whom the claim is brought is excused from payment and entitled to judgment on the plaintiff's claim. Until judgment in favour of the defendant on the ground of set-off has been given, the plaintiff's claim is not extinguished (e).

Part II.—Set-off.

SECT. 1.—When Set-off Available.

When set-off
available.

855. A set-off is available to a defendant only when the rules of procedure of the court in which the plaintiff brings his action allow a set-off to be pleaded, and the mode in which a plea of set-off is to be raised is also determined by those rules (f).

Jurisdiction
of courts to
entertain
set-off.

856. No court has jurisdiction to entertain a defence of set-off unless the subject of the set-off is in its nature such that it might be made the subject of a cross-action or counterclaim in that court (g).

(c) Tender of the difference between the amount claimed and the set-off was formerly held not to be a good tender; see title *CONTRACT*, Vol. VII., p. 419; see, however, pp. 517, 518, *post*. A defendant who pays into court the difference between the amount of the claim and the set-off he succeeds in establishing 's in the same position as a defendant who has paid into court the whole amount recovered.

(d) See title *PLEADING*, Vol. XXII., p. 447, note (d).

(e) *Re Hiram Maxm Lamp Co.*, [1903] 1 Ch. 70. If there is a doubt whether the facts show payment or set-off, both payment and set-off should be pleaded as alternative defences. Both defences must be specially pleaded; see title *PLEADING*, Vol. XXII., p. 447, note (d); *Fidgett v. Penny* (1834), 1 Cr. M. & R. 108; *Thomas v. Cross* (1852), 7 Exch. 728; *Cooper v. Moorcraft* (1838), 3 M. & W. 500.

(f) This is part of the general rule that the pleadings in a court are governed by the rules of procedure of that court; see title *PLEADING*, Vol. XXII., p. 419. For example, a Canadian Court of Admiralty has not the same jurisdiction to entertain a plea of set-off as the Admiralty Division of the High Court in England (*Bow, McLachlan & Co. v. Ship "Camosun,"* [1909] A. C. 597, 603, 608, P. C.; see *The Don Francisco* (1862), Lush. 468). As to the form in which a set-off is pleaded in the English courts, see p. 509, *post*.

(g) *Bow, McLachlan & Co. v. Ship "Camosun," supra*, where the Privy Council held that a claim for unliquidated damages could not be set off in an action *in rem* in a Canadian Court of Admiralty, because such a claim could not have been entertained by that court as a counterclaim in such

857. Set-off should not be pleaded in respect of a sum for which the plaintiff has properly given credit in his claim (*h*).

SECT. 1.
When
Set-off
Available.

When not
available.
Defendant's
rights in
respect of
set-off.

858. The right of set-off cannot be waived (*i*). A defendant may, however, be estopped by his conduct from relying on a set-off. Thus a defendant to whom the plaintiff had produced an account which the defendant admitted to be correct was not allowed, after a long period of acquiescence in the correctness of the account, to claim a set-off when sued for a sum debited in such account (*k*). Similarly, where a defendant had given credit in an account with the plaintiff under a mistake, and after discovering such mistake had allowed the plaintiff to remain in ignorance of it, he was not allowed when sued by the plaintiff to set off the sum for which credit had been so given (*l*).

A defendant cannot be compelled to plead a set-off. He can, if he wishes, enforce his claim by independent action (*m*).

SECT. 2.—*Essential Characteristics of Set-off.*

SUB-SECT. 1.—*As to Nature of Claim.*

859. Apart from agreement all rights of set-off are purely the creation of statute or rules of court (*a*).

Nature of
right.

an action. There are claims which, though sufficient to found a set-off, cannot be made the subject of a counterclaim, for example, some debts not enforceable until a statutory requirement has been fulfilled (see pp. 493, 504, *post*), or a claim against the agent of an undisclosed principal (see pp. 495, 505, *post*).

(*h*) *Lovejoy v. Cole*, [1894] 2 Q. B. 861.

(*i*) Thus, a defendant who borrows from his debtor on an express promise that the loan shall be repaid without deduction may, if sued for repayment of the loan, set off an antecedent debt (*Taylor v. Okey* (1806), 13 Ves. 180). A broker sued for sums collected for his principal, which he has agreed to pay over without deduction, may set off a debt due from the principal (*McGillivray v. Simson* (1826), 9 Dow. & Ry. (κ. B.) 35; see also *Lechmere v. Hawkins* (1798), 2 Esp. 626; *Baillie v. Edwards* (1848), 2 H. L. Cas. 74).

(*k*) *Baker v. Langhorn* (1816), 6 Taunt. 519; and see title AGENCY, Vol. I., p. 210.

(*l*) *Skyring v. Greenwood* (1825), 4 B. & C. 281; compare *R. v. Blenkinsop*, [1892] 1 Q. B. 43, 46, 47; and see title ESTOPPEL, Vol. XIII., pp. 388, 396.

(*m*) *Laing v. Chatham* (1808), 1 Camp. 252; *Jennet v. Morris* (1861), 3 De G. F. & J. 45, 54, C. A.; *Davis v. Hedges* (1871), L. R. 6 Q. B. 687; *Re Sturmeys Motors, Ltd.*, *Rattray v. Sturmeys Motors, Ltd.*, [1913] 1 Ch. 16.

(*a*) "Set-off is the creature of statute; to be allowed a set-off you must statutory right" (*Liskeard and Looe Rail. Co. v. Liskeard and Caradon Rail. Co. and Foster* (1901), 18 T. L. R. 1, *per* COZENS-HARDY, J., citing JESSEL, M.R.). "Set-off and counterclaim are both the creation of statute" (*Stooke v. Taylor* (1880), 5 Q. B. D. 569, *per* COCKBURN, C.J., at p. 575). The first statute which gave to the defendant in an action a right of set-off was passed in 1729 (2 Geo. 2, c. 22), and provided as follows:—"Where there are mutual debts between the plaintiff and defendant, or if either party sue, or be sued, as executor or administrator, where there are mutual debts between the testator or the intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator, or his intestate is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon such general issue" (*ibid.*, s. 13). This enactment was only

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Character-
istics of
Set-off.

temporary, but it was re-enacted by stat. (1735) 8 Geo. 2, c. 24, which enacted that "mutual debts may be set against each other, either by being pleaded in bar, or given in evidence on the general issue, in the manner therein mentioned, notwithstanding that such debts are deemed in law to be of a different nature, unless in cases where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty; and in all cases where either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same hath accrued, or shall accrue by reason of any such penalty, the debt intended to be set off shall be pleaded in bar, in which plea shall be shown how much is truly and justly due on either side: and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff after one debt being set against the other as aforesaid." These two statutes, which were repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), s. 4, presumably on the ground stated in the preamble that the subject-matter is provided for by the Judicature Acts and rules made pursuant thereto (see p. 487, *post*), are known as the "Statutes of Set-off," but before they were passed there already existed a right of set-off in bankruptcy which had been created by statutory enactment in somewhat wider language than that used in the statutes mentioned above. The first statute that gave this right in bankruptcy was stat. (1705) 4 & 5 Anne, c. 4. Then by stat. (1718) 5 Geo. 1, c. 24, it was provided that where it should appear to the Commissioners in Bankruptcy "that there hath been mutual credit given by the bankrupt and any other person" at any time before the bankruptcy, the Commissioners should state the account between them, and only the balance shown on taking the account should be paid or claimed. This Act was followed, at a date between the Statutes of Set-off, by stat. (1732) 5 Geo. 2, c. 30, which provided (*ibid.*, s. 28) that where it should appear "that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person" at any time before bankruptcy, then the Commissioners or the assignees of the bankrupt should "state the account between them and one debt shall be set against another" and only the balance should be claimed or paid. Thus it will be seen that the right of set off in an action, with which alone this title deals, is different in origin from the right of set-off in bankruptcy, as to which see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 31, 211 *et seq.* Quite apart from statutory enactment, equity allowed a set-off where it could find an agreement to set off, which it did on very slender grounds, to prevent circuity of action and multiplicity of suits; see title EQUITY, Vol. XIII., pp. 161 *et seq.* In taking this course equity was influenced by the statutes relating to bankrupts mentioned above (*Downam v. Matthews* (1722), Prec. Ch. 580), but the right was recognised quite apart from cases of bankruptcy and existed before the passing of these statutes (*Curson v. African Co.* (1683), 1 Vern. 121; *Peters v. Soame* (1702), 2 Vern. 428; *Freeman v. Lomas* (1851), 9 Hare, 109). The Statutes of Set-off were construed strictly by the courts of common law, and it was held that a claim in damages could not be the subject of a set-off, but that "debts to be set off must be such as *indebitatus assumpsit* will lie for" (*Howlet v. Strickland* (1774), 1 Cowp. 56, *per* ASHHURST, J.; and see the cases cited in note (a), p. 490, *post*). Similarly, it was held that a defendant could not plead a set-off where the plaintiff's claim was for unliquidated damages (*Grant v. Royal Exchange Assurance Co.* (1816), 5 M. & S. 439, and cases cited p. 491, *post*). This doctrine was not applied to set-off in bankruptcy, the word "credit" used in the Bankruptcy Acts being held *ex vi termini* to include a claim for unliquidated damages (see *Cumming v. Forester* (1813), 1 M. & S. 494, *per* Lord ELLENBOROUGH, C.J., at p. 499). The result is that the law now governing set-off in bankruptcy (see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 211 *et seq.*) is more liberal than that which determines the right of set-off allowed to the defendant in an action, and the decisions in the old equity reports as to set-off allowed in an action brought by the assignee of a bankrupt are not always in point in discussing the law of

860. A set-off may be created by agreement, and on this ground a claim may be set off which could not be pleaded under the statutory law (*b*). Such set-off is allowed even though the evidence of the agreement be slight (*c*), but there must be some evidence on which the court can find an agreement express or implied (*d*). A course of dealing between the parties by which mutual debts have been set off is evidence from which the court will imply such an agreement (*e*). But a set-off cannot be based on a custom of which the plaintiff was not aware (*f*). Such a set-off is not allowed if there is no consideration to support the agreement (*g*).

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istics of
Set-off.

Set-off by
agreement.

861. There can be no set-off to a claim which the law forbids to be assigned or incumbered (*h*).

Inalienable
claim.

862. The Statutes of Set-off (*i*) have been repealed, and the right of set-off as it now exists is that conferred by the Rules of the Supreme Court (*j*), and is as follows :—

When set-off
allowed.

A defendant in an action may set off or set up by way of counter-

set-off in cases not connected with bankruptcy. Fresh grounds of equitable set-off (see title EQUITY, Vol. XIII., pp. 161 *et seq.*) arose after the passing of the statutes owing to the equitable construction put upon the statutes by courts of equity. If one debt was legal and the other equitable, a set-off was allowed (*Hunt v. Jessel* (1854), 18 Beav. 100). Cases were held to be within the equity of the statutes though not within their actual words. On the other hand, courts of equity, following the spirit of the statutes, would not allow a man to set off, even at law, where there was an equity to prevent him doing so, that is to say, where the rights, although legally mutual, were not equitably mutual (see *Re Whitehouse & Co.* (1878), 9 Ch. D. 595, *per JESSEL, M.R.*, at p. 597). By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 75, it was provided that pleas of set-off should be taken distributively, and that, if such a plea were found true by the jury as to part of the cause of action, a verdict should pass for the defendant as to that part of the cause of action and for the plaintiff as to the rest. By the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 83, a defendant in an action in a court of law was allowed to plead equitable defences, and in this way it became possible to raise an equitable set-off in courts of law as well as in courts of equity. Apart from the various statutes relating to bankruptcy, the next statute which affected the law of set-off was the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 of which made it possible to set up a legal or an equitable set-off in any Division of the High Court, even in the Admiralty Division (*Bow, McLachlan & Co. v. Ship "Camosun,"* [1909] A. C. 597, 608, P. C.). Shortly afterwards, by the Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10, the rules in bankruptcy as to right of set-off were made applicable in the winding up of companies: see *Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95, C. A.; title COMPANIES, Vol. V., pp. 482, 502 *et seq.*, 515. (*b*) *Wood v. Akers* (1797), 2 Esp. 594; *Kinnerley v. Hossack* (1809), 2 Taunt. 170.

(*c*) *Dowman v. Matthews* (1722), Prec. Ch. 580; *Unity Joint Stock Banking Association v. King* (1858), 25 Beav. 72; *Jeffer v. Wood* (1723), 2 P. Wms. 128; *Cuxon v. Chadley* (1824), 5 Dow. & Ry. (K. B.) 417 (agreement binding though not in writing).

(*d*) *Freeman v. Lomas* (1851), 9 Hare, 109; *Hunt v. Jessel*, *supra*.

(*e*) *Jeffer v. Wood*, *supra*; *Bamford v. Harris* (1816), 1 Stark. 343.

(*f*) *Blackburn v. Mason* (1893), 68 L. T. 510, C. A.

(*g*) *Birkbeck Building Society v. Birkbeck* (1913), 29 T. L. R. 218.

(*h*) *Gathercole v. Smith* (1881), 7 Q. B. D. 626, C. A. A defendant sued for a pension created by the Incumbents Resignation Act, 1871 (34 & 35 Vict. c. 44), s. 10, cannot plead a set-off (*ibid.*).

(*i*) See note (*a*), p. 485, *ante*.

(*j*) R. S. C., Ord. 19, r. 3; Ord. 21, r. 17. R. S. C. (1883), Ord. 19, r. 3.

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istics of
Set-off.

claim against the claim of the plaintiff any right or claim whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross-action, so as to enable the court to pronounce a final judgment in the same action both on the original and on the cross claim. But the court or a judge may, on the application of the plaintiff before trial, if in the opinion of the court or a judge such set-off cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof (*k*).

Where in any action a set-off or counterclaim is established as a defence against the plaintiff's claim, the court or a judge may, if the balance is in favour of the defendant, give judgment for the defendant for such balance (*l*), or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case (*m*).

Claims must
arise in same
right.

863. Set-off can only arise where the claims to be set one against

only differs from the R. S. C. (1875), Ord. 9, r. 3, by omitting the words "statement of claim in" before the words "cross action." The Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), repealed stat. (1729) 2 Geo. 2, c. 22, and stat. (1735) 8 Geo. 2, c. 24, as far as they related to the Supreme Court of Judicature, subject to the qualification that "any jurisdiction or principle or rule of law or equity established or confirmed, or right or privilege acquired" under those enactments, was not to be affected by the repeal (Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), s. 4 (1)(a)), and that the repeal was not to "operate in respect of any court other than the Supreme Court of Judicature in England" (*ibid.*, s. 4 (2)). The Common Law Procedure Acts, 1852 (15 & 16 Vict. c. 76), s. 75, and 1854 (17 & 18 Vict. c. 125), s. 83 (see note (*a*), p. 485, *ante*), were repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), s. 3. Stat. (1729) 2 Geo. 2, c. 22, and stat. (1735) 8 Geo. 2, c. 24, were completely repealed, subject to a similar qualification to that made by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), on the ground stated in the preamble, that the subject-matter thereof had been "provided for by or under the Supreme Court of Judicature Act, 1873, and the Acts amending it, or rules made pursuant thereto"; whilst by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), s. 6 (c), it was provided that the power to make rules contained in the Judicature Act, 1875 (38 & 39 Vict. c. 77), and the Acts amending it should be deemed to extend to the matters contained in and regulated by the enactments thus repealed. The effect of these statutes was considered by the Court of Appeal in *Snelling v. Pulling* (1885), 29 Ch. D. 85, C. A., where BRETT, M.R., at p. 87, laid it down that "the Judicature Acts gave the judges power to make rules having a statutory force," and "though the judges had no power to make rules altering any statute, they had power to make rules dealing with any principle of law which affected rules of procedure and practice." The result appears to be that the present law of set-off, at least so far as the High Court is concerned, depends entirely on R. S. C., Ord. 19, r. 3; Ord. 21, r. 17. The King's Bench Division held in *Bankes v. Jarvis*, [1903] 1 K. B. 549, that the right of set-off is greater under the present rules than before the Judicature Acts were passed; see, further, note (*g*), p. 491, *post*.

(*k*) R. S. C. (1883), Ord. 19, r. 3, reproducing R. S. C. (1875), Ord. 22, r. 10.

(*l*) Probably the court would not do this unless there was a counter-claim for the balance; see *Stooke v. Taylor* (1880), 5 Q. B. D. 569, 576; *Stumore v. Campbell & Co.*, [1892] 1 Q. B. 314, 316, C. A.; but see *Gathercole v. Smith* (1881), 7 Q. B. D. 626, 629, C. A.

(*m*) R. S. C., Ord. 21, r. 17.

the other, whether of the plaintiff or of the defendant, exist in the same right (*n*).

864. In an action for specific performance of a contract for the sale of land the defendant cannot plead a set-off, and it is no ground for refusing specific performance that there is a debt due from the plaintiff to the defendant (*o*), but if the debt is a mortgage debt it may be set off against a claim for the purchase-money (*p*).

And in an action of covenant for a sum payable under a contract which contains a provision that in certain events the defendant may claim a deduction to be ascertained by arbitration, a set-off may be pleaded of a sum which the arbitrator has found to be the proper amount of deduction (*q*).

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istics of
Set-off.

What claims
may not be
pleaded by
way of set-off.

SUB-SECT. 2.—Effect of the Judicature Acts.

865. Before the Judicature Acts (*r*) set-off was only allowed where both the plaintiff's and the defendant's claims were for a legal or an equitable debt (*s*), and was therefore subject to the following limitations:—

Former rights
of set-off.

(1) No set-off was allowed as against a claim which sounded in damages (*t*), either at law or in equity (*u*).

(2) A claim which sounded in damages could not be made the subject of a set-off (*a*).

(*n*) See Statutes of Set-off, note (*a*), p. 485, *ante*; *Freeman v. Lomas* (1851), 9 Hare, 109; *Richardson v. Richardson* (1867), L. R. 3 Eq. 686, 695; *Stammers v. Elliott* (1867), L. R. 4 Eq. 675, 679; (1868), 3 Ch. App. 195, 199; *Middleton v. Pollock, Ex parte Nugee* (1875), L. R. 20 Eq. 29, 34. For example, where a municipal corporation opened three separate accounts with the plaintiff's bank, the first as the corporation, the second as managers of public baths and washhouses, and the third as the local board of health, and were sued for a balance due on the first account, it was held that they could set off sums due to them on the second and third accounts (*Pedder v. Preston Corporation* (1862), 12 C. B. (N. S.) 535), but where a trustee for creditors of a firm to whom an assignment had been made sued for a debt owing to him in respect of the business which had accrued since the assignment, it was held that the defendant could not set off a debt due from the firm (*Hunt v. Jessel* (1854), 18 Beav. 100); see also *Charlton v. Hill* (1831), 5 C. & P. 147 (clerk of racecourse cannot refuse to pay stakes won by plaintiff on ground that plaintiff owes entrance fee in respect of another race). For the exceptions to this rule, see pp. 495 *et seq.*, *post*.

(*o*) *Phipps v. Child* (1857), 3 Drew. 709. If the agent of the vendor without the knowledge of the vendor agrees that the purchaser may deduct from the purchase price a debt due from the agent, such agreement does not bind the vendor and affords no ground of set-off, even though completion has taken place (*Young v. White* (1844), 7 Beav. 506).

(*p*) *Willis v. Bastard* (1853), 4 De G. M. & G. 251, C. A.

(*q*) *Parkes v. Smith* (1850), 15 Q. B. 297; *Murphy v. Glass* (1869), L. R. 2 P. C. 408; *Alcoy and Gandia Railway and Harbour Co., Ltd. v. Greenhill* (1897), 76 L. T. 542; and see title EQUITY, Vol. XIII., p. 163.

(*r*) See title COURTS, Vol. IX., p. 51, note (*g*).

(*s*) Including the amount of a judgment debt or of a verdict for which judgment had not been entered (*Baskerville v. Brown* (1761), 2 Burr. 1229; *Hawkins v. Baynes* (1823), 1 L. J. (O. S.) (K. B.) 167; *Russell v. May* (1828), 7 L. J. (O. S.) (K. B.) 88).

(*t*) *Cooper v. Robinson* (1818), 2 Chit. 161; *Morley v. Inglis* (1837), 4 Bing. (N. C.) 58; *Williams v. Flight* (1842), 2 Dowl. (N. S.) 11; *Atthwooll v. Atthwooll* (1853), 2 E. & B. 23.

(*u*) *Rawson v. Samuel* (1841), Cr. & Ph. 161, 178.

(*a*) *Howlett v. Strickland* (1774), 1 Cowp. 56 (non-delivery of goods);

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istics of
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(8) A claim on a guarantee or an indemnity sounds in damages, and therefore a set-off could not be pleaded to it (b), nor could it be made the subject of a set-off (c), unless the claim was one of indemnity in respect of money already paid (d).

(4) If either the plaintiff's claim or the claim sought to be set off by the defendant accrued by reason of a penalty contained in a bond of specialty, the defendant might plead a set-off, but only by a plea in bar which showed exactly how much was due on either side (e). Therefore a defendant sued on a bond who desired to plead a set-off was required to state in his plea how much he admitted to be due on the bond (f). A defendant could not set off a penalty on a bond, but only such a sum as should be held to be due on the bond (g). If the condition of a bond was to do an act other than payment of money, and the condition was broken, no right of set-off arose (h); but if the condition of the bond was to pay a liquidated sum, or if a contract for payment of a sum for work to be done contained a stipulation for payment of a liquidated sum in the event of non-completion by a certain day, then in an action for such sum a set-off could be pleaded (i), and such a sum could itself be the subject of a set-off (k).

(5) If the plaintiff could frame his claim either in such a way that a set-off could be pleaded, or in such a way that a set-off could not be pleaded, the defendant could plead a set-off if the claim were framed in the former manner (l), but not if it were framed in the latter manner (m). If the plaintiff joined in the same action claims

Freeman v. Hyett (1762), 1 Wm. Bl. 394; *Weigall v. Waters* (1795), 6 Term Rep. 488; *Morley v. Inglis* (1837), 4 Bing. (N. C.) 58; *Williams v. Flight* (1842), 2 Dowl. (N. S.) 11; *Newfoundland Government v. Newfoundland Rail. Co.* (1888), 13 App. Cas. 199, 213, P. C.

(b) See the cases in note (t), p. 489, *ante*.

(c) *Crawford v. Stirling* (1802), 4 Esp. 207; *Pellas v. Neptune Marine Insurance Co.* (1879), 5 C. P. D. 34, C. A.

(d) *Brown v. Tibbits* (1862), 11 C. B. (N. S.) 855; *Hutchinson v. Sydney* (1854), 10 Exch. 438.

(e) Stat. (1735) 8 Geo. 2, c. 24.

(f) *Symmons v. Knox* (1789), 3 Term Rep. 65; *Grimwood v. Barrit* (1795), 6 Term Rep. 460.

(g) For a breach of the condition of a bond for a penalty the plaintiff could only recover the loss sustained by reason of the breach, which was not necessarily equivalent to the penalty; see stat. (1696-7) 8 & 9 Will. 3, c. 11, s. 8; *Collins v. Collins* (1759), 2 Burr. 820; *Nedriffe v. Hogan* (1760), 2 Burr. 1024.

(h) *Hutchinson v. Sturges* (1741), Willes, 261; *Gillingham v. Waskett* (1824), M'Cle, 198; *Davies v. Penton* (1827), 6 B. & C. 216; *Atwooll v. Atwooll* (1853), 2 E. & B. 23. The claim on a bond in such a case sounded in damages.

(i) *Collins v. Collins* (1759), 2 Burr. 820; *Lee v. Lester* (1849), 7 C. B. 1008.

(k) *Fletcher v. Dyche* (1787), 3 Term Rep. 32; *Duckworth v. Alison* (1836), 1 M. & W. 412; *Macintosh v. Midland Counties Rail. Co.* (1845), 14 M. & W. 548; *Legge v. Harlock* (1848), 12 Q. B. 1015. If the delay in completion was due to the plaintiff's own act, the set-off could not be claimed (*Holme v. Guppy* (1838), 3 M. & W. 387; *Russell v. Da Bandeira (Viscount)* (1862), 13 C. B. (N. S.) 149; *Jones v. St. John's College* (1870), L. R. 6 Q. B. 115).

(l) *Thorpe v. Thorpe* (1832), 3 B. & Ad. 580.

(m) *Hardcastle v. Netherwood* (1821), 5 B. & Ald. 93; *Cooper v. Robinson* (1818), 2 Chit. 161.

of both kinds the defendant could plead a set-off to those of the former kind, notwithstanding the joinder (*n*).

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istics of
Set-off.

Effect of
Judicature
Acts and
Rules of the
Supreme
Court.

866. The effect of the Judicature Acts (*o*) and of the Rules of the Supreme Court (*p*) on the right of set-off appears open to some doubt. It has been decided that in an action at the suit of a trustee a claim for unliquidated damages by the defendant against the *cestui que trust* can be relied on as a defence (*q*), and the view was expressed that the defendant's claim was an answer to the plaintiff's claim and ought to be allowed as a set-off, and that by the Act and the Rules made in pursuance of it, more particularly R. S. C., Ord. 19, r. 9, an unliquidated claim is put "on the same footing as a liquidated claim for the purpose of a set-off," and that as the cross-claim could before the Acts (*o*) have been set off if liquidated, it could by virtue

(*n*) *Birch v. Depeyster* (1816), 4 Camp. 385; *Crampton v. Walker* (1860), 3 E. & E. 321.

(*o*) See title COURTS, Vol. IX., p. 51, note (*g*).

(*p*) See note (*j*), p. 487, *ante*.

(*q*) *Bankes v. Jarvis*, [1903] 1 K. B. 549. [It may be contended, however, that some of the *dicta* in *Bankes v. Jarvis*, *supra*, go further than was necessary for the decision of the case, and that the decision does not apply to all cross-claims, but is confined to equitable rights of set-off such as were the subject-matter of that case, and which were given effect to in *Agra and Masterman's Bank v. Leighton* (1866), L. R. 2 Exch. 56, which was relied on in it, and only decides that where before the Rules of the Supreme Court (see note (*j*), p. 487, *ante*) an equitable plea of set-off could have been maintained in respect of a liquidated claim, such a plea may now be maintained in respect of unliquidated damages. As to these equitable rights, it was laid down in *Newfoundland Government v. Newfoundland Rail. Co.* (1888), 13 App. Cas. 199, 213, P. C., following *Young v. Kitchin* (1878), 3 Ex. D. 127, that "unliquidated damages may now be set off between the original parties, and also against an assignee if flowing out of and inseparably connected with the dealings and transactions which give rise to the subject of assignment." See, further, *Watson v. Mid Wales Rail. Co.* (1867), L. R. 2 C. P. 593; *Baker v. Adam* (1910), 15 Com. Cas. 227, 235 *et seq.*; *Stoddart v. Union Trust, Ltd.*, [1912] 1 K. B. 181, C. A.; *Parsons v. Sovereign Bank of Canada*, [1913] A. C. 160, P. C.; compare *Reeves v. Pope*, [1913] 1 K. B. 637, cited p. 500, *post*. It must be observed that in these cases the cross-claim set up against the assignee is really in the nature of an equitable defence, and that, although it may afford an answer to the whole or a part of the claim, the defendant cannot recover anything from the assignee even if his claim against the assignor exceeds the amount of the claim made by the assignee. The *dicta* in *Bankes v. Jarvis*, *supra*, go beyond this, and the *dictum* in *Newfoundland Government v. Newfoundland Rail. Co.*, *supra*, referring to a "set-off as between the original parties," which was also *obiter*, appears to support the view that unliquidated damages may now be in all cases the subject of a "set-off." This view is, however, opposed to the view expressed in *Bennett v. White*, [1910] 2 K. B. 643, C. A., *per* KENNEDY, L.J., at p. 648, and seems opposed to the views expressed by the Court of Appeal in *Stumore v. Campbell & Co.*, [1892] 1 Q. B. 314, C. A., 316, 318. It also appears inconsistent with the reasoning on which the cases which show the difference between the effect of a set-off and a counterclaim as regards the amount the plaintiff "recovers," within the meaning of the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116 (see p. 520, *post*), were decided; and with the cases, many of them decided in the Court of Appeal, in which the same difference has been held to exist as to the incidence of the cost of the plaintiff's claim (see pp. 518, 519, *post*), and with the cases as to security for costs, *e.g.*, *New Fenix Compagnie Anonyme d'Assurances de Madrid v. General Accident, Fire, and Life Assurance Corporation, Ltd.*, [1911] 2 K. B. 619, C. A. None of these latter cases appear to have been cited in *Bankes v. Jarvis*, *supra*, and it seems

SECT. 2.
Essential
Character-
istics of
Set-off.

of the Acts be "now set off though unliquidated" (r). If this be so, then it would appear that the effect of the Acts and Rules is that claims in damages, even when unliquidated, may now be made the subject of a set-off, and a set-off may be allowed in an action where the plaintiff's claim is for damages.

SUB-SECT. 3.—As to Date of Origin.

When claims
must arise.

867. No debt can be made the subject of a set-off unless it was in existence and was an actionable and enforceable debt both at the time when the action was commenced (s) and at the date when the plea was pleaded (t), and has continued unsatisfied up to the trial (u). Therefore a plea of set-off of a debt is bad unless it alleges that the plaintiff was at the commencement of the action and still is liable to the defendant (v).

Debt arising
after action
brought.

868. A debt arising after action brought, even though it arise before the defence is delivered, cannot be made the subject of a set-off (w); but it is no objection to a set-off that the debt relied upon accrued due after the plaintiff's cause of action accrued (x).

A defendant cannot set off a sum due on a bill of exchange which was in the hands of a third party at the date of action brought and was subsequently and before plea indorsed to the defendant (a).

Statute-
barred debt.

869. It is a good answer to a plea of set-off that the debt sought to be set off was statute-barred at the date of action brought if the statute is pleaded in reply (b), but not that it has become statute-

curious if the defendant's liability to pay the costs of the claim and the general costs of the action could in many of them have been avoided by merely calling the counterclaim a set-off. *Bankes v. Jarvis*, [1903] 1 K. B. 549, was distinguished by HAMILTON, J., in *Baker v. Adam* (1910), 15 Com. Cas. 227, at p. 236, somewhat on the grounds above suggested. As to the previously existing right of a *cestui que trust* to set off a debt due to his trustee, see, further, *Cochrane v. Green* (1860), 9 C. B. (N. S.) 448; and, as to equitable pleas of set-off, see generally, Bullen and Leake, *Precedents of Pleadings*, 3rd ed. (1868), pp. 571, 573, 574. The judgment of VAUGHAN WILLIAMS, J., in *Westacott v. Bevan*, [1891] 1 Q. B. 774, at p. 780, may be cited in support of the view that as between the original parties to a contract, a right to set off the amount recovered on a counterclaim exists, but is limited to claims arising out of the same contract; but in *Stumore v. Campbell & Co.*, [1892] 1 Q. B. 314, C. A., the Court of Appeal did not approve of this.—EDITORIAL NOTE.]

(r) See, especially, *Bankes v. Jarvis*, *supra*, per CHANNELL, J., at p. 553.

(s) *Evans v. Prosser* (1789), 3 Term Rep. 186, and cases in note (w), *infra*. If *Bankes v. Jarvis*, *supra*, applies to all cases, it may be doubted whether this rule has not now gone. In that case the claim which was set off arose after action brought, and counterclaim can be maintained in respect of a claim arising after action brought; see p. 508, *post*.

(t) *Eyton v. Littledale* (1849), 7 Dow. & L. 55.

(u) *Ibid*.

(v) *Dendy v. Powell* (1838), 3 M. & W. 442; *Bennett v. White*, [1910] 2 K. B. 643, 648, C. A.

(w) *Richards v. James* (1848), 2 Exch. 471; *Maw v. Ulyatt* (1861), 31 L. J. (CH.) 33; *Hutchinson v. Reid* (1813), 3 Camp. 329; and see *Whyte v. O'Brien* (1824), 1 Sim. & St. 551; but see note (s), *supra*.

(x) *Lee v. Lester* (1849), 7 C. B. 1008.

(a) *Braithwaite v. Coleman* (1835), 4 Nev. & M. (K. B.) 654.

(b) *Bemington v. Stevens* (1747), 2 Stra. 1271; *Chapple v. Durston* (1830), 1 Cr. & J. 1; compare *Rawley v. Rawley* (1876), 1 Q. B. D. 460, C. A.; and see title LIMITATION OF ACTIONS, Vol. XIX., p. 184.

barred after the commencement of the action and before the defence was delivered (c).

If a company goes into liquidation, debts which accrued due before the winding-up may be set off against one another (d), but a defendant sued for a debt which has accrued since the winding-up cannot set off a debt due from the company before the liquidator was appointed (e). A similar rule applies when a defendant is sued by a trustee in bankruptcy (f).

870. A solicitor may set off an amount due to him for costs although he has not complied with the statutory provision (g), which requires the delivery of a bill of costs a month before action (h).

SECT. 2.
Essential
Character-
istics of
Set-off.

Set-off of
costs.

SUB-SECT. 4.—As to Parties.

871. Subject to the exceptions hereinafter mentioned, a set-off is available only between the same parties and in the same right as the claim (i).

Between what
parties right
exists.

A joint debt and a several debt cannot be set off against each other (k). Thus in an action for a debt due from the defendant to the plaintiff separately the defendant cannot set off a debt due from the plaintiff jointly with others who are not co-plaintiffs in the action (l); but he may set off a debt due from the plaintiff severally as well as jointly with others (m).

872. A defendant sued for a debt by two or more plaintiffs jointly cannot set off a debt due from one of the plaintiffs separately (n), even though the joint debt was contracted owing to fraud (o).

Joint and
separate
debts.

If two defendants be sued for a joint debt they cannot set off a debt due to one of them separately (p), and if a defendant be sued

(c) *Walker v. Clements* (1850), 15 Q. B. 1046; and see title **LIMITATION OF ACTIONS**, Vol. XIX., p. 184.

(d) *Anderson's Case* (1866), L. R. 3 Eq. 337.

(e) *Ince Hall Rolling Mills Co. v. Douglas Forge Co.* (1882), 8 Q. B. D. 179; *Re Newdigate Colliery, Ltd., Newdegate v. The Co.*, [1912] 1 Ch. 468, C. A.

(f) *Drew v. Josolyne* (1887), 18 Q. B. D. 590, C. A.

(g) *Solicitors Act*, 1843 (6 & 7 Vict. c. 73), s. 37.

(h) *Brown v. Tibbitts* (1862), 11 C. B. (N. S.) 855: in *Rawley v. Rawley* (1876), 1 Q. B. D. 460, C. A., COCKBURN, C.J., at p. 463, however, casts some doubt on this. See also p. 503, *post*, and, generally, title **SOLICITORS**.

(i) *Stats.* (1729) 2 Geo. 2, c. 22; (1735) 8 Geo. 2, c. 24.

(k) *Ex parte Twogood* (1805), 11 Ves. 517. This rule applies where the joint debt is a partnership debt, unless one partner has been held out as sole partner; see p. 499, *post*.

(l) *Arnold v. Bainbrigg* (1853), 9 Exch. 153. But, if a course of business is shown in which such debts have been set off, then, if the facts are strong enough to raise a presumption of an agreement to set off, the set-off is allowed (*Vulliamy v. Noble* (1817), 3 Mer. 593, 618; *Downam v. Matthews* (1722), Prec. Ch. 580; and see *Middleton v. Pollock, Ex parte Knight and Raymond* (1875), L. R. 20 Eq. 515, 521; p. 487, *ante*).

(m) *Fletcher v. Dyche* (1787), 2 Term Rep. 32; *Owen v. Wilkinson* (1858), 5 C. B. (N. S.) 526.

(n) *Crawford v. Stirling* (1802), 4 Esp. 207; *Gordon v. Ellis* (1846), 2 C. B. 821; *Piercy v. Finney* (1871), L. R. 12 Eq. 69.

(o) *Middleton v. Pollock, Ex parte Knight and Raymond, supra*.

(p) *Jones v. Fleming* (1827), 7 B. & C. 217; *Watts v. Christie* (1849), 11 Beav. 546.

SECT. 2.
Essential
Character-
istics of
Set-off.

Debt of
defendant
jointly with
others.

for a separate debt he cannot set off a debt due to himself and another jointly (*q*).

873. A defendant who is sued alone as one of several joint debtors may plead that the debt is due from himself jointly with others, and that he and his co-debtors are entitled to a set-off in respect of a debt owed by the plaintiff to them jointly (*r*), but he cannot set off a debt due to one of such co-debtors separately, even though such co-debtor has assigned a share of such debt to him (*s*).

SECT. 3.—Defences to Set-off.

How raised.

874. Defences to a set-off are raised in the High Court by means of a reply.

Where it is merely desired to traverse the facts on which set-off is based no reply need be delivered (*t*).

If the plaintiff desires to set up that the alleged set-off is bad, or that assuming the facts alleged in the plea of set-off to be proved there is no right of set-off, he must do so by specially pleading his contention in reply, together with the facts on which such contention is based (*a*). Thus, a plaintiff may reply to a plea of set-off that the debt is unenforceable. If he does so, he must set out the grounds on which he bases his contention (*b*).

A defence to a set-off arising after the defence has been delivered may be raised in the reply either alone or together with any other defence (*c*).

Plea of
payment.

875. Payment is a good answer to set-off, and a payment made by an unauthorised agent and not ratified until after set-off pleaded may be pleaded in defence to a set-off (*d*).

Plea as to
character in
which plain-
tiff claims.

876. It is no defence to a set-off of or claim against the plaintiff to plead that the plaintiff sues on his claim simply as trustee or assignee (*e*).

(*q*) *Ex parte Riley* (1731), W. Kel. 24; *Kinnerley v. Hossack* (1809), 2 Taunt. 170; *Re Fisher, Ex parte Ross* (1817), Buck, 125; *Tophis v. Grane* (1839), 5 Bing. (N. C.) 636; *Re Willis, Percival & Co., Ex parte Morier* (1879), 12 Ch. D. 491, C. A. If the other person is dead the defendant as sole surviving creditor may set off the debt (*Slipper v. Stidstone* (1794), 5 Term Rep. 493).

(*r*) *Stackwood v. Dunn* (1842), 3 Q. B. 822.

(*s*) *Bowyear v. Pawson* (1881), 6 Q. B. D. 540.

(*t*) See title PLEADING, Vol. XXII., p. 459.

(*a*) *Ibid.*

(*b*) *Remington v. Stevens* (1747), 2 Stra. 1271; *Chapple v. Dureston* (1830), 1 Cr. & J. 1 (debt barred by the Statute of Limitations); *Ford v. Dornford* (1846), 8 Q. B. 583; *Francis v. Dodsworth* (1847), 4 C. B. 202 (debt extinguished under the Judgments Act, 1838 (1 & 2 Vict. c. 110)); *Rawley v. Rawley* (1876), 1 Q. B. D. 460, C. A. (debt unenforceable under Lord Tenterden's Act); and, generally, as to matters to be specially pleaded, see p. 509, *post*; title PLEADING, Vol. XXII., pp. 446, 447.

(*c*) R. S. C., Ord. 24, r. 1; and see pp. 509, 511, *post*.

(*d*) *Eyton v. Littledale* (1849), 7 Dow. & L. 55; *Simpson v. Egginton* (1855), 10 Exch. 845. This defence must be specially pleaded; see title PLEADING, Vol. XXII., p. 447, note (*d*).

(*e*) *Watkins v. Clark* (1862), 12 C. B. (N. S.) 277; *Wilson v. Gabriel* (1863) 8 L. T. 502; *Banks v. Jarvis*, [1903] 1 K. B. 549.

SECT. 4.—Set-off by and against Particular Parties.

SUB-SECT. 1.—Agents, Factors, and Brokers.

SECT. 4.
Set-off
by and
against
Particular
Parties.Claim by
disclosed
principal.

877. A defendant who is sued by the disclosed principal of an agent cannot set off a debt due from the agent (*f*), and if the defendant is sued by the agent he cannot set off a debt due from the principal (*g*), unless it can be shown that the agent has assented to such a set-off (*h*). Where a set-off would operate to prejudice the agent's lien for his expenses, or a prior charge given to him by the principal, in respect of advances made at the principal's request, over the money in respect of which the action is brought, the set-off will not be allowed (*i*).

878. A defendant sued on a liquidated claim (*k*) by an undisclosed principal may set off a debt due from the agent of the undisclosed principal (*l*), provided that the claim is in respect of a transaction entered into by the agent acting in his own name as principal and that the plaintiff authorised the agent so to act or held him out as principal and the defendant dealt with the agent in the belief that he was the principal and that the debt which the defendant seeks to set off accrued due before he knew that the agent was merely an agent (*m*).

Claim by
undisclosed
principal.

879. If the defendant knows only that the agent is an agent, for instance, a broker, without knowing his principal, he is put on inquiry and cannot set off in an action by the principal a debt due from the agent (*n*), or rely on any custom not known to the plaintiff as giving him such right (*o*). But if he believes that the agent, having the right to do so, for instance, a factor, has sold in his own name to repay advances made by the agent to his principal, he is not bound

Mercantile
agents.

(*f*) *Moore v. Clementson* (1809), 2 Camp. 22; *Richardson v. Stormont, Todd & Co.*, [1900] 1 Q. B. 701, C. A. As to agents, generally, see title AGENCY, Vol. I., pp. 145 *et seq.*

(*g*) *Atkyns and Batten v. Amber* (1796), 2 Esp. 493; *Isberg v. Bowden* (1853), 8 Exch. 852; *Manley & Sons, Ltd. v. Berkett*, [1912] 2 K. B. 329 (set-off of debt due from owner to purchaser against claim by auctioneer for price).

(*h*) *Jarvis v. Chapple* (1815), 2 Chit. 387. In such a case the set-off may be considered as based on agreement; see p. 487, *ante*.

(*i*) *Manley & Sons, Ltd. v. Berkett*, *supra*.

(*k*) It was held in 1871 that the rule did not apply if the plaintiff's claim was for unliquidated damages (*Turner v. Thomas* (1871), L. R. 6 C. P. 610); but it is doubtful whether this case is still good law; see p. 491, *ante*.

(*l*) *Rabone v. Williams* (1785), 7 Term Rep. 360, n.; *George v. Olagett* (1797), 7 Term Rep. 359; *Carr v. Hinchcliff* (1825), 4 B. & C. 547; *Purchell v. Salter* (1841), 1 Q. B. 197; *Re Henley, Ex parte Dixon* (1876), 4 Ch. D. 133, C. A.; *Montague v. Forwood*, [1893] 2 Q. B. 350, C. A.

(*m*) *Borries v. Imperial Ottoman Bank* (1873), L. R. 9 C. P. 38; *Cooke v. Eshelby* (1887), 12 App. Cas. 271, 275. If the defendant has no belief one way or the other the right of set-off does not arise (*ibid.*).

(*n*) *Waring v. Favenck* (1807), 1 Camp. 85; *Baring v. Corrie* (1818), 2 B. & Ald. 137; *Fish v. Kempton* (1849), 7 C. B. 687; *Walshe v. Provan* (1853), 8 Exch. 843; *Semenza v. Brinsley* (1865), 18 C. B. (n. s.) 467; *Pearson v. Scott* (1878), 9 Ch. D. 198; *Mildred v. Maspons* (1883), 8 App. Cas. 874. In this respect the position of a broker differs from that of a factor.

(*o*) *Blackburn v. Mason* (1893), 68 L. T. 510, C. A.

SECT. 4.
Set-off
by and
against
Particular
Parties.

Defendant
contracting
by broker.
Principal and
agent.

to make further inquiry, and so may set off against a claim by the principal a debt due from the agent (p).

880. If the claim the defendant seeks to set off arises out of a transaction entered into by a broker acting on the defendant's behalf, the knowledge of the broker is the knowledge of the defendant, and if the broker knew that the agent was an agent the defendant cannot set off a debt due from the agent (q).

881. A broker may set off as against his principal a debt due from the principal (a).

Where a broker has negotiated a sale and purchase and, after disclosing the name of the seller to the purchaser, has resold for the latter to a third party, he cannot set off against the purchaser a sum paid by him to the original seller as the purchase price, even though he acted for such seller on a *del credere* commission (b).

SUB-SECT. 2.—Assignees.

Effect of
assignment.

882. The assignee of a chose in action takes it subject to certain equities (c). In an action by the assignee of a chose in action the defendant may set off any debt that could have been set off as against the assignor (d), even though the debt arises out of an act initially wrongful if the assignee has affirmed and adopted it (e), but not a debt that accrues due from the assignor after notice of the assignment (f), unless it appears from the circumstances of the case that the parties intended that one should be set off against the other (g). A debt accruing due from the assignee after notice of assignment may be set off (h). A debt owed to a third person by the plaintiff and assigned (i) by such third person to the defendant can be set off against the plaintiff (k).

Set-off of
claim against
assignor.

883. If the assignee of a debt due on a contract for work done or goods supplied sue for such debt, the defendant may set up in reduction of such debt a claim in damages which he has against

(p) *Warner v. McKay* (1836), 1 M. & W. 591.

(q) *Dresser v. Norwood* (1864), 17 C. B. (N. S.) 466; see title AGENCY, Vol. I., p. 210.

(a) *Dale v. Sollet* (1767), 4 Burr. 2133.

(b) *Morris v. Cleasby* (1816), 4 M. & S. 566. As to *del credere* agents, see titles AGENCY, Vol. I., pp. 153, 184; SALE OF GOODS, note (o), p. 178, *ante*.

(c) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6); see title CHOSSES IN ACTION, Vol. IV., pp. 367 *et seq.*

(d) *Clark v. Oort* (1840), Cr. & Ph. 154; *Smith v. Parkes* (1852), 16 Beav. 115; *Re McKerrell, McKerrell v. Gowan* (1912), 107 L. T. 404; and see title CHOSSES IN ACTION, Vol. IV., pp. 387, 388. This is not so where the indorsee of an overdue bill of exchange sues the payee (*Whitehead v. Walker* (1842), 10 M. & W. 696).

(e) *Smith v. Hodson* (1791), 4 Term Rep. 211.

(f) *Colvin v. Hartnell* (1837), 5 Cl. & Fin. 484, H. L.; *Hunt v. Jessel* (1854), 18 Beav. 100; *Unity Joint Stock Banking Association v. King* (1858), 25 Beav. 72; and see title MORTGAGE, Vol. XXI., p. 179. Notice of a floating charge is not notice of an assignment (*Biggerstaff v. Rowatt's Wharf, Ltd., Howard v. Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93, C. A.).

(g) *Smith v. Parkes*, *supra*; *Watson v. Mid Wales Rail. Co.* (1867), L. R. 2 C. P. 593.

(h) *Smith v. Parkes*, *supra*.

(i) This must be before action brought; see p. 492, *ante*.

(k) *Bennett v. White*, [1910] 2 K. B. 643, C. A.

the assignor for defects in the work done or goods supplied under the contract (*l*), or for non-delivery of other goods under the contract (*a*).

SECT. 4.
Set-off
by and
against
Particular
Parties.

In an action by the assignee of a chose in action (*b*) the defendant may set off any claim in damages available against the assignor if the damages flow out of and are inseparably connected with the dealings and transactions which give rise to the chose in action assigned (*c*); but he may not, as against an innocent assignee for value and without notice of the fraud, set off damages for fraudulent misrepresentation whereby he was induced to enter into the contract which gave rise to the chose in action (*d*) or claims for unliquidated damages arising out of breaches of contracts not connected with the subject-matter of the plaintiff's claim (*e*).

884. The defendant to an action brought by the assignee of a marine insurance policy is entitled to raise any defence, and therefore any set-off, arising out of the contract which he would have been entitled to raise against the assignor (*f*), but he has no greater right of set-off than has the defendant to an action brought by the assignee of any other chose in action, and therefore may not set off a claim for indemnity arising out of some other policy than that on which the plaintiff sues (*g*). Insurance policy.

SUB-SECT. 3.—*Bankers.*

885. A banker is entitled to set off what is due to a customer on one account against what is due from him on another account (*h*), although the moneys due to him may in fact belong to other persons (*i*), unless there is some equity sufficient to countervail the legal right of set-off (*k*); but he is not justified of his own motion in transferring a balance from what he knows to be a trust account of Banker and customer.

(*l*) *Young v. Kitchin* (1878), 3 Ex. D. 127.

(*a*) *Parsons v. Sovereign Bank of Canada*, [1913] A. C. 160, P. C.

(*b*) This does not apply to the case of a reversion expectant on the termination of a lease (*Reeves v. Pope*, [1913] 1 K. B. 637).

(*c*) *Newfoundland Government v. Newfoundland Rail. Co.* (1888), 13 App. Cas. 199, 213, P. C.; *Parsons v. Sovereign Bank of Canada*, *supra*.

(*d*) *Stoddart v. Union Trust, Ltd.*, [1912] 1 K. B. 181, C. A. For a further discussion of where a set-off can be pleaded against an assignee, see title CHOSSES IN ACTION, Vol. IV., pp. 387, 388.

(*e*) *Baker v. Adam* (1910), 15 Com. Cas. 227, 235.

(*f*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 50 (2).

(*g*) *Baker v. Adam*, *supra*, following *Pellas v. Neptune Marine Insurance Co.* (1879), 5 C. P. D. 34, C. A. As to set-off as between insurance brokers and underwriters, see title INSURANCE, Vol. XVII., pp. 350, 351.

(*h*) *Bailey v. Finch* (1871), L. R. 7 Q. B. 34; *Re European Bank, Agra Bank Claim* (1872), 8 Ch. App. 41; *Union Bank of Australia v. Murray-Aynsley*, [1898] A. C. 693; compare *Watts v. Christie* (1849), 11 Beav. 546.

(*i*) *Ibid.*; *Bank of New South Wales v. Goulburn Valley Butter Co. Proprietary*, [1902] A. C. 543, P. C.; compare *North and South Wales Bank, Ltd. v. Macbeth, North and South Wales Bank, Ltd. v. Irvine*, [1908] A. C. 137, 141.

(*k*) *Bailey v. Finch*, *supra*; *Newell v. National Provincial Bank of England* (1876), 1 C. P. D. 496; *Parsons v. Sovereign Bank of Canada*, *supra*.

SECT. 4.
Set-off
by and
against
Particular
Parties.

Customer's
 personal
 and joint
 accounts.

his customer to the customer's private account (*l*), nor in setting off against his customer's balance a debt from the customer before it has actually fallen due (*m*), nor can he set off any debt from his customer against the holder of a letter of credit given to the customer (*n*).

A customer has a right to set off a balance due to him from his bank against a debt due to the bank from him (*o*), unless he has notice that the debt due from him has been assigned to a stranger (*p*).

886. Where a customer of a bank having an account in his own name also has an account in the name of himself and another jointly, a right to set off items in the two accounts will only arise where the customer is so beneficially interested in the balance of the joint account that a court of equity would without terms or inquiry compel a transfer of the account into the customer's name alone (*q*).

SUB-SECT. 4.—Executors.

Claims against
 executors.

887. If either party sue or be sued as executor, or administrator, and there are mutual debts between the testator, or intestate, and the other party, one debt may be set off against the other (*r*), provided both debts arose before or both arose after the death of the testator or intestate (*s*).

Thus in an action by an executor on a cause of action which has accrued to him as executor, the defendant cannot set off a debt due from the testator in his lifetime (*t*); and in an action against an executor for a debt due from the testator the executor cannot set off a claim which has accrued to him as executor (*a*).

An executor can set off against a legatee a debt owed to the testator (*b*), even though such debt has become statute-barred since the death of the testator (*c*).

(*l*) *Re Gross, Ex parte Kingston* (1871), 6 Ch. App. 632; approved in *Bank of New South Wales v. Goulburn Valley Butte Co. Proprietary*, [1902] A.C. 543, 550, P. C.

(*m*) *Rogerson v. Ladbroke* (1822), 1 Bing. 93; compare *Thomas v. Howell* (1874), L. R. 18 Eq. 198.

(*n*) *Re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation* (1867), 2 Ch. App. 391; explained in *Rainford v. James Keith and Blackman Co., Ltd.*, [1905] 1 Ch. 296, 303.

(*o*) *Bailey v. Finch* (1871), L. R. 7 Q. B. 34.

(*p*) *Cavendish v. Geaves* (1857), 24 Beav. 163.

(*q*) *Watts v. Christie* (1849), 11 Beav. 546; *Re Willis, Percival & Co., Ex parte Morier* (1879), 12 Ch. D. 491, C. A.

(*r*) Stat. (1729) 2 Geo. 2, c. 22; see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 328 *et seq.*; and see note (*a*), p. 485, *ante*.

(*s*) This is due to the equitable construction of the statutes by which a line was drawn at death and the state of things existing before that date kept quite distinct from the state of things that existed after.

(*t*) *Schofield v. Corbett* (1836), 11 Q. B. 779; *Watts v. Rees* (1854), 9 Exch. 696; affirmed (1855), 11 Exch. 410, Ex. Ch.; *Newell v. National Provincial Bank of England* (1876), 1 C. P. D. 496; *Re Gregson, Christison v. Bolam* (1886), 36 Ch. D. 223; *Watkins v. Lindsay & Co.* (1898), 67 L. J. (Q. B.) 362; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 328. The rule holds good if the defendant is sued as an executor (*Medlicot v. Bowers* (1749), 1 Ves. Sen. 207).

(*a*) *Marshall v. Thellusson* (1856), 6 E. & B. 976.

(*b*) *Smith v. Smith* (1861), 3 Giff. 263.

(*c*) *Oates v. Oates* (1864), 33 Beav. 249; *Gee v. Liddell* (No. 2) (1868), 35 Beav. 629; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 263.

A debtor to a testator cannot set off against the executor a debt due from a legatee (*d*).

SECT. 4.
Set-off
by and
against
Particular
Parties.

What claims
may be set off.

888. The rule that the debts must accrue in the same right is strictly applied. Therefore, if a plaintiff sues as executor the defendant cannot set off a debt due from the plaintiff in his personal capacity (*e*). If an executor be sued as executor he cannot set off a claim he has in his personal capacity against the plaintiff (*f*), and if sued in his personal capacity he cannot set off a claim he has as executor (*g*), unless it be such a claim that he can also sue on it in his personal capacity (*h*).

SUB-SECT. 5.—*Husband and Wife.*

889. A debt incurred by a wife before marriage cannot be set off by the defendant in an action brought by the husband alone (*i*).

Wife's ante-
nuptial debt.

Nor can such a debt be set off in an action brought to enforce a claim accruing to the wife after marriage which the husband treats as his several claim (*k*).

890. A debt due to a husband in right of his wife cannot be set off by him against a debt due from him personally (*l*).

Debt due to
husband in
right of wife.

891. A debt due to a wife before her marriage cannot be set off against a claim made against her husband personally (*m*).

Claims
against and
by husband.

A defendant who has advanced money to a wife deserted by her husband for the purchase of necessaries may set off such advances against a debt due from him to the husband (*n*).

A debt due from a husband cannot be set off against the assignees of the husband suing on a chose in action which belonged to the wife before marriage (*o*).

892. An administrator cannot set off against the claim of a wife to a share of the estate, in an action brought by the wife against him and her husband, a debt due to him from the husband (*p*), nor can he set off a debt from the husband to the prejudice of the wife's equity to a settlement (*q*).

As between
wife and
husband and
third party.

(*d*) *Smee v. Baines* (1861), 4 L. T. 573.

(*e*) *Hutchinson v. Sturges* (1741), Willes, 261; *Macdonald v. Carington* (1878), 4 C. P. D. 28; *Phillips v. Howell*, [1901] 2 Ch. 773.

(*f*) *Gale v. Luttrell* (1826), 1 Y. & J. 180. If the plaintiff sues as assignee, the executor cannot set off a personal claim against the assignor (*Bishop v. Church* (1748), 3 Atk. 691; *Whitaker v. Rush* (1761), Amb. 407).

(*g*) *Harvey v. Wood* (1821), 5 Madd. 459; *Macdonald v. Carington* (1878), 4 C. P. D. 28; *Re Willis, Percival & Co., Ex parte Morier* (1879), 12 Ch. D. 491, C. A.; *Nelson v. Roberts* (1893), 69 L. T. 352.

(*h*) For a further discussion of the law of set-off as applied to executors, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 328 *et seq.*, and as applied between executors and legatees, *ibid.*, p. 268.

(*i*) Unless he agrees after marriage to pay (*Wood v. Akers* (1797), 2 Esp. 594).

(*k*) *Burrough v. Moss* (1830), 10 B. & C. 558.

(*l*) *Paynter v. Walker* (1764), Buller, Law of Nisi Prius, 175.

(*m*) *Ex parte Blagden* (1815), 19 Ves. 465.

(*n*) *Jenner v. Morris* (1861), 30 L. J. (CH.) 361; and see *Jenner v. Morris, Webster v. Jenner* (1863), 11 W. R. 943; title HUSBAND AND WIFE, Vol. XVI., p. 426.

(*o*) *Yates v. Sherrington* (1843), 11 M. & W. 42.

(*p*) *Elbank (Lady) v. Montolieu* (1801), 5 Ves. 737.

(*q*) See title HUSBAND AND WIFE, Vol. XVI., p. 336.

SMOT. 4.

Set-off
by and
against
Particular
Parties.Insurance
policy.SUB-SECT. 6.—*Insurance Brokers and Underwriters.*

893. A claim under a policy is a claim for unliquidated damages, and losses and premiums could not be set off against each other under the Statutes of Set-off (*r*), but by virtue of the Judicature Acts (*s*) the broker in an action brought by the insurers against him for premiums can counterclaim to the extent to which he could recover on the policies for his own use and benefit (*t*).

SUB-SECT. 7.—*Landlord and Tenant.*Former
rights.

894. Before the Judicature Acts (*s*) a tenant could not set off against a claim for rent a claim in damages for breach of covenant by the landlord (*u*) unless he had himself repaired the breach and was entitled to recover the cost from the landlord as money paid to his use (*a*).

Claims of
tenant against
landlord.

895. Where a tenant who has obtained judgment against his landlord became indebted to him in arrears of rent and for dilapidations, it was held that he could not be restrained from issuing execution against his landlord on the judgment (*b*).

Where a tenant sues in replevin and there is an avowry of rent due, the tenant cannot set off a debt due from the landlord in reply to such avowry (*c*).

But where he has paid ground rent to the superior landlord (*d*), or where he has paid rent to a mortgagee, who has threatened to put the law in force (*e*), he may plead payment (*f*) *pro tanto* in reply to such avowry; similarly where a tenant has paid rates on the promise of the landlord that they shall come out of the rent (*g*).

Assignment
of reversion.

896. The rule of equity that to an action by an assignee of a chose in action the defendant may set off a claim for damages against the assignor directly arising out of the same transaction as the subject-matter of the assignment does not apply to the assignment of a reversion expectant on the termination of a lease (*h*).

(*r*) See note (*a*), p. 485, *ante*.

(*s*) See title COURTS, Vol. IX., p. 51, note (*g*); and see p. 491, *ante*.

(*t*) See title INSURANCE, Vol. XVII., p. 350; and as to set-off of unliquidated sums, compare p. 491, *ante*.

(*u*) *Weigall v. Waters* (1795), 6 Term Rep. 488. It is doubtful whether this decision is still law in view of the decision in *Bankes v. Jarvis*, [1903] 1 K. B. 549; see p. 491, *ante*.

(*a*) *Waters v. Weigall* (1795), 2 Anst. 575.

(*b*) *Maw v. Ulyatt* (1861), 31 L. J. (CH.) 33.

(*c*) *Absolom v. Knight* (1743), Buller, Law of Nisi Prius, 177; *Laycock v. Tufnell* (1787), 2 Chit. 531. In *Sapsford v. Fletcher* (1792), 4 Term Rep. 511, Lord KENYON, C.J., said it was much to be regretted that the law had been so decided. It is doubtful whether this case is good law at the present time; see p. 491, *ante*.

(*d*) *Sapsford v. Fletcher*, *supra*; *Boodle v. Campbell* (1844), 7 Man. & G. 386.

(*e*) *Johnson v. Jones* (1839), 9 Ad. & El. 809.

(*f*) This is not the same as set-off (see p. 483, *ante*), but the cases are cited here for convenience and as showing how the courts used to get round the technicalities of the law of set-off.

(*g*) *Roper v. Burnford* (1810), 3 Taunt. 76.

(*h*) *Reeves v. Pope*, [1913] 1 K. B. 637.

SUB-SECT. 8.—*Master and Servant.*

SECT. 4.
Set-off
by and
against
Particular
Parties.

897. A servant discharged without proper notice may set off a claim for wages in lieu of notice against a claim by the master for money had and received (*i*).

A master sued for wages cannot set off a sum claimed for the value of goods lost by the negligence of the servant (*k*), unless there be an agreement authorising such sum to be deducted from the wages (*l*).

Master and
servant.

Where proceedings between an employer and workman are taken in a court of summary jurisdiction the defendant cannot, except by leave of the court, rely on any set-off or counterclaim unless notice thereof has been given (*m*).

898. The Truck Act, 1831 (*n*), does not make it illegal to deduct from wages a debt due to the master, and a master sued for wages is not debarred by that Act from setting off against a claim for wages a sum due under a magistrate's order against the workman for damages for unlawfully absentsing himself from work (*o*).

Truck Act,
1831.

899. A defendant cannot, in the absence of special agreement, set off a claim for the board and lodging of the plaintiff's son sent to him on a "liking" for a month, where no apprenticeship has resulted (*p*).

Other claims.

A sum which has been overpaid to a workman cannot (*q*) be set off against compensation subsequently becoming due to him under the Workmen's Compensation Act, 1906 (*r*).

SUB-SECT. 9.—*Partners.*

900. The law as to set-off between joint debts and several debts (*s*) applies where one or more of the parties is a firm. Therefore, where a defendant is sued by a firm he cannot set off a debt due from one of the partners individually (*t*) unless the partners have permitted one of their number to deal as a sole

Joint and
separate debts
of partners.

(*i*) *East Anglian Railways Co. v. Lythgoe* (1851), 10 C. B. 726.

(*k*) *Le Loir v. Bristow* (1815), 4 Camp. 134. It is doubtful whether this decision would now be upheld; see p. 491, *ante*.

(*l*) *Le Loir v. Bristow*, *supra*; *Duckworth v. Alison* (1836), 1 M. & W. 412; *Oleworth v. Pickford* (1840), 7 M. & W. 314; and as to setting off a sum forfeited on the ground of absence or leaving work, see title MASTER AND SERVANT, Vol. XX., p. 91.

(*m*) See title MASTER AND SERVANT, Vol. XX., p. 116.

(*n*) 1 & 2 Will. 4, c. 37.

(*o*) *Williams v. North's Navigation Collieries* (1889), *Ltd.*, [1904] 2 K. B. 44, C. A.; *Chawner v. Cummins* (1846), 8 Q. B. 311. As to this ground of set-off and as to the case of children, young persons or women within the scope of the Factory and Workshops Acts, see title MASTER AND SERVANT, Vol. XX., p. 91.

(*p*) *Wilkins v. Wells* (1825), 2 C. & P. 231.

(*q*) *Hosegood & Sons v. Wilson*, [1911] 1 K. B. 30, C. A.; see title MASTER AND SERVANT, Vol. XX., pp. 208, 209.

(*r*) 6 Edw. 7, c. 58; see, generally, title MASTER AND SERVANT, Vol. XX., pp. 153 *et seq.*

(*s*) See pp. 493, 494, *ante*.

(*t*) See title PARTNERSHIP, Vol. XXII., p. 41; p. 494, *ante*. Where the debt accrued due from the individual partner before the firm was constituted there is no right of set-off although the firm have since admitted the existence of the debt (*France v. White* (1839), 6 Bing. (N. C.) 33).

SMOY. 4.
Set-off
by and
against
Particular
Parties.

trader with the defendant and thereby led him to believe that he was dealing with an individual and not with a firm, and the defendant in this belief has made advances or given credit to such partner. In such a case the defendant may set off against the firm the debt due from the individual partner in respect of such advance or as to which such credit has been given (*u*). Similarly, if in like circumstances an individual partner has agreed to allow a set-off, such agreement is binding on the firm (*v*), provided such debt is due in respect of a matter within the scope of the apparent authority given by the firm to the individual partner (*x*); but if the other party knew that somebody besides the individual partner had an interest in the debt sued for, he will not be allowed to set off a debt due from the individual partner, and an agreement to allow him to do so, if made without the authority of the other partners, is not binding on the firm (*a*).

Firm acting
as agent.

901. Where a firm act as agents for an undisclosed principal and contract with a defendant, in an action on such contract by the undisclosed principal the defendant may set off a debt due from the firm if the circumstances are such that he would have had a right of set-off if the agent had been a single individual (*b*); a similar rule applies where the agent is not really a firm but contracts in a firm name on behalf of one only of the persons acting as agents under such name (*c*).

Debts owed
by and to
a firm.

902. A defendant sued for a debt due from himself alone may not set off a debt owing to a firm of which he is a member (*d*); similarly, a debt owed by a firm may not be set off against a claim by an individual partner (*e*); but where all the other partners have died and the right to the firm debt is in the individual partner as survivor, it may be made the subject of a set-off (*f*).

Effect of
assignment.

903. The law as to set-off as against an assignee obtains where any one or more of the parties concerned is a firm (*g*), and a firm may set off against the assignee of a retiring partner a debt due from the retiring partner at the date of assignment (*h*) and a debtor may set off against the assignee of a firm a debt due from the firm before assignment (*i*).

(*u*) *Stracey v. Deay* (1789), 7 Term Rep. 261, n.; *Gordon v. Ellis* (1844), 7 Man. & G. 607.

(*v*) *Muggeridge's v. Smith & Co.* (1884), 1 T. L. R. 166.

(*x*) *Baker v. Gent* (1892), 9 T. L. R. 159.

(*a*) *Piercy v. Finney* (1871), L. R. 12 Eq. 69.

(*b*) *Rabone v. Williams* (1785), 7 Term Rep. 360, n.

(*c*) *Spurr v. Cass, Cass v. Spurr* (1870), L. R. 5 Q. B. 656.

(*d*) See cases cited in note (*q*), p. 494, *ante*. As to when a person may be sued alone for a debt on a transaction concluded by him under a firm name, see *Bonfield v. Smith* (1844), 12 M. & W. 405.

(*e*) See cases cited in note (*l*), p. 493, *ante*.

(*f*) *Golding v. Vaughan* (1782), 2 Chit. 436; *Slipper v. Stidstone* (1794), 5 Term Rep. 493; *French v. Andrade* (1796), 6 Term Rep. 582; *Smith v. Sparkes* (1852), 16 Beav. 115.

(*g*) Subject, of course, to the limitations as to setting off joint and several debts; see p. 493, *ante*.

(*h*) *Smith v. Sparkes* (1852), 16 Beav. 115.

(*i*) *Puller v. Roe* 1792, Peake, 260 [198].

SUB-SECT. 10.—*Solicitors.*

SECT. 4.
Set-off
by and
against
Particular
Parties.
Solicitors.

904. A solicitor is not prevented from setting off a sum due for costs by the fact that no signed bill has been delivered (*j*).

Where a claim for costs and disbursements in respect of work done by a solicitor fails because the solicitor is guilty of negligence, and there is joined with it a claim as to which this defence does not avail, the defendant cannot set off against the second claim moneys paid to the solicitor and expended by him in doing the work before the negligence occurred (*k*).

SUB-SECT. 11.—*Sureties.*

905. A surety for payment of a sum due under a contract is entitled to be exonerated by his principal, and may therefore set off in an action against himself as surety a debt due from the plaintiff to the principal arising out of the same transaction (*l*); and if under the contract the principal is entitled to the benefit of a deduction to be ascertained by arbitration, the surety may set off a sum awarded by an arbitrator acting under the contract (*m*).

Claim against
surety.

906. A surety sued by his principal may set off sums paid by him as surety (*n*), and if sued by the executor of the principal the right of set-off holds good (*o*).

Surety and
principal.

907. Where a loan is made by an insurance company to B. on the security of a policy on the life of A. and A. dies, the company cannot set off a debt due from A. against a claim on the policy by a surety who has paid off the loan (*p*).

Claim against
surety's
securities.

SUB-SECT. 12.—*Trustees and Cestuis que Trust.*

908. In an action at the suit of a trustee a cross-claim for a liquidated amount (*q*), or even for unliquidated damages (*r*), which the defendant has against his *cestui que trust* may be set off, and in an action against a *cestui que trust* the defendant may set off a cross-claim which his trustee has against the plaintiff (*s*).

Trustee and
cestui que
trust.

In an action against solicitors to recover money received by them on a trust which had failed it was held that they could not in garnishee proceedings set off a claim for costs (*t*).

Solicitor-
trustee.

(*j*) *Harrison v. Turner* (1847), 10 Q. B. 482; *Brown v. Tibbits* (1862), 11 C. B. (N. S.) 855; see p. 493, *ante*.

(*k*) *Lewis v. Samuel* (1846), 8 Q. B. 685; and see the text, *infra*.

(*l*) *Bechervaise v. Lewis* (1872), L. R. 7 C. P. 372; and see title GUARANTEE, Vol. XV., pp. 504, 508, 526.

(*m*) *Parke v. Smith* (1850), 15 Q. B. 297; *Murphy v. Glass* (1869), L. R. 2 P. C. 408; *Alcoy and Gandia Railway and Harbour Co., Ltd. v. Greenhill* (1897), 76 L. T. 542.

(*n*) This is so even if the surety has been sued to judgment and a *fi. fa.* issued, and the sum has been paid by the sheriff out of the proceeds of the goods taken in execution (*Rodgers v. Maw* (1846), 15 M. & W. 444).

(*o*) *Jones v. Mossop* (1844), 3 Hare, 568.

(*p*) *Re Jeffery's Policy* (1872), 20 W. R. 857.

(*q*) *Agra and Masterman's Bank v. Leighton* (1866), L. R. 2 Exch. 56; *Thornton v. Maynard* (1875), L. R. 10 C. P. 695.

(*r*) *Bankes v. Jarvis*, [1903] 1 K. B. 549; see p. 491, *ante*.

(*s*) *Cochrane v. Green* (1860), 9 C. B. (N. S.) 448.

(*t*) *Stumore v. Campbell & Co.*, [1892] 1 Q. B. 314; and see the text, *supra*.

SECT. 4.

Set-off
by and
against
Particular
Parties.

909. Trustees have, in certain circumstances, a right of set-off. This is, however, dealt with elsewhere (u).

Trustees.

Part III.—Counterclaim.

SECT. 1.—When Counterclaim Available.

When
counterclaim
available.

910. A counterclaim (v) is available to a defendant only when the rules of procedure of the court in which the plaintiff brings his action allow a counterclaim to be set up, and the mode in which a counterclaim may be brought is determined by those rules (a).

In the High Court the court has power to exclude a counterclaim which cannot be conveniently tried with the plaintiff's claim (b).

A counterclaim may be set up only in respect of claims as to which the party could bring an independent action in the court in which the counterclaim is brought (c). The Judicature Acts (d) and

(u) See title TRUSTS AND TRUSTEES.

(v) Counterclaim is entirely the creation of the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (3), Schedule, r. 18, and R. S. C., Ord. 19, r. 3, Ord. 21, rr. 10—17. Until the Judicature Act, 1873 (36 & 37 Vict. c. 66) was passed a defendant could not raise in the plaintiff's action any claim which could not be made the subject of set-off. His only remedy was to bring an independent cross-action (*Stooke v. Taylor* (1880), 5 Q. B. D. 569, 576; *Stumore v. Campbell & Co.*, [1892] 1 Q. B. 314, 316, C. A.). Now by his counterclaim he may raise any claim, whatever its nature, against the plaintiff in the plaintiff's action that might have been the subject of an independent action, subject only to the discretionary power of the court under R. S. C., Ord. 19, r. 3, Ord. 21, r. 15, to refuse to allow him to adopt that method of procedure if it be inconvenient that his claim should be tried in the same proceedings as the plaintiff's. If the defendant's claim exceeds the plaintiff's and is such that the defendant may plead it as a set-off, he should counterclaim as well, as it is considered that only in this way can he recover the balance in the action. This is the usually accepted interpretation of R. S. C., Ord. 21, r. 17, although the rule possibly allows judgment to be given for the defendant for the balance; see *Gathercole v. Smith* (1881), 7 Q. B. D. 626, *per LUSH, L.J.*, at p. 629, C. A.). In *Stumore v. Campbell & Co.*, *supra*, at p. 318, *LOPES, L.J.*, said that the Judicature Acts "did not alter, or intend to alter, the rights of parties. This power to counterclaim was introduced to prevent circuity of action. It is a matter of procedure and does not affect rights." *KAY, L.J.*, *ibid.*, at p. 319, said: "All that those Acts have done in respect of a counterclaim is to allow a cross-action to be brought and tried at the same time as the original action. This is for the general convenience and to prevent the necessity for trying the action separately, with all the costs of doing so."

(a) This is part of the general law as to pleading; see title PLEADING, Vol. XXII., p. 419.

(b) See p. 514, *post*.

(c) *Pellas v. Neptune Marine Insurance Co.* (1879), 5 C. P. D. 34, C. A.; *Birmingham Estates Co. v. Smith* (1880), 13 Ch. D. 506, 508; *Bow, McLachlan & Co. v. Ship "Camosun,"* [1909] A. C. 507, P. C.; *Factories Insurance Co., Ltd. v. Anglo-Scottish General Commercial Insurance Co., Ltd.* (1913), 29 T. L. R. 312, C. A. (leave to add counterclaim against colonial plaintiff refused).

(d) See title COURTS, Vol. IX., p. 51, note (g).

the rules made thereunder have not given new rights of action, but have only altered the procedure to the extent of allowing a cross-action and an action to be brought and tried in the same proceedings (e). A person who has a right not enforceable by action, but in some other way, cannot enforce the same by a counterclaim, but is confined to the proper remedy (f).

SECT. 1.
When
Counter-
claim
Available.

911. A counterclaim cannot be set up in respect of a cause of action or to claim relief which would not be available to the defendant, or defendants if there are more than one, suing in an independent action without the joinder of a co-plaintiff, and the court will not add a fresh defendant to enable a counterclaim to be raised (g) unless the relief claimed by the plaintiff in the action is such that the fresh defendant may properly be added having regard to the plaintiff's claim (h).

Joint claims.

A husband joined as co-defendant with his wife for conformity only may with his wife counterclaim in respect of a cause of action available to them jointly (i).

One of several co-defendants may set up a counterclaim in respect of a several cause of action available to himself alone (k).

SECT. 2.—*Essential Characteristics of Counterclaim.*

SUB-SECT. 1.—*Plaintiff must be a Party.*

912. A counterclaim by a defendant must allege a cause of action (l) available against the plaintiff (m), either alone or together with some other person, as defendant or defendants to the counterclaim (n). A counterclaim may not be set up only against persons or a person not plaintiffs or a plaintiff in the action (a).

Plaintiff must
be a party.

A defendant who has a cause of action available against the plaintiff or plaintiffs in the action, together with some person not a plaintiff, may join such person as a defendant to the counterclaim subject to the restriction mentioned below (b).

(e) *Re Milan Tramways Co., Ex parte Theys* (1882), 22 Ch. D. 122, *per KAY, J.*, at p. 126; affirmed (1884), 25 Ch. D. 587, C. A.

(f) *Gas Light and Coke Co. v. Holloway* (1885), 52 L. T. 434; *Scholfield v. Hincks* (1888), 60 L. T. 573; *Lancashire and Yorkshire Rail. Co. v. Greenwood* (1888), 21 Q. B. D. 215.

(g) *Norris v. Beasley* (1877), 2 C. P. D. 80; *Pender v. Taddei*, [1898] 1 Q. B. 798, C. A.; *McOheane v. Gyles* (No. 2), [1902] 1 Ch. 911.

(h) *Montgomery v. Foy, Morgan & Co.*, [1895] 2 Q. B. 321, C. A.; and see *Dear v. Swoorder, Swoorder v. Dear* (1876), 4 Ch. D. 476, 482.

(i) *Hodson v. Mochi* (1878), 8 Ch. D. 569.

(k) *Ibid.*

(l) As to what is a cause of action, see title PLEADING, Vol. XXII., p. 443, note (l).

(m) Relief claimed only against a person not a plaintiff can be claimed only, if at all, by third party procedure; see title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 162 *et seq.*

(n) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (3); R. S. C., Ord. 19, r. 3; Ord. 21, rr. 11—13; *Harris v. Gamble* (1877), 6 Ch. D. 748.

(a) And therefore cannot be set up by one defendant against his co-defendant only (*Furness v. Booth* (1876), 4 Ch. D. 586; *Warner v. Twining* (1876), 24 W. R. 536; *Harris v. Gamble* (1877), 6 Ch. D. 748; *McLay v. Sharp*, [1877] W. N. 216; *Central African Trading Co. v. Grove* (1879), 40 L. T. 540, C.A.).

(b) R. S. C., Ord. 21, rr. 11—13; see p. 506, *post*.

SECT. 2.

Essential
Character-
istics of
Counter-
claim.Claim against
plaintiff
alone.

SUB-SECT. 2.—When Raised against Plaintiff only.

913. Where there are several co-plaintiffs a counterclaim may be brought against all of them or against one or some of them only (c).

In an action by several co-plaintiffs the defendant may in his counterclaim allege separate causes of action against each or any of them (d).

A counterclaim cannot be brought against a plaintiff personally and also in a representative capacity unless the rules governing joinder of parties (e) would allow of such joinder in an independent action (f).

SUB-SECT. 3.—When Raised against Plaintiff and a Third Person.

Claim against
plaintiff and
another.

914. The defendant in an action may set up a counterclaim against the plaintiff, together with some third person, provided the subject-matter thereof or relief claimed is connected with or relates to the subject-matter of the plaintiff's claim (g), even though such third person could not have been joined as a co-plaintiff in the action (h), but the cause of action alleged must be a cause of action available against the plaintiff and such third person jointly and not against such third person merely in the alternative (i), and the subject-matter thereof or relief claimed must relate to or be connected with the original subject of the cause or matter (g).

SECT. 3.—How Counterclaim Differs from Set-off.

Distinction
between
counterclaim
and set-off.

915. A counterclaim does not afford any defence to the plaintiff's claim (k) as does a set-off, but is in effect an independent action which alleges a cause of action against the plaintiff or the plaintiff together with some third person, as the subject of a cross-action which is to be tried at the same time as the plaintiff's claim (l). It can be brought in respect of any claim that could be the subject of an independent action (m). The amount that may be recovered by a counterclaim is not limited by the jurisdiction of the court

(c) *Manchester and Sheffield Rail. Co. v. Brooks* (1877), 2 Ex. D. 243.

(d) *Ibid.*

(e) See title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 104 *et seq.*

(f) *Macdonald v. Carington* (1878), 4 C. P. D. 28; *McEwan v. Crombie* (1883), 25 Ch. D. 175, 177; *Stumore v. Campbell & Co.*, [1892] 1 Q. B. 314, C. A.

(g) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (3); *Padwick v. Scott, Re Scott's Estate Scott v. Padwick* (1876), 2 Ch. D. 736; *Dear v. Swooner, Swooner v. Dear* (1876), 4 Ch. D. 476; *Barber v. Blaiberg* (1882), 19 Ch. D. 473; *Edge (S. F.), Ltd. v. Weigel* (1907), 97 L. T. 447, C. A.

(h) *Turner v. Hednesford Gas Co.* (1878), 3 Ex. D. 145, C. A.

(i) *Evans v. Buck, Buck v. Evans* (1876), 4 Ch. D. 432; *Central African Trading Co. v. Grove* (1879), 48 L. J. (Q. B.) 510, C. A.; *Times Cold Storage Co. v. Lowther, and Blankley, Lowther and Blankley v. Times Cold Storage Co. and New Zealand Shipping Co.*, [1911] 2 K. B. 100.

(k) See p. 483, *ante*.

(l) *Stooke v. Taylor* (1880), 5 Q. B. D. 569; *Amon v. Bobbett* (1889), 22 Q. B. D. 543, 548, C. A.; *Stumore v. Campbell & Co.*, [1892] 1 Q. B. 314, 317, C. A.; see p. 483, *ante*.

(m) *Birmingham Estates Co. v. Smith* (1880), 13 Ch. D. 506, 509.

in respect of the amount of the claim (*n*), unless notice in writing of the objection to the jurisdiction is given (*o*).

SECT. 3.
How
Counter-
claim
Differs
from
Set-off.

Subjects of
counterclaim.

916. Counterclaim is not confined to money claims, and is not confined to causes of action of the same nature as the original action (*p*); and except where a person other than the plaintiff is made a defendant to it, it need not relate to or be connected with the original subject of the cause or matter (*q*), and a defendant is entitled to set up any counterclaim which is not so incongruous as to be incapable of being tried with the original action (*r*). A claim founded on tort may be opposed to one founded on contract (*s*), and in an action *in rem* the defendant may set up a counterclaim *in personam* (*t*). The defendant by his counterclaim may ask for any form of relief, for example, a declaration (*a*), a vesting order or relief against forfeiture (*b*), an injunction (*c*), a receiver (*d*), specific performance (*e*), revocation of a patent (*f*), an account (*g*), payment of money claim, or damages.

SECT. 4.—Effect of Counterclaim when Raised.

917. The effect of a counterclaim when raised is to put the plaintiff, and any third person against whom together with the plaintiff the counterclaim is set up, in the position of a defendant to a cross-action, who must defend himself and show a good answer or suffer judgment against himself, on which execution may issue in respect of the cause or causes of action alleged in the counterclaim (*h*).

Effect of
counterclaim.

(*n*) *Amon v. Bobbett* (1889), 22 Q. B. D. 543, 548, C. A.

(*o*) See Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 89, 90; Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 18; and titles COURTS, Vol. IX., p. 131; MAYOR'S COURT, LONDON, Vol. XX., p. 288.

(*p*) *Beddall v. Maitland* (1881), 17 Ch. D. 174, 181; *Gray v. Webb* (1882), 21 Ch. D. 802.

(*q*) See p. 506, *ante*.

(*r*) *Bartholomew v. Rawlings*, [1876] W. N. 56.

(*s*) *Stooke v. Taylor* (1880), 5 Q. B. D. 569; *Besant v. Wood* (1879), 12 Ch. D. 605; *Lewin v. Trimming* (1888), 21 Q. B. D. 230.

(*t*) *The Cheapside*, [1904] P. 339, C. A.

(*a*) *Adams v. Adams* (1890), 45 Ch. D. 426; affirmed, [1892] 1 Ch. 369, C. A.; *Oholmeley's (Sir Roger) School at Highgate (Warden etc.) v. Sewell*, [1893] 2 Q. B. 254.

(*b*) *Oholmeley's (Sir Roger) School at Highgate (Warden etc.) v. Sewell*, *supra*.

(*c*) See title INJUNCTION, Vol. XVII., p. 273.

(*d*) *Carter v. Fey*, [1894] 2 Ch. 541, C. A.; *Collison v. Warren*, [1901] 1 Ch. 812, C. A.

(*e*) *Dear v. Swarder*, *Swarder v. Dear* (1876), 4 Ch. D. 476.

(*f*) See title PATENTS AND INVENTIONS, Vol. XXII., p. 219.

(*g*) *Dear v. Swarder*, *Swarder v. Dear*, *supra*; *Mutrie v. Binney* (1887), 35 Ch. D. 614, C. A.

(*h*) If the plaintiff is an independent Sovereign, the defendant may avail himself of a counterclaim which is not outside of and independent of the subject-matter of the claim, but only to the extent of the plaintiff's claim. He will not be allowed to recover judgment for any excess (*Strousberg v. Costa Rica Republic* (1880), 29 W. R. 125, C. A.; *Imperial Japanese Government v. P. & O. Co.*, [1895] A. C. 644, P. C.).

SECT. 4.
Counter-
claim
Arising
after
Action
Brought.

The counterclaim is not affected by anything which relates solely to the plaintiff's claim, but proceeds as an independent action (i).

SECT. 5.—Counterclaim Arising after Action Brought.

918. A defendant may set up a counterclaim set up a cause of action which has accrued since action brought (k). A contributory on whom calls have been made in the winding-up of a company can counterclaim for rescission of the contract to take shares provided he has taken legal steps to have his name removed from the register before the winding-up commenced (l).

When cause
of action
may arise.

A defendant may set up a counterclaim in respect of a cause of action arising after defence, if he amend the defence and state in the counterclaim that it arose after defence (m).

SECT. 6.—Counterclaim to Counterclaim.

Counterclaim
to counter-
claim.

919. A plaintiff, in reply to a counterclaim, may set up a counterclaim against the defendant in respect of a matter which arose at the same time and out of the same transaction as the defendant's counterclaim (n), provided the plaintiff sets up such counterclaim merely as a protection against the defendant's counterclaim; otherwise any fresh claim he wishes to raise must be raised by amending the statement of claim (o).

A person not a party to the original action, but who is served with a counterclaim, may not raise a counterclaim against the original defendant alone (p) or against the original defendant together with the plaintiff (q).

SECT. 7.—Third Party Notice.

Third
party notice.

920. A plaintiff or other person against whom a counterclaim is set up may by leave issue a third party notice against a third person from whom he claims contribution or indemnity in respect of the subject-matter of the counterclaim (r).

(i) R. S. C., Ord. 21, r. 16; *McGowan v. Middleton* (1883), 11 Q. B. D. 4, 64, C. A.; and see p. 516, *post*.

(k) *Beddall v. Maitland* (1881), 17 Ch. D. 174, *per* FRY, J., at p. 180, dissenting from the view taken by JESSEL, M.R., in *Original Hartlepool Collieries Co. v. Gibb* (1877), 5 Ch. D. 713; *Wood v. Goodwin*, [1884] W. N. 17.

(l) *Whiteley's Case*, [1900] 1 Ch. 365, C. A.; see title COMPANIES, Vol. V., p. 538.

(m) *Ellis v. Munson* (1876), 35 L. T. 585, C. A. As to a plea *puis darrein continuance*, see title PLEADING, Vol. XXII., p. 450, note (b).

(n) *Toke v. Andrews* (1882), 8 Q. B. D. 428.

(o) *Benton, Gibbs & Co., Ltd. v. Neville & Co.*, [1900] 2 Q. B. 181, C. A.; *James v. Page* (1888), 85 L. T. Jo. 157.

(p) *Street v. Gover* (1877), 2 Q. B. D. 498.

(q) *Alcoy etc. Co. v. Greenhill*, [1896] 1 Ch. 19, C. A.; see p. 513, *post*.

(r) *Levi v. Anglo-Continental Gold Reefs of Rhodesia, Ltd.*, [1902] 2 K. B. 481, C. A. As to third party procedure, see title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 162 *et seq.*

Part IV.—Pleading and Practice.

SECT. 1.
Pleading.SECT. 1.—*Pleading.*SUB-SECT. 1.—*Form.*

921. In the High Court of Justice a set-off or counterclaim should be raised by being specially pleaded in the same document as the defence (a). In the High Court.

922. In the county court, a set-off or counterclaim is raised by notice in writing given five clear days before the date fixed for the hearing (a), or where the plaintiff's claim exceeds £50, then ten clear days before such date (b). The notice must state the facts relied on as showing the ground of set-off or counterclaim in the same form as that in which such facts would be pleaded in an action in the High Court (c). In the county court.

923. In any inferior court (d), including the Mayor's Court, London (e), the mode of raising a set-off or counterclaim is determined by the rules of procedure in force in such court. Inferior courts.

924. When in the High Court a party wishes to set up a set-off or counterclaim, the pleading in which he does so should be marked with the proper description (f). A party wishing to plead a set-off may do so by alleging facts sufficient to support the same without stating that it is a set-off (g), but a party wishing to set up a counterclaim must not only allege the necessary facts, but must also state that he does so by way of counterclaim (h). Form of pleading.

925. When in the High Court a defendant by his defence sets Title of pleading.

(a) R. S. C., Ord. 19, rr. 3, 15; Ord. 21, r. 10; *Graham v. Partridge* (1836), 1 M. & W. 395; and see title PLEADING, Vol. XXII., pp. 446, 451. As to the time for raising the claim, see p. 510, *post*.

(a) See County Court Rules, Ord. 10, r. 10; title COUNTY COURTS, Vol. VIII., p. 486.

(b) See County Court Rules, Ord. 22A; title COUNTY COURTS, Vol. VIII., p. 486.

(c) See title PLEADING, Vol. XXII., p. 419, note (i), and, as to pleading generally, see *ibid.*, pp. 417 *et seq.*

(d) See title COURTS, Vol. IX., p. 132.

(e) See title MAYOR'S COURT, LONDON, Vol. XX., pp. 290, 292. As to the practice of this court, see *ibid.*, pp. 288 *et seq.*

(f) R. S. C., Ord. 19, r. 11. Where there are pleadings the facts relied on as a set-off or as the subject of a counterclaim are pleaded in the same document as the defence after the facts relied on by way of defence pure and simple. The allegations which form the counterclaim should be headed "Counterclaim," and the title of the defendant's pleading should be "Defence and Counterclaim"; see R. S. C., Appendix D., s. I. Allegations which show a ground of set-off are usually headed "Set-off" or are introduced by words indicating that they are alleged by way of set-off. The pleading should be divided into paragraphs numbered consecutively; see title PLEADING, Vol. XXII., p. 421.

(g) *Newell v. National Provincial Bank of England* (1876), 1 C. P. D. 406, 501.

(h) R. S. C., Ord. 21, r. 10.

SECT. 1.
Pleading.

up any counterclaim which raises questions between himself and the plaintiff along with any other persons, he must add to the title an additional title as in a statement of claim, setting forth the names of all the persons who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross-action (i).

Time for raising claim.

926. Where the writ in an action in the High Court is indorsed for trial without pleadings (k), a defendant who seeks to rely on a set-off or counterclaim must, within ten days after appearance, give notice in writing to the plaintiff setting out the grounds and particulars (l) of such set-off or counterclaim (m), or apply by summons to the court or a judge for delivery of a statement of claim (n), and on the hearing of such summons ask for leave to deliver a set-off or counterclaim (a).

Contents of claim.

927. A defendant seeking to avail himself of a set-off or counterclaim must set out all the material facts on which he relies in support thereof in his pleading or notice (b) with the same particularity as he would as plaintiff in an independent action brought to enforce the subject of the set-off or counterclaim (c).

A plea of set-off must allege both that the plaintiff is and that the plaintiff was indebted to the defendant in the amount sought to be set off (d).

Form of claim.

928. A defendant may plead several grounds of set-off or counterclaim, either simply or in the alternative, which several grounds must be pleaded in the same manner as grounds of claim

(i) R. S. C., Ord. 21, r. 11. The form is:—

19—, B., No. .

In the High Court of Justice,
King's Bench Division.

Between A. B. . . . Plaintiff.
and

C. D. . . . Defendant.

(By original action.)

and between the said C. D. . . . Plaintiff.
and

the said A. B. and E. F. Defendants.

(By counterclaim.)

As to the marking of pleadings, see title PLEADING, Vol. XXII., p. 420.

(k) See title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 161, 162.

(l) As to particulars, see title PLEADING, Vol. XXII., pp. 453 *et seq.*

The particulars must show how the set-off arises.

(m) R. S. C., Ord. 18A, r. 5.

(n) On the hearing of the summons the judge may order pleadings to be delivered or that the defendant give particulars of his defence; see title PRACTICE AND PROCEDURE, Vol. XXIII., p. 162.

(a) R. S. C., Ord. 18A, r. 3.

(b) *Ibid.*, Ord. 19, r. 7, puts a notice on the same footing as a pleading in respect of particulars.

(c) Set-off is a ground of defence, and the facts in support thereof are relied upon as showing that the plaintiff's claim is not maintainable and must therefore be raised by the defendant's pleading (R. S. C., Ord. 19, r. 15). A counterclaim being, in effect a cross-action is, as regards mode of pleading, governed by the same rules as a statement of claim, as to which see title PLEADING, Vol. XXII., pp. 440 *et seq.*

(d) See p. 492, *ante*.

SECT. 1.
Pleading.

in a statement of claim (*e*), but if he alleges an alternative cause of action only against a person not a plaintiff he cannot claim to have him joined as a party (*f*).

A counterclaim may allege more than one cause of action provided the different causes of action are such as could be joined in the same statement of claim in an independent action (*g*), but the facts relied upon in support of each cause of action must be separately alleged (*h*), and if more than one form of relief be claimed the forms of relief must be specifically stated, either simply or in the alternative (*i*).

929. A defendant relying in support of a set-off or counterclaim on facts already alleged by way of defence need not repeat them *in extenso*, but may incorporate them in the set-off or counterclaim by way of reference only (*k*). Similarly, where the same claim is relied on as a subject both of set-off and counterclaim, the facts, if not already alleged in the defence, may be alleged in the counterclaim and incorporated in the set-off by way of reference (*l*).

Facts alleged by way of defence, set-off and counterclaim.

SUB-SECT. 2.—*Delivery or Service.*

930. Where a set-off or counterclaim is relied upon by a defendant only as against a person or persons by whom the action is brought as plaintiff or plaintiffs, such set-off is delivered in the same manner as and as part of the defence (*m*).

Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff or plaintiffs along with any other persons, he must deliver his defence to such of them as are parties to the action (*n*) within the period within which he is required to deliver it to the plaintiff or plaintiffs (*o*), and any person not a party to the action, but made a defendant to a counterclaim, must be summoned to appear by being served with a copy thereof, and such service is regulated by the same rules as apply to the service of a writ of summons (*p*).

Service.

(*e*) R. S. C., Ord. 20, rr. 6, 7; and see title PLEADING, Vol. XXII., pp. 422, 423.

(*f*) *Times Cold Storage Co. v. Lowther and Blankley, Lowther and Blankley v. Times Cold Storage Co. and New Zealand Shipping Co.*, [1911] 2 K. B. 100.

(*g*) *Turner v. Hednesford Gas Co.* (1878), 3 Ex. D. 145, C. A.; *Compton v. Preston* (1882), 21 Ch. D. 138; compare *Mardonald v. Oarington* (1879), 4 C. P. D. 28.

(*h*) R. S. C., Ord. 20, r. 7; and see title PLEADING, Vol. XXII., pp. 428, 445.

(*i*) R. S. C., Ord. 20, r. 6; and see title PLEADING, Vol. XXII., pp. 444, 445.

(*k*) *E.g.*, "And by way of counterclaim the defendant repeats the allegations in par.—of the Defence"; see *Birmingham Estates Co. v. Smith* (1880), 13 Ch. D. 506; *Benbow v. Low* (1880), 13 Ch. D. 553.

(*l*) *E.g.*, "By reason of the matters in the counterclaim hereinafter alleged the plaintiff is and was at the commencement of the action indebted to the defendant in a sum exceeding the plaintiff's claim, if any, in this action, namely, the sum claimed in the counterclaim, which sum the defendant is willing to set-off against the plaintiff's said claim."

(*m*) R. S. C., Ord. 21, r. 10.

(*n*) That is, persons who are plaintiffs or co-defendants; see p. 505, *ante*.

(*o*) R. S. C., Ord. 21, r. 11.

(*p*) See title PRACTICE AND PROCEDURE, Vol. XXII., pp. 114 *et seq.*

SECT. 1.
Pleading.

Appearance.

SUB-SECT. 3.—Appearance by Third Person not a Plaintiff.

931. Any person not already a party to the action, who is served with a defence and counterclaim, must appear thereto as if he had been served with a writ of summons (g) to appear in an action (r).¹

Where a person so served with a counterclaim fails to enter an appearance, judgment cannot be signed against him in default of appearance (s), but when the time for delivery of reply has expired the defendant may move for judgment in default of defence (t).

SUB SECT. 4.—Pleading in Answer to Counterclaim or Set-off.

Reply.

932. A defence to a set-off or counterclaim must be pleaded by a plaintiff in the reply (a) and delivered in the time limited for reply (b).

A person not a plaintiff made a defendant to a counterclaim may deliver a reply (c) within the time within which he might deliver a defence if it were a statement of claim (d).

A reply delivered by a plaintiff against whom a counterclaim is set up is headed "Reply." In a reply delivered by a plaintiff the paragraphs dealing with the defence are prefaced by the words "As

Every defence so served must be indorsed in the Form No. 2 in Appendix B, Part III., of the Rules of the Supreme Court, or to the like effect (R. S. C., Ord. 21, r. 12). The form is as follows:—

"To the within named E. F.

"Take notice that if you do not appear to the within counterclaim of the within-named C. D. within eight days from the service of this defence and counterclaim upon you, you will be liable to have judgment given against you in your absence.

"Appearance to be entered at"

(g) See title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 124 *et seq.*

(r) R. S. C., Ord. 21, r. 13. The rule says "Every person not a defendant," but having regard to *ibid.*, r. 12, it is submitted that "party" is the correct word, and that a plaintiff need not enter an appearance.

(s) See notes in the Yearly Practice of the Supreme Court, 1913, p. 283; *Higgins v. Scott* (1888), 21 Q. B. D. 10; *Verney v. Thomas* (1888), 58 L. T. 20; *Jones v. Macaulay*, [1891] 1 Q. B. 221, C. A.; *Roberts v. Booth*, [1893] 1 Ch. 52.

(t) R. S. C., Ord. 27, r. 11; and see titles JUDGMENTS AND ORDERS, Vol. XVIII., pp. 156 *et seq.*; PLEADING, Vol. XXII., p. 453.

(a) A reply cannot be delivered without leave. This is usually dealt with on the summons for directions; see title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 135, 136. If not so dealt with, a plaintiff to whom a counterclaim has been delivered should get leave to reply. A person not a plaintiff served with a counterclaim can probably reply without getting leave (R. S. C., Ord. 21, r. 14; see Yearly Practice of the Supreme Court, 1913, p. 283). If the only defence to a set-off is a traverse, no reply is needed, but if any other defence is relied upon it must be pleaded and leave to deliver a reply for that purpose should be obtained; see p. 494, *ante*; and title PLEADING, Vol. XXII., pp. 431, 458.

(b) *Bumley v. Winn* (1889), 22 Q. B. D. 265; and see title PLEADING, Vol. XXII., p. 459.

(c) See note (a), *supra*.

(d) R. S. C., Ord. 21, r. 14; and see title PLEADING, Vol. XXII., pp. 449, 450. The Rule says any "person named in the defence," but the practice is that a plaintiff must deliver his reply in the time limited for reply; see note (a), *supra*.

to the Defence," and those dealing with the counterclaim are prefaced with the words "As to the Counterclaim" (*e*).

SECT. 1.
Pleading.

933. A party or person served with a counterclaim pleads thereto in the same manner as a defendant would plead thereto if it were a statement of claim in an independent action, and must so plead in accordance with the rules of pleading governing a defence (*f*); but he may not set up a counterclaim to the counterclaim (*g*) unless he is a plaintiff in the action (*h*).

Party served
with
counterclaim.

934. A plaintiff or other person (*i*) against whom a set-off or counterclaim is set up may raise by his pleading any point of law or any of the defences hereinbefore mentioned (*k*) in answer thereto. Such point of law may be disposed of in the same way as a point of law raised by a defendant in answer to a statement of claim (*l*), and, if the decision of such point of law substantially disposes of any ground of set-off or counterclaim, the court or a judge may dismiss the same or make such other order as may be just (*m*), and similarly an objection in point of law may be taken to a reply (*n*).

Contents of
reply to
set-off or
counterclaim.

A counterclaim may be struck out as disclosing no cause of action (*o*).

935. A defendant who has set up any set-off or counterclaim may, without any leave, amend such set-off or counterclaim at any time before the expiration of the time allowed him for answering the reply, and before such answer, or in case there be no reply, then at any time before the expiration of twenty-eight days from defence (*p*), and the opposite party may within eight days apply to the court or a judge to disallow such amendment (*q*).

Amendment
without
leave.

Where any defendant has amended a set-off or counterclaim as mentioned above, the opposite party must plead thereto, or amend his own pleading, in like manner and subject to the conditions that obtain when a plaintiff has amended his statement of claim (*r*).

936. A set-off or counterclaim, or reply thereto, may be amended by leave of the court or a judge in the same manner as any other pleading (*s*).

Amendment
by leave.

(*e*) See R. S. C., Appendix E, s. I.

(*f*) See title PLEADING, Vol. XXII., pp. 445 *et seq.*

(*g*) See p. 508, *ante*.

(*h*) *Alcoy etc. Co. v. Greenhill*, [1896] 1 Ch. 19, C. A.; *Street v. Gover* (1877), 2 Q. B. D. 498; and see p. 508, *ante*.

(*i*) *Evans v. Buck, Buck v. Evans* (1876), 4 Ch. D. 432.

(*k*) See p. 494, *ante*; compare p. 506, *ante*.

(*l*) R. S. C., Ord. 25, r. 2; see title PLEADING, Vol. XXII., p. 433.

(*m*) R. S. C., Ord. 25, r. 3.

(*n*) *Ibid.* The rule covers every kind of pleading.

(*o*) *Ibid.*, r. 4; *Birmingham Estates Co. v. Smith* (1880), 13 Ch. D. 506; and see title PLEADING, Vol. XXII., p. 435.

(*p*) R. S. C., Ord. 28, r. 3.

(*q*) *Ibid.*, r. 4. As to the law governing amendment, see title PLEADING, Vol. XXII., pp. 437 *et seq.*

(*r*) R. S. C., Ord. 28, r. 5; see title PLEADING, Vol. XXII., p. 436.

(*s*) R. S. C., Ord. 28, rr. 1, 6; see title PLEADING, Vol. XXII., p. 438.

SECT. 2.

Applica-
tionsto Exclude
or Stay
Counter-
claim or
Set-off.Application to
exclude
counterclaim.Exclusion of
set-off or
counterclaim.Grounds of
exclusion.SECT. 2.—*Applications to Exclude or Stay Counterclaim or Set-off.*

937. Where a defendant sets up a counterclaim, if the plaintiff or any other person (*t*) named as party to such counterclaim (*u*) contends that the claim thereby raised ought not to be disposed of by way of counterclaim, but in an independent action, he may at any time before reply (*a*) apply to the court or a judge for an order that such counterclaim may be excluded, and the court or a judge may, on the hearing of such application, make such order as may be just (*b*).

938. The court or a judge may, on the application of the plaintiff before trial, if of opinion that a set-off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof and exclude the same (*c*).

A counterclaim may be excluded as embarrassing (*d*), or as tending unduly to delay the trial of the action (*e*).

939. Any counterclaim infringing the rules as to joinder of causes of action or parties will be disallowed (*f*). A counterclaim will not be excluded on the ground that the plaintiff is a foreigner who would not be amenable to the jurisdiction as defendant in an independent action (*g*), but if such plaintiff be an independent Sovereign, the defendant can only counterclaim to the extent of the plaintiff's claim, and in respect of a matter not outside or independent of the subject-matter of the plaintiff's claim (*h*). In an action for the protection of a trust fund in which the plaintiff claimed a beneficial interest, a counterclaim for libel was excluded (*i*); and in an action for the balance of an account leave to amend by adding a counterclaim for libel was refused (*j*). So such a counterclaim not connected with the subject-matter of the claim was excluded in an action for rent (*k*), but such a counterclaim will not

(*t*) *Dear v. Swarder, Swarder v. Dear* (1876), 4 Ch. D. 476. The next rule below applies only to a plaintiff.

(*u*) This rule does not apply to set-off, but the next rule applies to both set-off and counterclaim.

(*a*) The next rule applies to any time before trial.

(*b*) R. S. C., Ord. 21, r. 15.

(*c*) *Ibid.*, Ord. 19, r. 3; *Huggons v. Tweed* (1879), 10 Ch. D. 359, C. A.; *Compton v. Preston* (1882), 21 Ch. D. 138; *Lynch v. Macdonald* (1887), 37 Ch. D. 227, C. A.

(*d*) *Fendall v. O'Connell* (1885), 52 L. T. 538. The mere fact that a counterclaim sets up a claim *in personam* against a claim *in rem* does not make it embarrassing (*The Cheapside*, [1904] P. 339, C. A.).

(*e*) *Gray v. Webb* (1882), 21 Ch. D. 802.

(*f*) See pp. 504 *et seq.*, *ante*.

(*g*) *Friendloven v. Hamlyn & Co.* (1892), 8 T. L. R. 231.

(*h*) *Strousberg v. Costa Rica Republic* (1880), 29 W. R. 125, C. A.; *Imperial Japanese Government v. P. & O. Co.*, [1895] A. C. 644, P. C.

(*i*) *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1897] 2 Ch. 487, C. A.

(*j*) *Factories Insurance Co., Ltd. v. Anglo-Scottish General Commercial Insurance Co., Ltd.* (1913), 29 T. L. R. 312, C. A.

(*k*) *Botherham v. Priest* (1879), 28 W. R. 277.

be disallowed merely on the ground that it is brought in the Chancery Division (*l*).

In an action by a trustee on a covenant of indemnity, the court will not allow a counterclaim involving an administration action, nor one asserting a secret trust in favour of a third party (*m*).

In an action by a tenant for life for breach of trust the defendant will not be allowed to counterclaim on a bill of exchange (*n*).

In an action for goods sold and delivered, the defendant may not counterclaim in respect of a totally different transaction against a third person who happens to be the plaintiff's principal (*o*).

940. A counterclaim in respect of a matter which the parties have agreed to submit to arbitration may be stayed (*p*).

SECT. 2.
Applica-
tions
to Exclude
or Stay
Counter-
claim or
Set-off.

Submission to
arbitration.

SECT. 3.—Effect of Default in Pleading.

941. If a plaintiff or other person against whom a counterclaim is set up makes default in pleading thereto, the defendant cannot sign judgment in default of pleading, but he may set down the counterclaim on motion for judgment, and such judgment will be given as upon the counterclaim the court or a judge considers the defendant entitled to (*q*). If the reply be delivered before notice of motion for judgment is served, the motion will be refused (*r*).

Default in
pleading.

SECT. 4.—Security for Costs.

942. A defendant who sets up a counterclaim may, in a proper case be ordered to give security for costs (*s*).

Security for
costs.

Whether security for costs should be ordered to be given by a foreigner resident out of the jurisdiction, who is making a claim as plaintiff in a cross-action, or is counterclaiming as defendant in an action, is a matter of discretion. There is no hard and fast rule as to what are the circumstances under which an order for security for costs should be made. Generally speaking, if such a defendant is in substance setting up the counterclaim by way of defence to the action, he ought not to be required to give security; but if the counterclaim is really a cross-claim having nothing to do with the subject-matter of the plaintiff's claim, then the fact that he

(*l*) *Kinnaird (Lord) v. Field*, [1905] 2 Ch. 361, C. A.

(*m*) *Padwick v. Scott, Re Scott's Estate, Scott v. Padwick* (1876), 2 Ch. D. 736.

(*n*) *Fendall v. O'Connell* (1885), 52 L. T. 538.

(*o*) *Tagart & Co. v. Marcus & Co.* (1888), 36 W. R. 469. Sometimes he can claim a set-off; see p. 495, *ante*.

(*p*) Under the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4; see *Chappell v. North*, [1891] 2 Q. B. 252; see title ARBITRATION, Vol. I., p. 451. The plaintiff must not have "taken a step" since counterclaim delivered.

(*q*) R. S. C., Ord. 27, r. 11; *Street v. Crump* (1883), 25 Ch. D. 68; *McGowan v. Middleton* (1883), 11 Q. B. D. 464, C. A.; *Higgins v. Scott* (1888), 21 Q. B. D. 10; *Verney v. Thomas* (1888), 58 L. T. 20; *Jones v. Macaulay*, [1891] 1 Q. B. 221, C. A.; *Roberts v. Booth*, [1893] 1 Ch. 52; see also *Ailken v. Dunbar* (1877), 46 L. J. (CH.) 489; *Lumsden v. Winter* (1882), 8 Q. B. D. 650; *Caroli v. Hirst* (1883), 48 L. T. 759.

(*r*) *Graves v. Terry* (1882), 9 Q. B. D. 170.

(*s*) As to security for costs generally, see title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 152 *et seq.*

SECT. 4.
Security
for Costs.

is a defendant will not prevent him being ordered to give security for costs (*t*). Such a defendant will not be ordered to give security whenever the cross-claim goes beyond mere matter of defence (*u*); but if as defendant he by his counterclaim is in effect bringing an action quite independent of the transaction out of which the plaintiff's claim arises, he will be ordered to give security for costs (*u*). If the only matter really in dispute is that raised by the counterclaim, such a defendant will be ordered to give security (*a*). Where the claim is in Admiralty for damages caused by collision, such a defendant must give security for all the costs (*b*).

Company.

943. A defendant company in liquidation setting up a counterclaim may be ordered to give security for costs in the same way as though it were plaintiff in an independent action (*c*).

Admission of
foreign
plaintiff's
cause of
action.

944. A defendant who admits the cause of action sued upon and counterclaims against a foreign plaintiff is not entitled to security for costs (*d*).

SECT. 5.—*Effect of Discontinuance, Stay, or Dismissal of Action.*

Discontinu-
ance or
dismissal of
action.

945. If in any case in which the defendant sets up a counterclaim (*e*) the action is stayed, discontinued, or dismissed, the defendant may nevertheless proceed with his counterclaim (*f*), and the plaintiff cannot by discontinuing prevent a defendant from proceeding with his counterclaim and recovering judgment thereon (*g*).

Where an action is dismissed for want of prosecution (*h*), or as being frivolous or vexatious (*i*), the defendant may proceed with his counterclaim (*k*), and on default of pleading set it down on motion for judgment (*l*).

A counterclaim cannot after discontinuance be set up (*m*) or remitted to the county court (*n*).

(*t*) *New Fenix Compagnie Anonyme d'Assurances de Madrid v. General Accident, Fire, and Life Assurance Corporation, Ltd.*, [1911] 2 K. B. 619, C. A.; *Neck v. Taylor*, [1893] 1 Q. B. 560, C. A.

(*u*) *Mapleson v. Masini* (1879), 5 Q. B. D. 144; and see the cases cited in note (*t*), *supra*.

(*a*) *Sykes v. Sacerdoti* (1885), 15 Q. B. D. 423, C. A.

(*b*) *The Julia Fisher* (1877), 2 P. D. 115; and see *The Newbattle* (1885), 10 P. D. 33, C. A.

(*c*) *Pure Spirit Co. v. Fowler* (1890), 25 Q. B. D. 235. The jurisdiction to make such order now depends on the Companies (Consolidation) Act, 1908 (8 Edw. 7. c. 69), s. 278; see title COMPANIES, Vol. V., p. 327.

(*d*) *Winterfield v. Bradnum* (1878), 3 Q. B. D. 324, C. A.

(*e*) As to what amounts to "setting up," see *Bildt v. Foy* (1892), 9 T. L. R. 34; *Whiteley's Case*, [1900] 1 Ch. 365; *The Salybia*, [1910] P. 25.

(*f*) R. S. C., Ord. 21, r. 16.

(*g*) *Ibid.*; *McGowan v. Middleton* (1883), 11 Q. B. D. 464, C. A., overruling *Vavasour v. Krupp* (1880), 15 Ch. D. 474. But if the action is wholly discontinued before the counterclaim is set up the defendants cannot then proceed by counterclaim (*The Salybia, supra*).

(*h*) *Roberts v. Booth*, [1893] 1 Ch. 52.

(*i*) *Adams v. Adams* (1880), 45 Ch. D. 426; affirmed, [1892] 1 Ch. 369, C. A.

(*k*) R. S. C., Ord. 21, r. 16.

(*l*) *Ibid.*; and see *Roberts v. Booth, supra*; *Adams v. Adams, supra*.

(*m*) *The Salybia, supra*.

(*n*) *R. v. City of London Court (Judge)*, [1891] 2 Q. B. 71.

A defendant who has no defence to the plaintiff's claim but who has a *bonâ fide* counterclaim is entitled to apply for a stay of the action pending trial of the counterclaim (o).

SECT. 6.—*Judgment.*

SECT. 5.
Effect of
Discon-
tinuance,
Stay, or
Dismissal
of Action.

Stay.

Form of
judgment.

946. Where the defendant establishes a set-off equal to or exceeding the plaintiff's claim, judgment is entered in his favour on the claim, because a set-off amounts to an absolute defence (p), and, therefore, if he has also counterclaimed in respect of the matters pleaded by way of set-off, he gets judgment both on the claim and the counterclaim (q). Where the defendant succeeds in establishing a set-off, but for less amount than the plaintiff recovers on the claim, judgment is entered for the plaintiff for the difference between the amount recovered on the claim and the amount in respect of which a set-off has been proved (r). If both the claim and the counterclaim fail, judgment is entered for the defendant on the claim and the plaintiff on the counterclaim (s).

947. Where in any action a set-off or counterclaim is established as a defence against the plaintiff's claim, the court or a judge may, if the balance is in favour of the defendant, give judgment for the defendant for such balance (a), or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case (b).

Judgment for
defendant.

The power so to enter judgment in the case of a counterclaim is discretionary, and when judgment is so entered it should state the decision on the claim and on the counterclaim (c). Where the plaintiff succeeds on the claim and the defendant on the counterclaim, judgment is usually entered for the plaintiff on the claim and for the defendant on the counterclaim (d). Where the plaintiff has succeeded on his claim and the defendant has succeeded on the counterclaim, and the one amount exceeds the other,

(o) *Russell v. Pellegrini* (1856), 26 L. J. (Q. B.) 75.

(p) *Lowe v. Holme* (1883), 10 Q. B. D. 286; *Baines v. Bromley* (1881), 6 Q. B. D. 691, C. A.

(q) See the cases cited in note (t), p. 519, and note (a), p. 520, *post*; and see note (r), p. 504, *ante*.

(r) *Re Brown, Ward v. Morse* (1883), 23 Ch. D. 377, C. A.; see also the latter part of note (q), p. 491, *ante*.

(s) *Saner v. Bilton* (1879), 11 Ch. D. 416; *Mason v. Brentini* (1880), 15 Ch. D. 287, C. A.; *James v. Jackson*, [1910] 2 Ch. 92.

(a) R. S. C., Ord. 21, r. 17. Formerly a defendant who established a set-off exceeding in amount the plaintiff's claim could not get judgment in his favour for the excess (*Stooke v. Taylor* (1880), 5 Q. B. D. 569, 575). His only course was after getting judgment in respect of the claim brought by the plaintiff to bring an independent action for the balance. Even now, where a defendant desires judgment in his own favour for a balance in addition to judgment in respect of the plaintiff's claim, he should set up a counterclaim for this as well as a set-off.

(b) R. S. C., Ord. 21, r. 17. If the amount recovered by the defendant on his counterclaim exceeds the amount recovered by the plaintiff on his claim, but the balance of costs is in favour of the plaintiff, the court may allow the defendant to set off against such balance the difference between the two amounts (*Meynall v. Morris* (1911), 104 L. T. 667).

(c) *Hewitt & Co. v. Blumer & Co.* (1886), 3 T. L. R. 221, C. A.

(d) *Sharpe v. Haggith* (1912), 106 L. T. 13, C. A.

SECT. 6.
Judgment. judgment may be entered for the balance (e), but it is usually entered for the plaintiff on the claim and for the defendant on the counterclaim (f). It is entirely a matter for the discretion of the judge at the trial whether judgment is entered in the one form or the other (g).

Execution. **948.** Where a plaintiff obtains judgment on his claim and a defendant on the counterclaim, there are two judgments for all purposes except execution (h). Execution may not issue for more than the balance, and for this purpose it is immaterial whether judgment has been entered in the one or the other of the forms mentioned above (h).

SECT. 7.—Costs.

In general. **949.** Where a plaintiff succeeds on his claim and the defendant on a counterclaim, which is not the subject of a set-off, the plaintiff, in the absence of circumstances which the court may treat as a ground for depriving him of his costs, and, subject to the provision of the County Courts Act, 1888 (i), s. 116, is entitled to the general costs of the action (j), and the defendant is entitled to the costs of the counterclaim (k). Where a defendant sued in the High Court succeeds on a counterclaim, he is entitled to costs on the counterclaim, however small the amount recovered, and the County Courts Act, 1888 (i), s. 116, does not apply (l). Similarly, if the plaintiff fails on the claim and the defendant fails on the counterclaim, the defendant is entitled to the costs of the claim, including the general

(e) *Hewitt & Co. v. Blumer & Co.* (1886), 3 T. L. R. 221, C. A.; *Shrapnel v. Laing* (1888), 20 Q. B. D. 334, C. A.

(f) *Provincial Bill Posting Co. v. Low Moor Iron Co.*, [1909] 2 K. B. 344, 349, C. A. (plaintiff company in liquidation), *per* KENNEDY, L.J., at p. 351: "The court must consider in each case whether it would be right to give judgment for the balance, and if it would not be reasonable or right to deal with the claim and counterclaim by a judgment for the balance, then judgment should be given for the plaintiff on the claim and for the defendant on the counterclaim"; *Sharpe v. Haggith* (1912), 106 L. T. 13, C. A.

(g) *Shrapnel v. Laing*, *supra*; *Sharpe v. Haggith*, *supra*; see *Sprange v. Lee*, [1908] 1 Ch. 424, 432, where the amounts were equal.

(h) *Stumore v. Campbell & Co.*, [1892] 1 Q. B. 314, 317, C. A. Where judgment was entered for plaintiffs with costs on the claim, and judgment for the plaintiffs and other persons (added as defendants to the counterclaim) with costs on the counterclaim, it was held that the judgment debts were separate and could not be the subject of one bankruptcy notice (*Re A Bankruptcy Notice* (1906), 96 L. T. 133, C. A.). The claim and counterclaim are treated as one action for the purpose of determining the sum on which a solicitor has a charging order for his costs (*Westacott v. Bevan*, [1891] 1 Q. B. 774). As to such charging orders, see, generally, title SOLICITORS.

(i) 51 & 52 Vict. c. 43; see titles COUNTY COURTS, Vol. VIII., pp. 586 *et seq.*; PRACTICE AND PROCEDURE, Vol. XXIII., p. 182.

(j) See *Wight v. Shaw* (1887), 19 Q. B. D. 396, C. A., and cases cited in note (k), *infra*. As to what is "good cause" for depriving a party of costs, see title PRACTICE AND PROCEDURE, Vol. XXIII., p. 181, note (e).

(k) *Baines v. Bromley* (1881), 6 Q. B. D. 691, C. A.; *Wight v. Shaw*, *supra* (claim admitted); *Shrapnel v. Laing*, *supra*, at p. 338; *Finnska Anfartygs Aktiebolaget v. Brown, Toogood & Co.*, [1891] W. N. 116, C. A.; *Hallinan v. Price* (1879), 41 L. T. 627.

(l) *Staples v. Young* (1877), 2 Ex. D. 324; *Blake v. Appleyard* (1878), 3 Ex. D. 195; *Chatfield v. Sedgwick* (1879), 4 C. P. D. 459, C. A.; *Wood's*

SECT. 7
Costs.
—

costs of the action, and the plaintiff to the costs of the counterclaim (*m*). If the plaintiff is successful in defeating the counterclaim he is entitled to his costs of the counterclaim on the High Court scale, notwithstanding that the costs of his claim are governed by the County Courts Act, 1888 (*n*), s. 116 (*o*).

Where one party gets costs on the claim and the other costs on the counterclaim, the two sets of costs are set one against the other and the balance paid by the party against whom the greater sum for costs has been taxed (*p*).

The proper principle of taxation is to take the claim as if it and its issues were an action, and then to take the counterclaim and its issues as if it were an action, and then to give the allocatur for costs for the balance in favour of the litigant in whose favour the balance turns (*q*). If all the issues on the claim are found for the plaintiff he gets all the costs of the claim, but if only some of such issues are found in his favour he nevertheless gets the general costs of the action and of the issues on which he succeeds, but the defendant gets the costs of the issues on which the plaintiff fails (*r*). Costs incurred by a party in respect of matters that go partly to support the contentions on which he has succeeded and partly those on which he has failed, including the costs of a brief delivered to counsel on both claim and counterclaim, must be apportioned by the taxing master according to his own discretion (*s*).

Taxation.

950. Where a defendant succeeds in establishing a set-off equal to or exceeding the plaintiff's claim, he is, in the absence of circumstances which the court may treat as a ground for depriving him of costs, entitled to judgment with costs (*t*), and if he has also counter-

Set-off
equalling or
exceeding
claim.

Patent Brick Co. v. Cloke (1896), 40 Sol. Jo. 390. This is so in the absence of a special order, as against a person not a plaintiff made a defendant to the counterclaim (*Lewin v. Trimming* (1888), 21 Q. B. D. 230).

(*m*) *Saner v. Bilton* (1879), 11 Ch. D. 416; *Mason v. Brentini* (1880), 15 Ch. D. 287, C. A.; *James v. Jackson*, [1910] 2 Ch. 92. The costs of the counterclaim are the sum by which the whole costs of the proceedings have been increased by reason of the counterclaim.

(*n*) 51 & 52 Vict. c. 43; see note (*i*), p. 518, *ante*.

(*o*) *Amon v. Bobbett* (1889), 22 Q. B. D. 543, C. A.

(*p*) *Amon v. Bobbett*, *supra*. This is so in whichever of the two forms mentioned above judgment is given (*Shrapnel v. Laing* (1888), 20 Q. B. D. 334, C. A.; see R. S. C., Ord. 65, r. 27 (21)). If the difference between the amounts recovered respectively on the claim and counterclaim is in favour of one party, but the balance of costs is in favour of the other, the court may order such difference to be set off against such balance (*Meynall v. Morris* (1911), 104 L. T. 667).

(*q*) *Baines v. Bromley* (1881), 6 Q. B. D. 691, C. A., *per* BRETT, L.J., at p. 695; *Hewitt & Co. v. Blumer & Co.* (1886), 3 T. L. R. 221, C. A.; *Re Brown, Ward v. Morse* (1883), 23 Ch. D. 377, C. A.

(*r*) *Hewitt & Co. v. Blumer & Co.*, *supra*; *Atlas Metal Co. v. Miller*, [1898] 2 Q. B. 500, C. A.; *Slatford v. Erlebach*, [1912] 3 K. B. 155, C. A.

(*s*) *Baines v. Bromley*, *supra*; *Shrapnel v. Laing*, *supra*; *Atlas Metal Co. v. Miller*, [1898] 2 Q. B. 500, 506, C. A.; *Fox v. Central Silkstone Collieries, Ltd.*, [1912] 2 K. B. 597. The whole of the general costs of the action must be paid by a defendant against whom the plaintiff has established his claim; he is not entitled to any deduction on the ground that he has delivered a counterclaim instead of bringing a separate action (*Atlas Metal Co. v. Miller*, *supra*; *Re Brown, Ward v. Morse*, *supra*).

(*t*) *Baines v. Bromley*, *supra*.

SECT. 7.
Costs.

claimed in respect of the matters relied on by way of set-off he is similarly entitled to the costs of the counterclaim (a). If he proves a set-off for less than the plaintiff's claim he is held to have succeeded *pro tanto* (b).

Where a plaintiff brings an action in the High Court which might have been brought in the county court and succeeds on the claim, and the defendant establishes a set-off, the balance between the amount awarded on the claim and the amount the defendant has succeeded in setting off is the amount "recovered" for the purposes of the County Courts Act, 1888 (c), s. 116. But if the plaintiff gets judgment for an amount exceeding £100 and the defendant establishes a claim for a less amount by counterclaim, the plaintiff is nevertheless entitled to costs on the claim, however small the amount by which his claim exceeds the defendant's claim, and the County Courts Act, 1888 (d), s. 116, has no application (e).

(a) *Lowe v. Holme* (1883), 10 Q. B. D. 286; *Lund v. Campbell* (1885), 14 Q. B. D. 821, C. A. Where a defendant recovered on his counterclaim a sum equal to that recovered by a plaintiff on his claim, NEVILLE, J., ordered the plaintiff to pay the costs of the claim and counterclaim (*Sprange v. Lee*, [1908] 1 Ch. 424, 432), but it is difficult to see how this order can be supported unless the subject of counterclaim was also a good ground of set-off.

(b) *Lund v. Campbell*, *supra*. The word used in the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116 (amended by the County Courts Act, 1903 (3 Edw. 7, c. 42)), is "recover," and it has been held that the word "recover" means recover when set-off is allowed (*Ashcroft v. Foulkes* (1856), 18 C. B. 261, 271; *Beard v. Perry* (1862), 2 B. & S. 493; *Staples v. Young* (1877), 2 Ex. D. 324; *Stooke v. Taylor* (1880), 5 Q. B. D. 569, 575). If the plaintiff succeeds on his claim to the extent of £100, and the defendant succeeds on a counterclaim but not on a set-off, the plaintiff is entitled to costs on the High Court scale as he has "recovered" £100 (*Stooke v. Taylor*, *supra*).

(c) 51 & 52 Vict. c. 43, s. 116, as amended by the County Courts Act, 1903 (3 Edw. 7, c. 42); *Ashcroft v. Foulkes*, *supra*; *Beard v. Perry*, *supra*; see note (i), p. 518, *ante*.

(d) 51 & 52 Vict. c. 53; see note (c), *supra*.

(e) *Neale v. Clarke* (1879), 4 Ex. D. 286; *Stooke v. Taylor*, *supra*; title PRACTICE AND PROCEDURE, Vol. XXIII., p. 182.

SETTLED ESTATES ACT.

See INFANTS AND CHILDREN; LAND IMPROVEMENT; LANDLORD AND TENANT; SETTLEMENTS.

SETTLED LAND ACTS.

See LAND IMPROVEMENT; SETTLEMENTS.

SETTLEMENT.

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Part I.—Definition and Nature of Settlements.

SECT. 1.

Definition of a Settlement.

Definition of settlement.

SECT. 1.—*Definition of a Settlement.*

951. A settlement may be defined as any instrument or number of instruments whereby property, real or personal, is limited to or in trust for persons by way of succession, the object being the preservation and regulation of the enjoyment of the settled property between and by the persons or classes of persons nominated or intended by the settlor (*a*).

SECT. 2.—*Duration of Settlements.*

Duration of settlements.

952. The period during which such regulation may endure is limited by two rules: the first is that if land is limited to an unborn person during his life, a remainder cannot be limited to the children of such unborn person (*b*), whether the estates limited are legal or equitable (*c*); the second is that all estates and interests created by any settlement of real or personal property must vest indefeasibly in interest, but not necessarily in possession, within a life in being and twenty-one years after the determination of such life (*d*).

SECT. 3.—*Subject-matter of Settlements.*

Subject-matter of settlements.

953. Everything which can be a subject of private ownership may be settled by the owner (*e*). By reason of the differences in the

(*a*) Parliament has from time to time given definitions of the word "settlement" for the purpose of particular statutes, but there is no generally accepted legal definition of the word. For some definitions of settlement for the purposes of the particular statutes in which the definitions are contained, see Harbours and Passing Tolls, etc. Act, 1861 (24 & 25 Vict. c. 47), s. 2; Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 6 (4); Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 2; Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (1); Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47 (3); Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1) (i.). The definition set out in the text is adopted from that used in the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 2, and the Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 1, 2 (1) (see, further, pp. 624, 675, *post*), so as to include property of any nature settled by instruments of any nature; see pp. 527 *et seq.* The present title deals with the law as it affects settlements whether created by deed or will; and, as to questions arising on the construction of wills, see title WILLS.

(*b*) *Whitby v. Mitchell* (1890), 44 Ch. D. 85, C. A.; see title PERPETUITIES, Vol. XXII., p. 364.

(*c*) *Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1, C. A.

(*d*) See title PERPETUITIES, Vol. XXII., pp. 300 *et seq.* The enjoyment of a person who has a vested interest under a settlement cannot be postponed by a trust for accumulation exclusively for his benefit (*Saunders v. Vautier* (1841), Cr. & Ph. 240; *Wharton v. Masterman*, [1895] A. C. 186); and see title PERPETUITIES, Vol. XXII., pp. 327, 370.

(*e*) Limited interests cannot be given in consumable chattels; see titles GIFTS, Vol. XV., p. 408; PERSONAL PROPERTY, Vol. XXII., p. 414. It is, however, possible, though for obvious reasons it is not often done, to direct that a tenant for life shall be entitled to the enjoyment of only a limited amount, *e.g.*, of a cellar of wine in each year, and that the residue, if any, at his death, shall be distributed among the remaindermen. As to the settlement of a patent medicine for which there was no written recipe, see *Green v. Church* (1823), 1 L. J. (o. s.) (CH.) 203.

law of England with reference to real and personal property, settlements are sometimes divided, according to their subject-matter, into settlements of realty and settlements of personalty, but both realty and personalty may be settled by the same deed. Realty may also be settled by conveying it to trustees on trust for sale, the ordinary trusts contained in personal settlements being declared of the proceeds, while money is sometimes settled on trust to purchase lands to be settled to the proposed uses (*f*). In these cases, by virtue of the equitable doctrine of conversion (*g*), the land or money while remaining unconverted is regarded as money or land respectively.

SECT. 3.
Subject-matter of Settlements.

Realty and personalty.

Part II.—Creation of Settlements.

SECT. 1.—By Act of Parliament.

954. Settlements are sometimes created by either public or private Act of Parliament (*h*). In the first case they are created for the purpose of rewarding eminent public services by grants of land (*i*), and the Acts creating them are passed through Parliament in the same manner and with the same formalities as other public Bills (*k*).

By Act of Parliament.

In the second case the Act creating the settlement is known as an estate Bill, being one of the class of personal Bills which are introduced in the first instance in the House of Lords (*l*).

Estate Bill.

Recourse was had to these private Acts in cases where the estate was entangled by a multitude of contingent remainders, resulting trusts, springing uses, executory devises and the like, so that it might be out of the power of the courts of justice to relieve the owner; where the tenant of the estate lacked some reasonable power and recourse to the courts would not supply the deficiency; or where it was necessary, in settling an estate, to secure it against the claims of infants or other persons under legal disabilities who were not bound by any judgments or decrees of the ordinary courts of justice (*m*). Such Acts are, however, regarded as private conveyances rather than the solemn acts of the legislature, and they may be relieved against if obtained upon fraudulent suggestions (*n*).

Objects of settlements by private Acts.

(*f*) For forms of settlements of realty and personalty, see *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 289 *et seq.*

(*g*) See title *EQUITY*, Vol. XIII., pp. 104 *et seq.*

(*h*) The power of the Sovereign to make grants of Crown lands to subjects was abolished by the Crown Lands Act, 1702 (1 Anne, c. 1), s. 5, except in cases of grants or restitution of forfeited estates or of estates seized upon outlawry or executions by the Crown (*ibid.*, s. 8).

(*i*) *E.g.*, in the cases of the Duke of Marlborough, the Duke of Wellington, and Lord Nelson. It may be observed that the entails made by such Acts are indestructible; see stat. (1704) 3 & 4 Anne, c. 4, s. 1; stat. (1814) 54 Geo. 3, c. 161, s. 28; stat. (1813) 53 Geo. 3, c. 134, s. 1; and see titles *GIFTS*, Vol. XV., p. 408; *REAL PROPERTY AND CHATELS REAL*, Vol. XXIV., p. 261.

(*k*) See title *PARLIAMENT*, Vol. XXI., pp. 702 *et seq.*

(*l*) See *ibid.*, p. 758; and as to the procedure, see *ibid.*, pp. 759, 760.

(*m*) 2 Bl. Com. 298.

(*n*) *M'Kenzie v. Stuart* (1754), 5 Cru. Dig. 23, H. L.; *Biddulph v. Biddulph* (1790), 5 Cru. Dig. 26. The necessity for resorting to private Acts of

SECT. 2.

By Will.

By will.

SECT. 2.—By Will.

955. Settlements by private individuals may be made by will as well as by deed (*o*). A different rule of construction may be applied to the particular instrument creating the settlement according as it is a deed or a will, and different formalities are required for the execution of a will from those required for the execution of a deed (*p*).

SECT. 3.—By Deed or Deeds.

By deed or deeds.

956. A settlement may be created by a deed poll, but more commonly it is created by an indenture to which the intending settlor, the intended trustees of the settlement, and sometimes, and generally in the case of a marriage settlement, some of the beneficiaries, are parties. The settlement may be created by more than one deed, as where an assurance is effected by one deed and the trusts of the assured property are declared by another (*q*).

Execution.

The settlement must be executed by the settlor (*r*), and it is generally expedient that it should be executed by the trustees.

Recitals.

957. A settlement, if made in contemplation of marriage, usually recites the agreement to marry, the title of the property to be settled, and the agreement to settle. If there is any discrepancy between the recitals and the operative part, then, in accordance with the general rule affecting the construction of written instruments, the recitals do not control the operative part when it is

Parliament has been diminished by recent legislation, *e.g.*, the Settled Estates Act, 1877 (40 & 41 Vict. c. 18); the Settled Land Acts, 1882 to 1890 (45 & 46 Vict. c. 38; 47 & 48 Vict. c. 18; 50 & 51 Vict. c. 30; 52 & 53 Vict. c. 36; 53 & 54 Vict. c. 69), but several private Acts of this description are still passed every year.

(*o*) For the purpose of this title, it may be taken that there is no distinction at law between a settlement created by deed and one created by will. As to the distinction between settlements by deed of personal chattels and settlements thereof by will, see titles PERSONAL PROPERTY, Vol. XXII., pp. 413, 415; WILLS.

(*p*) As to the form of settlements by deed and as to their construction, see the text, *infra*; pp. 532, 533, *post*. As to the construction of wills and the formalities relating to their execution, see title WILLS. For various precedents of settlements by will, see Encyclopædia of Forms and Precedents, Vol. XV., pp. 403 *et seq.*

(*q*) As to settlements compounded of several deeds, see pp. 670 *et seq.*, *post*.

(*r*) Non-execution by some of the contracting parties does not necessarily prevent a settlement from binding those parties who execute the deed (*M'Neill v. Cahill* (1820), 2 Bli. 228, H. L.); see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 400, 402; and, as to the formalities of execution, see *ibid.*, pp. 382 *et seq.* Execution by a beneficiary is, as a rule, only important if the beneficiary is contracting to do something in consideration of the gift. Formerly, if property of the wife was settled, it was important that the intending husband should execute the deed to prevent the possibility of his impugning it as a fraud on his marital rights. This is of less consequence having regard to the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), but it is usual for both the intending spouses to execute a marriage settlement although the property settled may belong to one of them only.

SECT. 3.
By Deed
or Deeds.

clear (s), though they may be used to explain it (t). A recital in a settlement may amount to a covenant if it is plain upon the construction of the whole deed that it was so intended (a).

958. Freehold lands which are the subject of the settlement may be limited by the settlor to the use of the beneficiaries for successive legal estates according to the intention, or may be conveyed by him to trustees upon trusts in favour of the beneficiaries (b). No technical words of conveyance are required, and as a rule the settlor is expressed to convey the lands "as settlor." This expression by virtue of statute (c) implies a covenant for further assurance (d) by the person so conveying with the person, if only one, to whom the conveyance is made, or with the persons jointly to whom the conveyance is made as joint tenants, or with each of the persons to whom the conveyance is made as tenants in common (e). Proper words of limitation must, of course, be employed (e). What was formerly known as the "all estate" clause is now usually omitted in reliance on the statutory provision that every conveyance of property made after the 31st December, 1881, passes all the estate, right, title, interest, claim, and demand which the conveying parties have, or

Form of
settlements
of realty.

(s) *Holliday v. Overton* (1852), 14 Beav. 467; *Alexander v. Crostie* (1835), L. & G. temp. Sugd. 145; *Dawes v. Tredwell* (1881), 18 Ch. D. 354, C. A.

(t) *Jenner v. Jenner* (1866), L. R. 1 Eq. 361, and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 459 *et seq.*

(a) *Ibid.*, p. 461; *Farrall v. Hilditch* (1859), 5 C. B. (N. S.) 840.

(b) For precedents of settlements of real estate, see *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 291 *et seq.* As to settlements of registered land, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 312, 313. In the case of marriage settlements, the settled property is generally conveyed to trustees upon trust for the settlor till the solemnisation of the marriage, and afterwards upon the trusts declared by the settlement. A marriage which is declared null and void is never "solemnised" (*Re Garnett, Richardson v. Greenep* (1905), 74 L. J. (CH.) 570; see *Milford v. Reynolds* (1848), 16 Sim. 130); and see title HUSBAND AND WIFE, Vol. XVI., p. 572.

(c) See Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7 (1) (E); and see title SALE OF LAND, pp. 426 *et seq.*, *ante*.

(d) *I.e.*, that the person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution of law on his death, will, from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by them or any of them shall be reasonably required.

(e) Where realty was conveyed to the trustees of a settlement without proper words of limitation, they took only an estate for their joint lives and the life of the survivor, and the reversion was left in the settlor (*Re Hudson, Kühne v. Hudson* (1895), 72 L. T. 892; *Re Irwin, Irwin v. Parkes*, [1904] 2 Ch. 752); and see, further, *Chism v. Lipsitt*, [1905] 1 I. R. 60, C. A.: titles EQUIT, Vol. XIII., pp. 94, note (s), 95, note (c); REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 165, 166, and the cases there cited. For a case where the settlement was treated as rectified, see *Re Davis's Estate*, [1912] 1 I. R. 516.

SECT. 3.
By Deed
or Deeds.

Copyholds
and lease-
holds.

have power to convey, in the property (*f*). The habendum in a settlement does not differ from that in any other assurance dealing with a similar subject (*g*).

959. Copyholds are generally settled by a covenant to surrender them to the trustees to be held by them upon the trusts declared by the settlement, and leaseholds by an assignment to the trustees upon the trusts of the settlement (*h*). If freeholds are included in the settlement, the trusts of copyholds or leaseholds are generally declared by reference to the uses declared of the freeholds (*i*). If the leaseholds contain onerous covenants, they may be brought into the settlement by sub-demise to the trustees (*k*).

Settlements
of land
on trust
for sale.

960. If land is settled upon trust for sale, it is generally conveyed to the trustees upon trust to sell and to hold the proceeds of sale, and the rents and profits of the land till sale, upon the trusts declared by an indenture of even date (*l*). Such a trust for sale, if absolute (*m*), creates in equity an immediate conversion of the land into personality, notwithstanding that the consent of a beneficiary may be required during his life (*n*).

Mortgage
debt and
portions
charge.

If money secured by a mortgage is settled, the mortgage should be transferred to the trustees by one deed and the trusts declared by another to avoid the inconvenience that would otherwise arise of having to produce and acknowledge the right to production of the deed containing the trusts, on the sale or redemption of the mortgaged property (*o*). For similar reasons, if a portion charged on land is settled, it should be assigned to the trustees of the settlement by a separate deed (*p*).

Stocks and
shares.

961. If the settled property consists of stocks or funds, which pass by transfer in the books of the Bank of England (*q*), the settlement should recite that such transfer has been or is proposed to be made, as the case may be. A similar recital should be inserted

(*f*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 63; and see titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 472; SALE OF LAND, pp. 424, 425, *ante*. *Primâ facie*, when a person settles an estate, he intends to include in the conveyance every interest which he can part with and does not except (*Johnson v. Webster* (1854), 4 De G. M. & G. 474, 488).

(*g*) As to the habendum, see titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 473; SALE OF LAND, p. 425, *ante*.

(*h*) See title COPYHOLDS, Vol. VIII., pp. 90, 91. As to the importance of assigning chattels real to trustees in the case of settlements, see title PERSONAL PROPERTY, Vol. XXII., p. 413.

(*i*) See pp. 706 *et seq.*, *post*.

(*k*) See Encyclopædia of Forms and Precedents, Vol. XIII., p. 538; title LANDLORD AND TENANT, Vol. XVIII., pp. 408, 409.

(*l*) See Encyclopædia of Forms and Precedents, Vol. XIII., pp. 458, 689. For sales by trustees, see title TRUSTS AND TRUSTEES.

(*m*) *Goodier v. Edmunds*, [1893] 3 Ch. 455, 462.

(*n*) *Rainy v. Ellis* (1872), 27 L. T. 463; *A.-G. v. Dodd*, [1894] 2 Q. B. 150; and see title EQUITY, Vol. XIII., p. 104.

(*o*) *Capper v. Terrington* (1844), 1 Coll. 103; *Dobson v. Land* (1851), 4 De G. & Sm. 575.

(*p*) For a form, see Encyclopædia of Forms and Precedents, Vol. XIII., p. 696; and compare *ibid.*, p. 452.

(*q*) See titles BANKERS AND BANKING, Vol. I., p. 570; CHUSES IN ACTION, Vol. IV., p. 384; REVENUE, Vol. XXIV., pp. 753 *et seq.*; STOCK EXCHANGE.

in settlements of stocks and shares in joint stock companies which are transferred in accordance with the rules of the particular company (r). The trustees should see that the transfers are duly executed. Bonds and securities which pass by delivery (s) should be delivered to the trustees before the execution of the settlement, which should recite the fact of the delivery.

SECT. 8.
By Deed
or Deeds.

962. A fund or share of a fund of personalty to which the settlor is entitled, either under or in default of appointment, in the estate of a testator or intestate is settled by assigning to the trustees the settlor's interest, which should be described with precision, since settlements of an interest in a fund derived under a will by survivorship or otherwise have been held not to include a share in the fund coming to the settlor as next of kin of another beneficiary under the will, and shares taken under appointments do not pass under settlements which deal with shares in the same property taken in default of appointment (t).

Share of
personalty
under or in
default of
appointment

A reversionary interest is brought into settlement by being assigned to the trustees of the settlement, who should perfect their title, as in the case of other choses in action, by giving notice in writing of the assignment to the trustees of the instrument under which the reversionary interest is derived (u). The principle on which the court acts in discouraging dealing by expectant heirs with their reversionary interests has no application to the case of a settlement by an expectant heir (a).

Reversionary
interests.

963. If a debt is the subject of the settlement, it should be assigned to the trustees by the settlement. Such an assignment, coupled with notice thereof to the debtor in writing, vests in the trustees the legal right to the debt and the remedies therefor, with power to give a good discharge (b).

Debts.

964. Policies of insurance, generally on the life of an intending husband (c), are frequently made the subjects of settlements (d). The settlement may either declare the trusts of moneys to arise from a policy which is taken out by the trustees in their own

Policies of
insurance.

(r) For forms of such recitals, see *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 414, 446, 453; see also *ibid.*, pp. 517, 518. As to the transfer of shares in companies, see title COMPANIES, Vol. V., pp. 186 *et seq.*

(s) See title CHOSSES IN ACTION, Vol. IV., pp. 366, 393 *et seq.*

(t) *Re Newbold's Trust* (1856), 4 W. R. 735; *Parkinson v. Dashwood* (1861), 30 Beav. 49; *Edwards v. Broughton* (1863), 32 Beav. 667; compare *Cotteen v. Missing* (1815), 1 Madd. 176; *Smith v. Osborne* (1857), 6 H. L. Cas. 375; *Re Walpole's Marriage Settlement*, *Thomson v. Walpole*, [1903] 1 Ch. 928.

(u) See title CHOSSES IN ACTION, Vol. IV., pp. 382, 383.

(a) *Shafte v. Adams* (1864), 4 Giff. 492; compare title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 111 *et seq.* For forms of settlement of reversionary interest, see *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 413, 527.

(b) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6); and see title CHOSSES IN ACTION, Vol. IV., pp. 367 *et seq.*

(c) For the law relating to policies expressed to be for the wife and children of the assured, see titles HUSBAND AND WIFE, Vol. XVI., pp. 399, 400; INSURANCE, Vol. XVII., p. 545.

(d) A covenant by an intending husband to effect a policy with an insurance company is not satisfied by effecting a less beneficial policy with a friendly society (*Courtenay v. Courtenay* (1846), 3 Jo. & Lat. 519).

SECT. 3.

**By Deed
or Deeds.**Bonuses
on policy.

names (*e*), or the settlor may take out the policy in his own name and assign it by the settlement upon the trusts therein declared to the trustees, who should give notice in writing of such assignment to the insurance company (*f*). An assignment of a policy generally carries with it any bonuses that may accrue (*g*), though the settlor may be entitled to exercise any option that is given him by the rules of the company to apply the bonuses in reduction of premiums or receive them in cash (*h*). Where bonuses are excluded from the settlement, the trustees who receive them are not allowed to retain them, as against the personal representatives of the settlor, to make good a misappropriation of trust funds by him (*i*).

Appropriate
covenants.

The settlement should contain covenants with the trustees by the person whose life is assured not to avoid the policy, to pay premiums, to effect a substituted policy if necessary, and not to prejudice the trustees' rights to the policy moneys. If the covenant be merely to keep up the policy, there is no right of action against the covenantor's estate on the forfeiture of the policy by reason of a breach of the stipulations therein contained (*k*).

Failure to effect a substituted policy has been held to make the covenantor liable in damages to the trustees, though his life had in fact become uninsurable (*l*). Should the covenantor become bankrupt, his contingent future liability to pay premiums is a debt that may be proved in his bankruptcy (*m*). It is desirable always to give the trustees power to surrender the policy for a fully paid up one of a smaller amount.

SECT. 4.—*Construction of Settlements by Deed.*Construction
of settlement
by deed.

965. Settlements by deed are to be construed according to the general rules for the interpretation of deeds (*n*). The court gives

(*e*) *Tidswell v. Ankerstein* (1792), Peake, 204 [151]; *Collett v. Morrison* (1851), 9 Hare, 162; and see title INSURANCE, Vol. XVII., pp. 544 *et seq.*

(*f*) Policies of Insurance Act, 1867 (30 & 31 Vict. c. 144), s. 3; and, as to assignments of policies generally, see title INSURANCE, Vol. XVII., pp. 558 *et seq.* Where a settlor covenanted to settle any property to which, during his marriage, he should become entitled by devise, bequest, purchase, or otherwise, policies of insurance on his life subsequently effected by him were held to be within the operation of the covenant (*Re Turcan* (1888), 40 Ch. D. 5, C. A.). For forms of settlement of life policies, see *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 413, 503.

(*g*) *Courtney v. Ferrers* (1827), 1 Sim. 137; *Parkes v. Bott* (1838), 9 Sim. 388; *Gilly v. Burley* (1856), 22 Beav. 619; *Warren v. Wybaul* (1866), 12 Jur. (N. S.) 639. Bonuses do not pass if the policies are only securities for a specified sum which is settled (*Domville v. Lamb* (1853), 1 W. R. 246); compare *Re Armstrong's Trusts* (1857), 3 K. & J. 486, not following *Plunkett v. Mansfield* (1845), 2 Jo. & Lat. 344).

(*h*) *Hughes v. Searle*, [1885] W. N. 79; compare *Gilly v. Burley*, *supra*; and see *Lackersteen v. Lackersteen* (1860), 30 L. J. (CH.) 5.

(*i*) *Hallett v. Hallett* (1879), 13 Ch. D. 232. The case is different where the claim is made under the trusts of the settlement (*Re Weston, Davies v. Tagart*, [1900] 2 Ch. 164).

(*k*) *Dormay v. Borrodaile* (1847), 10 Beav. 335. For form of covenants, see *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 431, 432.

(*l*) *Re Arthur, Arthur v. Wynne* (1880), 14 Ch. D. 603.

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37. As to the method of valuing such a liability, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 198, 199; and, as to the effect of the bankrupt's discharge on his liability under such a covenant, see *ibid.*, pp. 260, 270.

(*n*) See title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 433 *et seq.*

effect to the intention of the parties as it appears in the settlement (o), even if it is impossible to adhere to the natural or ordinary meaning of the actual words used (p), and the court also, if necessary, substitutes a special meaning for the ordinary or the technical meaning of the words used (q), but clear and definite expressions are not overridden by ambiguous phrases (r). In short, such a construction is given to the settlement as supports the general intent, though a particular expression may be inconsistent with it (s).

SECT. 4.
Construction of Settlements by Deed.

Part III.—Contracts for Settlements.

SECT. 1.—Parol Agreements and the Statute of Frauds.

966. Contracts for settlements may be made in any circumstances in which settlements may be made. In practice, however, they are generally contracts made in consideration of marriage. Such contracts must be evidenced by a memorandum or note thereof in writing signed by the party to be charged or by some party lawfully authorised by him to sign (a). It follows that an agreement to make a settlement, when made before marriage by parol only (b), or only evidenced by an unsigned memorandum (c),

Contracts for settlements must be in writing.

Parol agreements.

(o) *Hodgeson v. Bussey* (1740), 2 Atk. 89, 91; *Newitt v. Robinson* (1866), 15 W. R. 77; *Re Blake's Estate* (1871), 19 W. R. 765; and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 433, 434; *Re Hammersly's Estate* (1861), 11 L. Ch. R. 229, where words of limitation in fee were rejected. As to the effect of recitals on construction, see *Doran v. Ross* (1789), 1 Ves. 57; title DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 459 *et seq.*

(p) Thus "or" has been construed to mean "and" (*White v. Supple* (1842), 2 Dr. & War. 471; but see *Malmesbury (Earl) v. Malmesbury (Countess)*, *Phillipson v. Turner* (1862), 31 Beav. 407; *Re Lund's Settlement*, *Stanfield v. Keene* (1903), 89 L. T. 606; *Re Coley, Gibson v. Gibson*, [1901] 1 Ch. 40), and clerical errors have been corrected (*Re Alexander's Settlement*, *Jennings v. Alexander*, [1910] 2 Ch. 225); see also titles DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 454; WILLS.

(q) Thus the word "sole" in a marriage settlement may find its appropriate meaning in its being a provision to give the wife the sole and absolute disposition of her property (*Massy v. Rowen* (1869), L. R. 4 H. L. 288, 297).

(r) *Dill v. Haddington (Earl)* (1841), 8 Cl. & Fin. 168, H. L., see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 439; and compare *Green v. Bailey* (1845), 14 Sim. 635 (where it was held that a gift to grandchildren in a contemplated event did not fail because there was a blunder in a subsequent limitation over); and see title CONTRACT, Vol. VII., pp. 518, 519.

(s) *Houston v. Barry* (1843), 5 L. Eq. R. 294.

(a) Statute of Frauds (29 Car. 2, c. 3), s. 4; see title CONTRACT, Vol. VII., pp. 361, 364. There is, of course, no reference here to mutual promises to marry. A deposit or collateral security for the performance of a written agreement to settle property is not within the purview of the statute (*Hales v. Van Berchem* (1708), 2 Vern. 617).

(b) *Montacute (Viscountess) v. Maxwell* (1720), 1 P. Wms. 618; *Spicer v. Spicer*, *Spicer v. Dawson*, *Lawford v. Spicer* (1857), 24 Beav. 365; *Caton v. Caton* (1867), L. R. 2 H. L. 127; *Johnstone v. Mappin* (1891), 60 L. J. (CH.) 241.

(c) *Bawdes v. Amhurst* (1715), Prec. Ch. 402; *Thynne (Lady, E.) v. Glenqall (Earl)* (1848), 2 H. L. Cas. 131. It should be observed, however,

SECT. 1.
Parol Agree-
ments and
the Statute
of Frauds.

Memorandum
after
marriage.
Part perform-
ance.

is not enforceable (*d*), whether such agreement is made by one of the parties to the intending marriage (*e*) or by a third person (*f*). An agreement for a settlement made by parol before marriage may, however, be sufficiently evidenced by a memorandum in writing made after the marriage so as to be enforced against a party to the agreement and any person identified in interest with him (*g*).

The Statute of Frauds (*h*) cannot be pleaded to bar the proof of a parol contract before marriage to settle land in cases where there has been part performance of such contract by the delivery of possession of the land in question after the marriage (*i*); but

that in neither of these cases was there any completed agreement; see *Welford v. Beazely* (1747), 3 Atk. 503. *Cokes v. Mascall* (1688), 2 Vern. 34, 200, and *Halfpenny v. Ballet* (1700), 2 Vern. 373, cannot now be relied on as authorities.

(*d*) An executor cannot retain a debt due to himself from his testator on an oral contract made in consideration of marriage (*Re Rowson, Field v. White* (1885), 29 Ch. D. 358, C. A.). An actual transfer of money, however, to trustees by the intending husband and wife before marriage on trusts agreed on by them in parol is good, whether there is or is not any subsequent declaration of trust in writing (*Cooper v. Wormuld* (1859), 27 Beav. 266).

(*e*) See cases cited in note (*b*), p. 533, *ante*.

(*f*) See cases cited in note (*c*), p. 533, *ante*.

(*g*) *Hodgson v. Hutchenson* (1712), 5 Vin. Abr. 522; *Mountague (Countess Dowager) v. Maxwell* (1719), 1 Stra. 236; *Taylor v. Beech* (1749), 1 Ves. Sen. 297; *Dundas v. Dutens* (1790), 1 Ves. 196; *Barkworth v. Young* (1856), 4 Drew. 1; *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360, C. A.; see *Surcome v. Pinniger, Ex parte Pinniger* (1853), 3 De G. M. & G. 571, 575, C. A.; *Hammersley v. De Biel (Baron)* (1845), 12 Cl. & Fin. 45, H. L. This question has given rise to a considerable discussion, but the cases of *Spurgeon v. Collier* (1758), 1 Eden, 55; *Randall v. Morgan* (1805), 12 Ves. 67; *Battersbee v. Farrington* (1818), 1 Swan. 106; *Lassence v. Tierney* (1849), 1 Mac. & G. 551; *Warden v. Jones* (1857), 2 De G. & J. 76; *Trowell v. Shenton* (1878), 8 Ch. D. 318, C. A., were all disallowed and distinguished in *Re Holland, Gregg v. Holland, supra*, which lays down the law as stated in the text. Letters (*Hodgson v. Hutchenson, supra*), an affidavit made in legal proceedings (*Barkworth v. Young, supra*), and a recital in a post-nuptial settlement (*Dundas v. Dutens, supra*; *Re Holland, Gregg v. Holland, supra*) have been held to be a sufficient memorandum within the statute. A post-nuptial settlement, however, which does not refer to an ante-nuptial parol contract, is not a memorandum of such contract, nor does it take the case out of the statute on the ground of part performance (*Warden v. Jones* (1857), 23 Beav. 487, affirmed 2 De G. & J. 76; see *Re Holland, Gregg v. Holland, supra*, at p. 388; *Trowell v. Shenton, supra*). A recital in a post-nuptial settlement of an ante-nuptial contract may be disproved by evidence (*Hogarth v. Phillips* (1858), 4 Drew. 360).

(*h*) 29 Car. 2, c. 3.

(*i*) *Surcome v. Pinniger, Ex parte Pinniger, supra*; *Ungley v. Ungley* (1877), 5 Ch. D. 887, C. A.; *Sharman v. Sharman* (1892), 67 L. T. 834, C. A. The doctrine of part performance appears to have been applied to parol contracts to settle personally only in *Williams v. Williams* (1868), 37 L. J. (CH.) 854, where STUART, V.-C., followed the opinion expressed in *De Biel (Baron) v. Thomson* (1841), 12 Cl. & Fin. 61, n., *per* Lord COTTENHAM, L.C.; see also *Re Gulliver, Stroughill v. Gulliver* (1856), 2 Jur. (N. S.) 700 (payments of interest in pursuance of a parol agreement held not to be part performance so as to take the case out of the statute); *Re Whitehead, Ex parte Whitehead* (1885), 14 Q. B. D. 419, C. A. It may be observed that the doctrine of part performance appears to be founded on two distinct lines of reasoning, the first, which is only applicable to land, being that possession by a stranger is such

marriage subsequent to and in reliance on a parol contract to settle is not part performance of the contract so as to exclude the operation of the Statute of Frauds (*k*).

A person who makes a misrepresentation of fact (*l*), and thereby induces a marriage, is not allowed, in accordance with the principle of estoppel by representation (*m*), to deny its truth (*n*). This principle is not affected by the Statute of Frauds (*o*).

SECT. 1.
Parol Agree-
ments and
the Statute
of Frauds.
Estoppel.

SECT. 2.—*Informal Contracts.*

967. An offer to make a settlement in the event of a marriage taking place may, by a marriage following on such offer, become a contract binding on all parties concerned (*p*).

Informal
contract.

No formal document is required to enable such a contract to be enforced (*q*), but it must comply with the following conditions:—

(1) There must be a sufficient memorandum or note in writing to satisfy the Statute of Frauds (*r*) in cases to which that statute applies.

Requisites for
contract.

cogent evidence that there was some contract as to compel the court to admit evidence of the terms of the contract in order that justice may be done between the parties (*Ungley v. Ungley* (1877), 5 Ch. D. 887, 890, C. A.). The other principle is that, if one of two contracting parties has been induced or allowed by the other to alter his position on the faith of the contract, it would be fraudulent to allow him to set up the statute against the party whom he has induced to alter his position (*Caton v. Caton* (1866), 1 Ch. App. 137, 148; see title EQUITY, Vol. XIII., p. 75), and this principle extends to any contract as to which, if in writing, a court of equity would order specific performance; see *McManus v. Cook* (1887), 35 Ch. D. 681, 697. For the doctrine of part performance generally, see titles CONTRACT, Vol. VII., pp. 379 *et seq.*; SPECIFIC PERFORMANCE.

(*k*) *Dundas v. Dutens* (1790), 1 Ves. 196, 199; *Lassence v. Tierney* (1849), 1 Mac. & G. 551; *Warden v. Jones* (1857), 2 De G. & J. 76; *Caton v. Caton* (1867), L. R. 2 H. L. 127, affirming S. C. (1866), 1 Ch. App. 137.

(*l*) As to representations of intention amounting to offers, see p. 536, *post*.

(*m*) See title ESTOPPEL, Vol. XIII., pp. 376 *et seq.*

(*n*) *Graves v. White* (1680), Freem. (CH.) 57; *Gale v. Lindo* (1687), 1 Vern. 475; *Montefiori v. Montefiori* (1762), 1 Wm. Bl. 363; *Neville v. Wilkinson* (1782), 1 Bro. C. C. 543; *Bold v. Hutchinson* (1855), 3 Eq. Rep. 743; see *Hunsden v. Cheyney* (1690), 2 Vern. 150; *Stone v. Godfrey* (1854), 5 De G. M. & G. 76, C. A.; *Maunsell v. Hedges and White* (1854), 4 H. L. Cas. 1039, 1055; *Jorden v. Money* (1854), 5 H. L. Cas. 185; *M'Keogh v. M'Keogh* (1870), 4 I. R. Eq. 338. The doctrine does not apply where a solemn deed has been executed from which alone the intention of the parties can be gathered (*Monypenny v. Monypenny* (1858), 4 K. & J. 174, reversed as to the legal construction of the deed (1859), 3 De G. & J. 572; and see *Kirwan v. Burchell* (1859), 10 I. Ch. R. 63). While it is not necessary that the party making the representation should know that it was false (*Jorden v. Money*, *supra*, at p. 212), there must be something in the nature of a warranty of the truth of the representation, and an innocent mistake common to all parties does not inflict upon the erring person any liability (*Merewether v. Shaw* (1789), 2 Cox, Eq. Cas. 124; *Ainslie v. Medlycott* (1803), 9 Ves. 13; *Evans v. Wyatt* (1862), 31 Beav. 217).

(*o*) *Jorden v. Money*, *supra*, at p. 207; *Warden v. Jones* (1857), 23 Beav. 487, 493.

(*p*) *Hammersley v. De Biel (Baron)* (1845), 12 Cl. & Fin. 45, H. L.; *Maunsell v. Hedges and White*, *supra*.

(*q*) *De Biel (Baron) v. Thomson* (1841), 12 Cl. & Fin. 61, n.

(*r*) 29 Car. 2, c. 3, s. 4. The memorandum must show the parties, the subject-matter, the agreement, and the consideration (*Vincent v. Vincent*

SECT. 2.
Informal
Contracts.

(2) There must be a definite offer which is turned into a contract by the celebration of the marriage(s); a mere representation of intention to do something in the future does not suffice (t).

(1886), 55 L. T. 181). A bond given before marriage by one party may, however, be turned into an agreement binding the other party after marriage by acquiescence and acts done upon it (*Archer v. Pope* (1754), 2 Ves. Sen. 523; see *Estcourt v. Estcourt* (1760), 1 Cox, Eq. Cas. 20; *Rippon v. Dawding* (1769), Amb. 565). A contract for a settlement may be made out by a correspondence (*Saunders v. Cramer* (1842), 3 Dr. & War. 87; *sub nom. Greene v. Cramer*, 2 Con. & Law. 54; *Moore v. Hart* (1682), 1 Vern. 110; *Douglas v. Vincent* (1691), 2 Vern. 202; *Wankford v. Fotherley* (1694), 2 Vern. 322; *Herbert v. Winchelsea* (Earl) (1714), 1 Bro. Parl. Cas. 145; *Seagood v. Meale* (1721), Prec. Ch. 560; *Luders v. Anstey* (1799), 4 Ves. 501; *Montgomery v. Beilly* (1827), 1 Bli. (N. S.) 364, H. L.; *Laver v. Fielder* (1862), 32 Beav. 1; *Coverdale v. Eastwood* (1872), L. R. 15 Eq. 121; *Keays v. Gilmore* (1873), 8 I. R. Eq. 290; *Viret v. Viret* (1880), 50 L. J. (CH.) 69); compare the cases cited in note (g), p. 534, *ante*; and, as to what constitutes a sufficient memorandum, see, generally, title CONTRACT, Vol. VII., pp. 367 *et seq.* Secondary evidence, either by parol or by written memorandum, has, however, been admitted where the contract was contained in documents which had been lost (*Jameson v. Stein* (1855), 21 Beav. 5; *Prole v. Soady* (1859), 2 Giff. 1; *Gilchrist v. Herbert* (1872), 26 L. T. 381; see *Peyton v. M'Dermott* (1857), 1 Dr. & Wal. 198).

(s) The following have been held to amount to definite offers:—"I still adhere to my last proposition, viz., to allow Elizabeth £100 a year . . . and at my decease she shall be entitled to her share of whatever property I may die possessed of" (*Laver v. Fielder* (1862), 32 Beav. 1); "I will give C. one-third of my business . . . and at my death he will have half the business and a child's share of what property I may be worth" (*Keays v. Gilmore* (1873), 8 I. R. Eq. 290); "If your daughter has or may have money, my wish and intention would be that it should be so settled for her sole and separate use" (*Alt v. Alt* (1862), 4 Giff. 84); "Some years ago I made my will, by which I left all my property to . . . trustees . . . upon trust to . . . pay the interest to my daughter during her life, independent of any husband with whom she might intermarry, and the principal to be divided as she by her will might ultimately dispose of. It has been my intention in the event of the marriage taking place to make a similar will in accordance with the facts of the case, and of course I should settle my property . . . on my daughter absolutely and independent of her husband, or in other words in strict settlement . . . I will take care that my property . . . shall be properly secured upon her and her children after my death" (*Coverdale v. Eastwood* (1872), L. R. 15 Eq. 121); "Mr. J. P. T. also intends to leave a further sum of £10,000 in his will to Miss T. to be settled on her and her children, the disposition of which supposing she has no children will be prescribed by the will of her father. These are the bases of the arrangement, subject of course to revision, but they will be sufficient for Baron B. to act upon" (*Hammersley v. De Biel* (Baron) (1845), 12 Cl. & Fin. 45, H. L.); see also *Luders v. Anstey*, *supra*; *Saunders v. Cramer*, *supra*; *Walford v. Gray* (1865), 11 Jur. (N. S.) 106, 473; *Shadwell v. Shadwell* (1860), 9 C. B. (N. S.) 159; *Synge v. Synge*, [1894] 1 Q. B. 466, C. A.; *Skeete v. Silberberg* (1895), 11 T. L. R. 491.

(t) Examples of expressions of intention which have been held not to constitute binding contracts are:—"She will have a share of what I leave after the death of her mother" (*Re Fickus, Farina v. Fickus*, [1900] 1 Ch. 331); "She is and shall be noticed in my will, but to what further amount I cannot say" (*Moorhouse v. Colwin* (1851), 15 Beav. 341); "My will has been made for some time, and I am confident that I shall never alter it to your disadvantage. I have mentioned before, and I again repeat, that my county of T. estate will come to you at my death, unless some unforeseen occurrence should take place" (*Mounsell v. Redges and White*

(3) There must be perfect or reasonable certainty as to the amount and nature of the property to which the contract applies (*u*), but parol evidence is admissible to explain ambiguities (*a*).

(4) It must be proved that the marriage took place on the faith of the offer (*b*); it necessarily follows that the offer must be communicated to the person seeking to enforce it (*c*).

SECT. 2.
Informal
Contracts.

968. A contract so created may be enforced if a marriage takes place on the faith of the offer, whether the offer has been made by one of the parties to the marriage to the other (*d*) or made by a third party to either of them (*e*).

Parties
between
whom
enforceable.

Such a contract has been enforced after the death of the contracting party against his estate (*f*). A promise to give a portion to a daughter has been enforced after her death in favour of her husband who had taken out administration to her estate (*g*).

969. There is a presumption, which may, however, be rebutted by sufficient evidence (*h*), that a completed settlement contains the entire marriage contract, and representations or promises made by correspondence prior to the settlement which are not carried out thereby are not enforced (*i*).

Informal con-
tract super-
seded by
settlement.

(1854), 4 H. L. Cas. 1039; and see *Randall v. Morgan* (1805), 12 Ves. 67; *Quinlan v. Quinlan* (1834), Hayes & Jo. 785; *Beaumont v. Carter, Carter v. Beaumont* (1863), 32 Beav. 586; *Re Allen, Hincks v. Allen* (1880), 49 L. J. (CH.) 553; *Madox v. Nowlan* (1824), Beat. 632; *Jordan v. Money* (1854), 5 H. L. Cas. 185; *Vincent v. Vincent* (1887), 56 L. T. 243, C. A.; *M'Askie v. M'Gay* (1868), 2 I. R. Eq. 447.

u) *Prole v. Soady* (1859), 2 Giff. 1, 22; *Kay v. Crook* (1857), 3 Sm. & G. 407; see *Moorhouse v. Colvin* (1852), 21 L. J. (CH.) 782, C. A., affirming S. C. (1851) 15 Beav. 341; *Re Allen, Hincks v. Allen, supra*; *M'Askie v. M'Gay, supra*.

(*a*) *Laver v. Fielder* (1862), 32 Beav. 1 (parol evidence was admitted to show what was meant by the words "her share").

(*b*) *Jameson v. Stein* (1855), 21 Beav. 5; *Goldicutt v. Townsend* (1860), 28 Beav. 445; *Dashwood v. Jermyn* (1879), 12 Ch. D. 776; see *De Mannerville v. Crompton* (1813), 1 Ves. & B. 354. The court may infer that the marriage took place on the faith of the offer from the fact of its taking place immediately after the offer (*Luders v. Anstey* (1799), 4 Ves. 501; *Alt v. Alt* (1862), 4 Giff. 84; *Viret v. Viret* (1880), 50 L. J. (CH.) 69).

(*c*) *Ayliffe v. Tracy, J.* (1722), 2 P. Wms. 65.

(*d*) *Alt v. Alt, supra*; *Viret v. Viret, supra*.

(*e*) *Wankford v. Fotherley* (1694), 2 Vern. 322; *Ramsden v. Oldfield* (1720), 4 Vin. Abr. 453, tit. Charge (B), 5; *Hammersley v. De Biel (Baron)* (1845), 12 Cl. & Fin. 45, H. L.; *Shadwell v. Shadwell* (1860), 9 C. B. (N. S.) 159; *Laver v. Fielder, supra*; *Coverdale v. Eastwood* (1872), L. R. 15 Eq. 121.

(*f*) *Laver v. Fielder, supra*; *Coverdale v. Eastwood, supra*; see *Keays v. Gilmore* (1873), 8 I. R. Eq. 290; *Williams v. Williams* (1868), 37 L. J. (CH.) 854.

(*g*) *Wankford v. Fotherley, supra*; *Lovett v. Lovett* (1859), John. 118; compare *Loxley v. Heath* (1860), 27 Beav. 523.

(*h*) *Hammersley v. De Biel (Baron), supra*; *Loxley v. Heath* (1860), 1 De G. F. & J. 489, 493, C. A.

(*i*) *Loxley v. Heath, 1 De G. F. & J. 489, C. A.*; *Sands v. Soden* (1862), 31 L. J. (CH.) 870; *Re Badcock, Kingdon v. Tagert* (1880), 17 Ch. D. 361; compare *White v. Anderson* (1850), 1 I. Ch. R. 419.

SECT. 3.
Articles.

Definition
of "marriage
articles."

SECT. 8.—Articles.

SUB-SECT. 1.—Definition.

970. Articles are clauses of a document, and hence the word "articles" sometimes means the document itself (*j*). The term "marriage articles" commonly means a contract in consideration of marriage to settle property on terms intended to be embodied subsequently in a formal marriage settlement (*k*).

SUB-SECT. 2.—Construction of Articles.

Trusts created
by articles.

971. The trusts created by articles are, in most instances, in the nature of executory trusts (*l*). A court of equity, therefore, directs a settlement in accordance with the intention of the parties rather than the technical meaning attached to the words used (*m*), and, if necessary, inserts words in order to give effect to such intention (*n*). The legal construction of an executed settlement is not, however, affected by proof that the settlement is not such as the court would have directed in accordance with the articles (*o*).

Exclusion
of rule in
Shilley's
Case.

Settlements
of realty.

972. It is assumed in marriage articles from the nature of the case that the settlement shall not be liable to immediate destruction by the act of the settlor, so that articles to settle land on the first taker for life, with remainder to his heirs general or particular, are carried out by directing a conveyance in strict settlement, namely, to the first taker for life, remainder to the first and every other son

(*j*) Sweet's Law Dictionary, p. 63.

(*k*) For forms of marriage articles, see *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 291, 407.

(*l*) See title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 227, note (*e*); and see *ibid.*, pp. 231 *et seq.* Articles may so finally declare the intention of the parties that no future instrument is required to carry it out, the trusts being perfect on the articles as they stand (*De Havilland v. De Saumarez*, *De Havilland v. Bingham* (1865), 14 W. R. 119; compare *Johnstone v. Mappin* (1891), 60 L. J. (CH.) 241, but as a rule they are treated by the court as short notes to be developed afterwards at length according to the usual course of settlements (*Blandford (Marchioness) v. Marlborough (Dowager Duchess)* (1743), 2 Atk. 542, 545; *Taggart v. Taggart* (1803), 1 Sch. & Lef. 84; *Bushell v. Bushell* (1803), 1 Sch. & Lef. 90; see *Randal v. Willis* (1800), 5 Ves. 262, 275; *Fegan v. Meegan*, [1900] 2 I. R. 441).

(*m*) *Webb v. Kelly* (1825), 3 L. J. (O. S.) (CH.) 172; *Sackville-West v. Holmesdale (Viscount)* (1870), L. R. 4 H. L. 543. This latter case was one of a will, but there is no distinction between an executory trust in marriage articles and in a will except that the object and purpose of the former furnish an indication of intention which in the latter must appear in some manner on the face of the instrument (*ibid.*; *Blackburn v. Stables* (1814), 2 Ves. & B. 367). As to executory trusts contained in wills, see title WILLS.

(*n*) *Kentish v. Newman* (1713), 1 P. Wms. 234; *Targus v. Puget* (1751), 2 Ves. Sen. 194.

(*o*) *Doe d. Daniell v. Woodroffe* (1842), 10 M. & W. 608. The proper remedy in such a case is the rectification of the settlement; see *Roberts v. Kingsly* (1749), 1 Ves. Sen. 238; title MISTAKE, Vol. XXI., p. 23. The court does not add to an agreement (*Warrington (Earl) v. Langham* (1699), Prec. Ch. 89). As to construction of settlements, see, further, pp. 532 *et seq.*, *ante*.

SECT. 3.
Articles.

in tail, and not by directing an estate tail to the first taker (p). This principle of construction is adopted against a subsequent mortgagee who has notice of the articles (q). If, however, the estate tail cannot be barred by the first taker alone, but the concurrence of both parents is required for the purpose, the deed of settlement follows the words of the articles (r).

On similar principles, where estates are directed to be settled to correspond with the uses of a peerage which is limited to each successive taker and his heirs male, the court directs that they shall go in strict settlement (s).

Articles that property should be conveyed to the use of the wife and the child or children of the intended marriage have been held to intend that the wife should take not a *quasi*-estate tail, but an estate for life, with remainder to her children (t).

Limitations in marriage articles in favour of the issue of the bodies of the husband and wife or of the issue of the marriage are carried out by directing a strict settlement giving estates tail to the sons, with remainders in tail to the daughters (a). If the issue are

Issue of
marriage.

(p) *Trevor v. Trevor* (1720), 1 P. Wms. 622; affirmed, 5 Bro. Parl. Cas. 122; *Collins v. Plummer* (1709), 1 P. Wms. 104; *Seale v. Seale* (1715), 1 P. Wms. 290; *Lowther v. Westmoreland (Earl)* (1784), 1 Cox, Eq. Cas. 64; *Nandike v. Wilkes* (1715), Gilb. (CH.) 114; see *Griffith v. Buckle* (1687), 2 Vern. 13; *Honor v. Honor* (1710), 1 P. Wms. 123; *Bale v. Coleman* (1711), 1 P. Wms. 142; *Randall v. Willis* (1800), 5 Ves. 262, 275; and see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 226, 227, note (c). The same construction has been adopted in the case of post-nuptial articles (*Brennan v. Fitzmaurice* (1839), 2 I. Eq. R. 113; *Rochford v. Fitzmaurice* (1842), 1 Con. & Law. 158). On the articles construed strictly the first taker would take the fee simple or in tail under the rule in *Shelley's Case* (1581), 1 Co. Rep. 93 b; see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 226.

(q) *Davies v. Davies* (1841), 4 Beav. 54.

(r) *Howel v. Howel* (1751), 2 Ves. Sen. 358; *Highway v. Banner* (1785), 1 Bro. C. C. 584; and see *Honor v. Honor*, *supra*; *Brudenell v. Elwes* (1802), 7 Ves. 382, 390; *Sackville-West v. Holmesdale (Viscount)* (1870), L. R. 4 H. L. 543. It may even be inferred from the articles that the husband shall take an estate tail (*Howel v. Howel*, *supra*; see *Dillon v. Blake* (1864), 16 I. Ch. R. 24).

(s) *Sackville-West v. Holmesdale (Viscount)*, *supra*; compare *Dorchester (Lord) v. Effingham (Earl)* (1813), 3 Beav. 180, n.; *Bankes v. Le Despencer* (1843), 11 Sim. 508.

(t) *Rossiter v. Rossiter* (1863), 14 I. Ch. R. 247. The rule in *Wild's Case* (1599), 6 Co. Rep. 16 b, that a devise to B. and to his children or issue, B. having no issue at the time of the devise, is an estate tail (see titles REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 245, note (h); WILLS), is not applicable to marriage articles (*Rossiter v. Rossiter*, *supra*, at p. 258).

(a) *Villiers v. Villiers* (1740), 2 Atk. 71; *Dod v. Dod* (1755), Amb. 274; *Phillips v. James* (1865), 3 De G. J. & Sm. 72, C. A.; *West v. Errissey* (1726), 2 P. Wms. 349; *Hart v. Middlehurst* (1746), 3 Atk. 371; *Bash v. Dalway* (1747), 3 Atk. 530; *Hamilton v. Cathcart* (1777), Wallis, 282; *Grier v. Grier* (1872), L. R. 5 H. L. 688; compare *Glenorchy (Lord) v. Bosville* (1733), Cas. temp. Talb. 3; and see *Randall v. Daniel* (1857), 24 Beav. 193; but, for cases where the daughters have been excluded, see *Powell v. Price* (1729), 2 P. Wms. 535; *M'Guire v. Souilly* (1829), Beav. 370. "Issue male" of a marriage has been held not to include the son of a daughter (*Lambert v. Peyton* (1860), 8 H. L. Cas. 1). Where the articles direct an estate to go to the children by way of remainder, the children take as purchasers (*Cordwell v. Mackrill* (1766), Amb. 515); compare title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 226.

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directed by the articles to take absolute interests, the children of the marriage (b) take as tenants in common and not as joint tenants (c), and the usual directions for vesting at twenty-one or marriage and survivorship and accruer clauses are inserted in the settlement (d).

No portion of any provision made by executory articles for a class merges in the residue by reason of the death of members of the class while any one member of the class remains, and such one member takes the whole provision made for the class (e).

Settlement of
personalty

Usual form.

Application
of principle.

973. Similar principles prevail where the articles are for the settlement of personalty. So far as the articles expressly provide for the destination of the capital or income the court must follow them, but in construing them it has regard to what is recognised as the usual form of settlement. The usual mode of settling a wife's personalty is to give her the first life interest for her separate use, then a life interest to the husband, then, subject to powers given to the husband and wife of appointing the fund among the issue of the marriage, the capital is given equally to such of the children as being sons attain twenty-one, or being daughters attain that age or marry, or else to the children equally, with gifts over in favour of the others, if any of them being sons die under twenty-one, or being daughters die under that age and unmarried; if there is no child who being a son attains twenty-one, or being a daughter attains twenty-one or marries, then, if the wife survives, the fund is limited to her, but, if she dies in her husband's lifetime, she has a general power of appointment over it, and in default of any exercise of that power it is given to her next of kin as if she had died intestate and without having married (f). In accordance with this principle, a life interest has been given to the wife in personalty where articles stipulated that it should be settled on her, though there was a subsequent provision that the income should in all cases belong to the husband (g). A direction in a deed that a fund should be settled upon a woman and her issue has been carried out by settling the property on her for life for her separate use, without power of anticipation, and after her death for her issue as she should by deed or will appoint, with trusts for her

(b) *Campbell v. Sandys* (1803), 1 Sch. & Lef. 281; *Thompson v. Simpson* (1841), 1 Dr. & War. 459; *Roche v. Roche* (1845), 2 Jo. & Lat. 561; see *Lambert v. Peyton* (1860), 8 H. L. Cas. 1.

(c) *Taggart v. Taggart* (1803), 1 Sch. & Lef. 84; *Thompson v. Simpson*, *supra*; *Mayn v. Mayn* (1867), L. R. 5 Eq. 150. As to joint tenancy and tenants in common, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 199 *et seq.*, 206 *et seq.*

(d) *Roche v. Roche*, *supra*; *Re Martin's Trusts* (1857), 6 I. Ch. R. 211; *Cronin v. Roche* (1858), 8 I. Ch. R. 103; *Herring-Cooper v. Herring-Cooper*, [1905] 1 I. R. 465; compare *Re Parrot*, *Waller v. Parrott* (1880), 33 Ch. D. 274, C. A.; *Wright v. Wright*, [1904] 1 I. R. 360 (both cases on wills); but see *Hynes v. Redington* (1844), 1 Jo. & Lat. 589.

(e) *Hynes v. Redington* (1834), L. & G. temp. Plunk. 33.

(f) *Cogan v. Duffield* (1876), 2 Ch. D. 44, C. A., affirming S. C. (1875) L. R. 20 Eq. 789; see *Corley v. Stafford* (Lord), *Campbell v. Corley* (1857), 26 L. J. (Ct.), 865, C. A. *Green v. Ekins* (1742), 2 Atk. 473, has not been followed. For a form of such a settlement, see *Encyclopædia of Forms and Precedents*, Vol. XIII., p. 407.

(g) *Byam v. Byam* (1854), 19 Beav. 58.

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issue *per stirpes* in default of appointment, and in default of issue as she should by will appoint, and in default of such appointment to her personal representatives (*h*). A direction in a will that a legacy shall be settled on the legatee, without reference to issue, gives the legatee an absolute interest (*i*).

974. Where marriage articles provide for the settlement of leasehold property in the same manner as freehold estates so far as the rules of law permit, effect is given to the articles by declining to apply the limitations of the freehold estates to the leaseholds literally, so as to give a vested interest to the eldest son upon birth (*k*), and by inserting a clause that no person shall be entitled to the absolute property unless he attains the age of twenty-one years or dies under that age leaving issue male (*l*).

Articles for settlements of leaseholds.

975. A direction in a will that, on the marriage of the testator's daughter, certain property should be settled for her and her issue may authorise the insertion in a settlement made on the daughter's marriage of a power to appoint a life interest to her husband (*m*). Provision for an annuity by way of jointure to a widow may be authorised by a direction contained in a will that in the event of a son marrying his property should be put into strict settlement (*n*); but a husband has been entirely excluded from the benefit of a settlement made under a direction in a will that the testator's daughters' shares should be put in strict settlement (*o*).

Powers for the benefit of a husband and wife.

SUB-SECT. 3. -Usual Powers and Provisions.

976. A clause in the articles that the settlement shall contain all usual powers and provisions authorises the insertion of powers for the management and better enjoyment of the settled estates which are

Usual powers

(*h*) *Stanley v. Jackman* (1857), 23 Beav. 450; compare *Stonor v. Curwen* (1832), 5 Sim. 264; *Combe v. Hughes* (1872), L. R. 14 Eq. 415 (both cases on wills). In *Samuel v. Samuel* (1845), 14 L. J. (CH.) 222, which was also a case on a will, the mother took the property absolutely. Where articles provided that the wife, in the event, which happened, of her surviving her husband, should settle and hand over two-thirds of any property remaining at the time to her children, she was held entitled to one-third of the property of which her husband died possessed in her own right (*M'Donnell v. M'Donnell* (1843), 2 Con. & Law. 481). If the husband had survived, his obligation to settle two-thirds of his property would have been satisfied by a disposition by will (*ibid.*); and see *Hankes v. Jones* (1756), 5 Bro. Parl. Cas. 136.

(*i*) *Laing v. Laing* (1839), 10 Sim. 315; *Magrath v. Morehead* (1871), L. R. 12 Eq. 491; and see, generally, title WILLS.

(*k*) See title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 267, note (*c*).

(*l*) *Newcastle (Duke) v. Lincoln (Countess)* (1797), 3 Ves. 387; affirmed by the House of Lords, against the opinion of Lord ELDON, L.C. (1806), 12 Ves. 218; compare titles PERSONAL PROPERTY, Vol. XXII., p. 413; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 266—268. For directions in a will to settle personally by reference to the limitations of realty, see *Sackville-West v. Holmesdale (Viscount)* (1870), L. R. 4 H. L. 543; *Shelley v. Shelley* (1868), L. R. 6 Eq. 540.

(*m*) *Charlton v. Rendall* (1853), 11 Hare, 296.

(*n*) *Wright v. Wright*, [1904] 1 I. R. 360.

(*o*) *Lock v. Bagley* (1867), L. R. 4 Eq. 122.

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Powers
implied.

Implied
exclusion.

beneficial to all parties (*p*), such as powers of sale and exchange and reinvestment (*q*), leasing (*r*), cutting timber in due course of management (*s*), changing securities (*t*) and appointing new trustees (*u*). Powers of maintenance, education and advancement are also inserted (*a*). On the other hand, powers of jointuring and charging portions in favour of younger children are not inserted, unless expressly provided for by the articles (*b*), and a covenant to settle after-acquired property is not a usual clause (*c*).

A reference to specific powers has been held to exclude others (*d*). A power of appointment among the children of the intended marriage is inserted (*e*), but not if the executory articles contain directions for equal division among children (*f*).

(*p*) *Hill v. Hill* (1834), 6 Sim. 136, 145; and as to what are "usual" powers, see title POWERS, Vol. XXIII., pp. 72 *et seq.* For various precedents, see *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 289 *et seq.*

(*q*) *Peake v. Penlington* (1813), 2 Ves. & B. 311; *Hill v. Hill*, *supra*; compare *Wise v. Piper* (1880), 13 Ch. D. 848, distinguishing *Wheate v. Hall* (1809), 17 Ves. 80. A power of sale may be authorised by implication (*Elton v. Elton* (No. 2) (1869), 27 Beav. 634); and see title POWERS, Vol. XXIII., pp. 72, 74.

(*r*) Including powers of granting building or mining leases (*Hill v. Hill*, *supra*; *Scott v. Steward* (1859), 27 Beav. 367); and see *Bedford (Duke) v. Abercorn (Marquess)* (1836), 1 My. & Cr. 312; title POWERS, Vol. XXIII., p. 74. The provisions of the articles must, however, be followed strictly (*Pearse v. Baron* (1821), Jac. 158; compare *Brasier v. Hudson* (1837), 9 Sim. 1, 11).

(*s*) *Davenport v. Davenport* (1863), 1 Hem. & M. 775.

(*t*) *Sampayo v. Gould* (1842), 12 Sim. 426.

(*u*) *Ibid.*; see *Brasier v. Hudson*, *supra*; *Lindow Fleetwood* (1835), 6 Sim. 152.

(*a*) *Turner v. Sargent* (1853), 17 Beav. 515; *Re Parrott, Walter v. Parrott* (1886), 33 Ch. D. 274, C. A.; see *Spirett v. Willows* (1869), 4 Ch. App. 407. In *Fullerton v. Martin* (1860), 1 Drew. & Sm. 31, a case on a will, it was held that the testator had himself directed the terms of the settlement, and the court would not vary those terms.

(*b*) *Bedford (Duke) v. Abercorn (Marquess)* (1836), 1 My. & Cr. 312; *Grier v. Grier* (1872), L. R. 5 H. L. 588; see *Higginson v. Barneby* (1826), 2 Sim. & St. 516; and see title POWERS, Vol. XXIII., pp. 80, 82. Where, however, a will directed real estate devised to a son to be put in strict settlement on the son's marriage, the court directed provision to be made by way of jointure for the son's widow (*Wright v. Wright*, [1904] 1 I. R. 360). Where the articles were for a strict settlement, to contain a power to the father to charge £1,000 for younger children, it was said that it might well be contended that the court would insert a clause to charge the estate with £1,000 with power only to the father to apportion the shares (*Savage v. Carroll* (1810), 1 Ball & B. 265, 276). In an Irish case the court declined to insert a hotchpot clause in the absence in executory marriage articles of any expression of intention of the parties to introduce such a clause (*Lees v. Lees* (1871), 5 I. R. Eq. 549), but it is doubtful whether this case would now be followed.

(*c*) *Re Maddy's Estate, Maddy v. Maddy*, [1901] 2 Ch. 820. For form of agreement by articles to settle after-acquired property, see *Encyclopædia of Forms and Precedents*, Vol. XIII., p. 409.

(*d*) *Brewster v. Angell* (1820), 1 Jac. & W. 625.

(*e*) *Thompson v. Simpson* (1841), 1 Dr. & War. 459; see *Oliver v. Oliver* (1878), 10 Ch. D. 765; *Re Gowan, Gowan v. Gowan* (1880), 17 Ch. D. 778; *Young v. Macintosh* (1843), 13 Sim. 445.

(*f*) *Re Parrott, Walter v. Parrott* (1886), 33 Ch. D. 274, C. A. A power of appointment given by articles to a husband has been held not to be indefinite, but confined to the issue of the marriage, the intention being to secure a provision for such issue and the intended wife (*Bristow v. Warde* (1794), 2 Ves. 336). This case cannot, however, be taken to establish a general rule; see *Mackinley v. Sison* (1837), 8 Sim. 561, 567; *Peover v.*

SUB-SECT. 4.—Covenants to Leave Property by Will.

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977. Articles on the marriage of a child sometimes contain a covenant by the parent to make some provision by his will for such child (*g*).

Covenant to provide for child.

978. If, having covenanted to settle by will a specific piece of property, the covenantor fails to fulfil his bargain, the covenantee is entitled to a conveyance of the property after the death of the covenantor against all who claim under the covenantor as volunteers (*h*), and, if the covenantor so disposes of the property in his lifetime as to make it impossible to fulfil his covenant, the covenantee has an immediate right to sue for damages (*i*). A covenant, however, to leave a child all or an aliquot share (*k*) of the parent's property at death does not interfere with the covenantor's power to dissipate the same in his lifetime (*l*), but he cannot defeat his covenant by any disposition that is testamentary, either in form or by its nature, for instance, by a gift of property reserving to himself a life estate (*m*), nor can he by will cut down the interest that he has covenanted to give (*n*).

Effect of covenant to settle property by will.

Hassel (1861), 1 John. & H. 341, 346; *Minton v. Kirwood* (1868), 3 Ch. App. 614, 618.

(*g*) For a form, see *Encyclopædia of Forms and Precedents*, Vol. XIII., p. 474.

(*h*) See title LIEN, Vol. XIX., pp. 24, 25.

(*i*) *Synge v. Synge*, [1894] 1 Q. B. 466, C. A.; see *Goilme v. Battison* (1682), 1 Vern. 48; *Anon.* (1710), 2 Vin. Abr. 292, tit. Condition (E. d.) 38.

(*k*) A covenant to bequeath a fourth part of whatsoever estate the covenantor should die possessed of means one fourth share in value and not *in specie* (*Bell v. Clarke* (1858), 25 Beav. 437), and a covenant to leave a daughter "her share" has been held to mean an equal share with the other children in the covenantor's residuary personal estate (*Laver v. Fielder* (1862), 32 Beav. 1; *Duckett v. Gordon* (1860), 11 I. Ch. R. 181); but a covenant to leave a share means only some share and may be satisfied by a legacy (*Re Fickus, Farina v. Fickus*, [1900] 1 Ch. 331). Where the covenant was to leave a daughter an equal share with the covenantor's other five daughters, it was satisfied by an absolute bequest of one sixth share of the covenantor's estate, the shares of the other five daughters being settled on them for life with remainders to their issue and gifts over to the other four in the event of any one dying without issue, and the covenantee was not entitled to claim any further provision in respect of the benefit derived by the four daughters from the share of the fifth daughter who died without issue (*Clegg v. Clegg* (1831), 2 Russ. & M. 570); and see *Stephens v. Stephens* (1886), 19 L. R. Ir. 190 (where advancements to other children were not taken into consideration). On the other hand, a gift of a life interest to one daughter is a portion to that daughter, and a covenantee is entitled to receive an equivalent in value under a covenant to give her an equal portion with her sister (*Eardley v. Owen* (1847), 10 Beav. 572). As to satisfaction generally, see title EQUIT, Vol. XIII., pp. 128 *et seq.*; and see title WILLS.

(*l*) *Needham v. Kirkman* (1820), 3 B. & Ald. 531; *Needham v. Smith* (1828), 4 Russ. 318; *Cochran v. Graham* (1812), 19 Ves. 63; *Willis v. Black* (1824), 1 Sim. & St. 525.

(*m*) *Jones v. Martin* (1800), 5 Ves. 266, n., H. L.; *Fortescue v. Hennah* (1812), 19 Ves. 67; *Logan v. Wienholt* (1833), 1 Cl. & Fin. 611, H. L.; compare *Webster v. Milford* (1708), 2 Eq. Cas. Abr. 362.

(*n*) *Davies v. Davies* (1831), 1 L. J. (Ch.) 31. A covenant to settle property subject and without prejudice to any dispositions made by the covenantor's will is only a provision against intestacy, and does not prevent

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Cases of
satisfaction.

Covenant to
settle by deed
or will.

Provision for
children or
grand-
children.

Covenant to
provide for
wife.

Satisfaction of
covenant to
pay money
to wife.

979. A covenant to bequeath a specific sum constitutes a debt against the covenantor's estate (*o*), but a covenant to bequeath a share of the estate is satisfied by a bequest of a share of residue to the covenantee, who is then in the same position as any other legatee as regards debts and lapse (*p*).

980. A covenant to make a settlement either by deed or will is satisfied if the provisions are carried out by will (*q*).

If the covenant is to make provision for children or grandchildren by deed or will, only those who are living at the death of the covenantor are entitled to the benefit of the covenant (*r*).

The wife's claim under a covenant by her husband in marriage articles to leave the wife, by deed or will, a sum of money at his death if she survives him is satisfied, in the event of his dying intestate, out of her share in his personal estate under the Statutes of Distribution (*a*). If, however, the husband is bound to carry out the covenant in his lifetime, then on his death intestate, without making the agreed provision, there is a clear breach of the covenant and the wife is entitled to the agreed sum in addition to her distributive share in the husband's personal estate (*b*); so also, if the covenant is to leave the wife an annuity, her distributive share is not a performance of the covenant either wholly or *pro tanto* (*c*).

981. If the covenant is to pay to the wife a certain sum after the husband's death, and the husband by his will leaves to the wife an equal or greater sum, the court has with some reluctance adhered to the rule that where there is a debt due from the testator to a third person, and the legacy given to such person is as

him disposing of the property by will (*Stocken v. Stocken* (1838), 4 My. & Cr. 95).

(*o*) *Eyre v. Monro* (1857), 3 K. & J. 305; *Graham v. Wickham* (No. 1) (1862), 31 Beav. 447. As to the liability of a bequest under such a covenant to legacy duty, see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 234.

(*p*) *Ennis v. Smith* (1839), Jo. & Car. 400; *Rowan v. Chute* (1861), 13 L. Ch. R. 169; *Jervis v. Wolferstan* (1874), L. R. 18 Eq. 18; *Re Brookman's Trust* (1869), 5 Ch. App. 182; compare *Wathen v. Smith* (1819), 4 Madd. 325. As to lapse, see title WILLS.

(*q*) *Re Brookman's Trust*, *supra*; *Jervis v. Wolferstan*, *supra*; *Jones v. How* (1850), 7 Hare, 267; and, as to satisfaction of debts by legacies, see, generally, title EQUITY, Vol. XIII., pp. 136 *et seq.*

(*r*) *Needham v. Smith* (1828), 4 Russ. 318; *Jones v. How*, *supra*; *Re Brookman's Trust*, *supra*; *Loxley v. Heath* (1860), 27 Beav. 523; but see *Barkworth v. Young* (1856), 4 Drew. 1 (where the covenantee left issue).

(*a*) *Blandy v. Widmore* (1716), 2 Vern. 709; 1 P. Wms. 324; *Lee v. D'Aranda and Cox* (1747), 1 Ves. Sen. 1; *Garthshore v. Chalie* (1804), 10 Ves. 1; *Goldsmid v. Goldsmid* (1818), 1 Swan. 211; compare *Thacker v. Key* (1869), L. R. 8 Eq. 408. As to such performance, see title EQUITY, Vol. XIII., p. 141. As to a widow's share on her husband's intestacy, see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 16 *et seq.* As to the Statutes of Distribution, generally, see *ibid.*

(*b*) *Lang v. Lang* (1837), 8 Sim. 451; *Oliver v. Brickland* (1732), cited 3 Atk. 420, 422; *Wright v. Fearris* (1791), 3 Swan. 681.

(*c*) *Couch v. Stratton* (1799), 4 Ves. 391; *Salisbury v. Salisbury* (1848), 6 Hare, 526; *James v. Castle* (1875), 33 L. T. 665; see *Young v. Young* (1871), 5 I. R. Eq. 615; *Creagh v. Creagh* (1845), 8 I. Eq. R. 68 (where the covenant was to provide a jointure).

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much or more than the debt, then such legacy is a satisfaction of the debt (*d*). Each case, however, turns largely on the construction of the particular covenant and will, and the court has allowed the wife to take both the provision made for her by the articles and that made by the will on grounds of difference of value between the two provisions (*e*), or where the will has contained a direction to pay the testator's debts (*f*).

SUB-SECT. 5.—Covenants to Settle Land.

982. A covenant to settle land, the covenantor possessing no lands, or to purchase and settle lands, is satisfied wholly or *pro tanto* by the purchase of lands suitable for settlement, though no settlement is actually made (*g*), and, if the covenantor dies intestate as to those lands, they are treated as against his heir-at-law as being bound by the trusts of the settlement (*h*). Covenants to settle land.

SUB-SECT. 6.—Variation of Articles.

983. The contracting parties may, if they please, vary marriage articles by other articles made before marriage (*i*); and, although a court of equity does not allow the parties to revoke before the marriage an executed settlement simply because they wish to make different terms from what they desired at the time the settlement Variation.

(*d*) *Atkinson v. Littlewood* (1874), L. R. 18 Eq. 595; see *Herne (Lady) v. Herne* (1706), 2 Vern. 555; *Bridges v. Bere* (1708), 2 Eq. Cas. Abr. 34; *Corus v. Farmer* (1707), 2 Eq. Cas. Abr. 34; *Mountague (Lord) v. Maxwell* (1716), 4 Bro. Parl. Cas. 598; and see title EQUITY, Vol. XIII., pp. 136, 137.

(*e*) *Haynes v. Mico* (1781), 1 Bro. C. C. 129 (where the covenant was to pay a sum within one month after the husband's death, and the legacy was payable six months afterwards); *Devese v. Pontet* (1785), 1 Cox, Eq. Cas. 188 (where a share of residue was held not to be a satisfaction); *Jobson v. Pelly* (1744), 9 Mod. Rep. 437; *Kirkman v. Kirkman* (1786), 2 Bro. C. C. 95; *Rhodes v. Rhodes* (1790), 1 Ves. 96.

(*f*) *Cole v. Willard* (1858), 25 Beav. 568 (dissenting from *Wathen v. Smith* (1819), 4 Madd. 325, in which case LEACH, V.-C., considered that a testator must not be understood to include under the word "debt" his liability on bond or covenant made before his marriage, although to be discharged after his decease). As to satisfaction generally, see title EQUITY, Vol. XIII., pp. 128 *et seq.*

(*g*) *Lechmere v. Lechmere (Lady)* (1735), Cas. temp. Talb. 80; see, further, title EQUITY, Vol. XIII., p. 139.

(*h*) *Deacon v. Smith* (1746), 3 Atk. 323; *Garthshore v. Chalie* (1804), 10 Ves. 1; as to a covenant to surrender copyholds, see *Wood v. Pessey* (1718), 5 Vin. Abr. 547, tit. Contract and Agreement (O) 36; and see *Tyssen v. Benyon* (1785), 2 Bro. C. C. 5 (where an option of paying cash instead of conveying was reserved by the settlor, and he died without doing either).

(*i*) *Legg v. Goldwire* (1736), Cas. temp. Talb. 20, n.; *Cook v. Fryer* (1842), 1 Hare, 498; *Re Gundry, Mills v. Mills*, [1898] 2 Ch. 504, 509. Whether the principle applies to a covenant to settle after-acquired property, *quære (ibid., at p. 509)*. According to the old cases, if the settlement differed from the articles and both were made before marriage, the court would not rectify the settlement, unless it was expressed to be made in pursuance of the articles, on the ground that the parties had altered their intention. Now, however, the court rectifies a mistake, whether the settlement is ante-nuptial or post-nuptial, and no evidence of mistake beyond the articles is necessary; see title MISTAKE, Vol. XXI., p. 23. A recital of articles contained in a settlement is not, however, sufficient evidence (*M'gnan v. Parry* (1862), 31 Beav. 211).

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was executed (*k*), yet, if the marriage contract is put an end to so that even if a marriage subsequently took place between the parties it would, strictly speaking, be not the same marriage but another marriage than the one intended, the court has declared an executed settlement not to be binding (*l*).

SUB-SECT. 7.—*Enforcement of Contracts in Consideration of Marriage.*

Enforcement
of articles.

984. The court will decree specific performance of a contract for which marriage was the consideration after the marriage has taken place (*m*), and after the death of the party primarily intended to be benefited thereby (*n*). It is no answer to an action to enforce articles that a third party has failed to perform his portion of the contract (*o*), or even that the person seeking to enforce them has himself failed to perform his part under them (*p*), but, if there is anything for him to do in which third parties are interested, the court takes care that he obtains no benefit until he has performed his part of the agreement (*q*).

Specific
performance.

Where no
relief given.

Relief is not, however, given in equity if the agreement is one which could not be enforced at law by reason of its being dependent on a contingency which has not happened (*a*); and specific performance of marriage articles, as of other contracts,

(*k*) *Page v. Horns* (1848), 11 Beav. 227; *Bond v. Walford* (1886), 32 Ch. D. 238, 242; see *Re Gundry, Mills v. Mills*, [1898] 2 Ch. 504 (where two ante-nuptial settlements were executed, and in the absence of any evidence as to the intention of the parties the court declined to hold that the first settlement was superseded by the second); compare, on this point, *Goodwin v. Goodwin* (1658), 1 Rep. Ch. 92 [173]; *Chadwick v. Doleman* (1706), 2 Vern. 528, 529.

(*l*) *Robinson v. Dickenson* (1828), 3 Russ. 399 (marriage solemnised, but, after the lapse of a year, discovered to be void: the parties purported to revoke the settlement, and afterwards in contemplation of their remarriage executed a new settlement: the first settlement was held not to be binding); *Thomas v. Brennan* (1846), 15 L. J. (Ch.) 420; *Bond v. Walford, supra*. But where, in contemplation of a marriage that did not take place, a feme sole vested property in trustees upon trust for herself until her marriage, if any, the settlement was held to be irrevocable (*McDonnell v. Hevilrige* (1852), 16 Beav. 346). As to variation of settlements after decree of divorce, see title HUSBAND AND WIFE, Vol. XVI., pp. 571 *et seq.*

(*m*) *Haymer v. Haymer* (1678), 2 Vent. 343. As to specific performance generally, see title SPECIFIC PERFORMANCE.

(*n*) *Jeston v. Key* (1871), 6 Ch. App. 610; *Dennehy v. Delany* (1876), 10 I. R. Eq. 377. But specific performance of a covenant to settle lands has been refused where the action was brought by the covenantor's grandson, whose father would have been tenant in tail under the settlement and could have disentailed (*Cann v. Cann* (1687), 1 Vern. 480).

(*o*) *Perkins v. Thornton* (1741), Amb. 502; *Lloyd v. Lloyd* (1837), 2 My. & Cr. 192; compare *North v. Ansell* (1731), 2 P. Wms. 618. *Meredith v. Jones* (1687), 1 Vern. 463, cannot be considered law.

(*p*) *Jeston v. Key, supra*; *Wallace v. Wallace* (1842), 2 Dr. & War. 452; compare *Woodcock v. Monckton* (1844), 1 Coll. 273 (where a covenantor was held discharged from his covenant in a marriage settlement executed by him by reason of the failure of another to execute the settlement); and see *Baskerville v. Gore* (1702), Prec. Ch. 186.

(*q*) *Jeston v. Key, supra*; *Re Smith's Trusts* (1890), 25 L. R. Ir. 439; see *Corbie v. Free* (1840), Cr. & Ph. 64; *Lloyd v. Lloyd* (1837), 2 My. & Cr. 192; and compare *Orofton v. Ormsby* (1806), 2 Sch. & Lef. 583, 602.

(*a*) *Whitmel v. Farrel* (1749), 1 Ves. Sen. 256.

may be refused on the ground of ambiguity and uncertainty (b), or the right thereto may be lost by conduct amounting to laches (c).

SECT. 3.
Articles.

The courts of equity have always supported marriage articles, and order specific performance thereof in preference to leaving the parties interested to sue in the names of the trustees for the recovery of damages (d). Where the only instrument is a bond given to secure an agreement to settle property on marriage, the bond is considered as articles of agreement for a settlement, and the obligor cannot elect to pay the penalty, but must specifically perform his contract (e). Specific performance may be ordered for the benefit and at the instance of the issue of the marriage (f).

Specific performance, the preferred remedy.

Marriage without a settlement is not a waiver of articles for a settlement before marriage, and specific performance is decreed after the death of the husband (g), or in his lifetime if he fails to perform his agreement (h).

Marriage without settlement.

985. A covenant to settle or charge specified land or other specified property of the covenantor creates in favour of the covenantee a lien on such land or other specified property binding on all persons to whom it may come except purchasers for value without notice (i); and a covenant to purchase and settle lands of a certain value has been enforced against the representatives of the covenantor, who died without purchasing the lands, by directing the investment in land of a sum equivalent to what would have been the then actual value of the lands if a purchase pursuant to the covenant had been made (k). If the settlement contains

Equitable lien of covenantee.

Enforcement of covenant to settle.

(b) *Franks v. Martin* (1759), 1 Eden, 309; affirmed (1760), 5 Bro. Parl. Cas. 151; see *Bromley v. Jefferies* (1701), 2 Vern. 415; title SPECIFIC PERFORMANCE.

(c) *Howorth v. Deem* (1758), 1 Eden, 351; but see *Slaney v. Slaney* (1714), 5 Bro. Parl. Cas. 113. As to laches generally, see title EQUIT, Vol. XIII., pp. 168 *et seq.*

(d) *Cannell v. Buckle* (1724), 2 P. Wms. 243; *Vernon v. Vernon* (1731), 2 P. Wms. 594; *Vereker v. Gort* (Lord) (1838), 1 I. Eq. R. 1; see *Roper v. Bartholomew*, *Butler v. Bartholomew* (1823), 12 Price, 797. The agreement is established according to the intention of the parties though the bond is void at law (*Watkins v. Walkyns* (1740), 2 Atk. 96; *Acton v. Peirce* (1704), 2 Vern. 480).

(e) *Chilliner v. Chilliner* (1754), 2 Ves. Sen. 528; *Logan v. Wienholt* (1833), 7 Bli. (N. S.) 1, 49, H. L.; *Hopson v. Trevor* (1722), 1 Stra. 533.

(f) *Trevor v. Trevor* (1720), 1 P. Wms. 622; and, as to the persons coming within the consideration of marriage, see, further, pp. 564 *et seq.*, *post.*

(g) *Haymer v. Haymer* (1678), 2 Vent. 343; see *Durant v. Durant* (1783), 1 Cox, Eq. Cas. 38.

(h) *Sidney v. Sidney* (1734), 3 P. Wms. 269. A wife's elopement has been held no bar to her claim for specific performance (*ibid.*); and see *Blount v. Winter*, *Winter v. Blount* (1781), cited 3 P. Wms. 276, n.

(i) *Legard v. Hodges* (1792), 1 Ves. 477; *Metcalf v. York* (Archbishop) (1836), 1 My. & Cr. 547; *Galavan v. Dunne* (1879), 7 L. R. Ir. 144; and see title LIEN, Vol. XIX., p. 24. Where an intending husband and wife agreed to transfer certain securities belonging to the wife into the names of herself and her son in trust for her, the wife was held to have a lien on other property coming to the hands of her husband for the value of the securities which he had disposed of in breach of the agreement (*Hastie v. Hastie* (1876), 2 Ch. D. 304, C. A.).

(k) *Suffield (Lady) v. Suffield (Lord)* (1812), 3 Mer. 699. For a case

SECT. 3.
Articles.

something equivalent to a warranty by the settlor that the settled property is of a certain value, he is liable to make good any deficiency (*l*), but in each case it is a question of the construction of the particular instrument (*m*).

SECT. 4.—*Covenants to Settle After-acquired Property.*

SUB-SECT. 1.—*In General.*

Covenants to
settle after-
acquired
property.

986. A provision that is commonly, though not universally (*n*), inserted in marriage (*a*) settlements is a covenant to settle property other than that which is the specific subject of the settlement (*b*). Such covenants may be so framed as to sweep in all property, both present and future (*c*), of one or both of the contracting parties, but as a rule they are confined to property to be acquired in the future by the wife during the coverture, or the husband in her right (*d*). Such a covenant is not a "usual covenant" (*e*), and ought not to be inserted without express instructions.

SUB-SECT. 2.—*General Rules of Construction of Covenants to Settle After-acquired Property.*

Construction
in general.

987. The instrument which contains the covenant is read as a whole, and the generality of the covenant may be cut down by reference to other parts of the instrument (*f*), or an ambiguity in

where in very special circumstances specific performance had become impossible, see *Barker v. Ivers* (1724), 5 Bro. Parl. Cas. 127.

(*l*) *Taylor v. Llossack* (1838), 5 Cl. & Fin. 380, II. L.

(*m*) *Weldon v. Bradshaw* (1873), 7 I. R. Eq. 168; see *Sheffield v. Coventry (Earl)* (1833), 2 Russ. & M. 317; *Milward v. Milward* (1834), 3 My. & K. 311; *Napier v. Staples* (1859), 10 I. Ch. R. 344.

(*n*) *Re Maddy's Estate, Maddy v. Maddy*, [1901] 2 Ch. 820. In making settlements under the Infant Settlements Act, 1855 (18 & 19 Vict. c. 43), it is the invariable practice to insert a covenant to bind the infant's after-acquired property (*Re Johnson, Moore v. Johnson*, [1891] 3 Ch. 48); see title INFANTS AND CHILDREN, Vol. XVII., p. 103.

(*a*) If the settlement is post-nuptial, the covenant cannot be enforced either as an assignment or a declaration of trust (*Wilkinson v. Wilkinson* (1857), 4 Jur. (N. S.) 47).

(*b*) Such a covenant is not intended to settle such part of the property expressly included in the deed as is left to revert to the settlor, but to settle property which otherwise the deed would not affect at all (*Re Wyatt, Gowan v. Wyatt* (1889) 60 L. T. 920).

(*c*) A covenant to settle all present and future property of a wife binds property which is not referred to in the settlement (*Caldwell v. Fellowes* (1870), L. R. 9 Eq. 410).

(*d*) For forms of covenants, see *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 421, 428, 481, 649. For a covenant by a husband to settle after-acquired property, see *Re Turcan* (1888), 40 Ch. D. 5, C. A. Such a covenant may reach property of any kind (*Lewis v. Madocks* (1810), 17 Ves. 48), either personalty (*ibid.*) or realty (*Gubbins v. Gubbins* (1825), 1 Dr. & Wal. 160, n.; *Prebble v. Boghurst* (1818), 1 Swan. 309); or a leasehold interest (*Ohurston (Lord) v. Buller* (1897), 77 L. T. 45).

(*e*) *Re Maddy's Estate, Maddy v. Maddy, supra*; see p. 542, ante.

(*f*) *Re Stephenson's Trust, Ex parte Stephenson* (1853), 3 De G. M. & G. 969, C. A.; *Hammond v. Hammond* (1854), 19 Beav. 29; *Re Neal's Trusts* (1857), 4 Jur. (N. S.) 6; *Childers v. Eardley* (1860), 28 Beav. 648; *Young v. Smith* (1865), 35 Beav. 87; *Re Mitchell's Trusts* (1878), 9 Ch. D. 5, C. A.; *Re Garnett, Robinson v. Gandy* (1886), 33 Ch. D. 300, C. A.

the covenant may be explained by the recitals (*g*). A covenant in clear terms, however, is not restricted by a recital (*h*).

988. Covenants to settle are contracts which must be performed in strict accordance with their terms (*i*), therefore general words are rejected, and a covenant to settle property derived from a particular source does not attach to property coming from another source or under another title (*k*).

If land is purchased out of the proceeds of personal property bound by a covenant of this kind, the land is charged with the money thus improperly invested (*l*).

SUB-SECT. 3.—*Effect of the Covenant on Various Interests in Property.*

(i.) *Estates Tail.*

989. The proper construction of a covenant to settle after-acquired property is that the property shall be conveyed for such estate and interest as is actually taken in it by the covenantor. If, therefore, the covenantor acquires an interest, such as an estate tail, which cannot be assured to the trustees of the settlement, the property in question is not caught by the covenant (*m*).

(ii.) *Life Interests.*

990. If the property does not fit the trusts of the settlement it may be assumed that it was not intended to come within the

SECT. 4.
Covenants
to Settle
After-
acquired
Property.

Strict con-
struction of
covenants.

Estates tail.

Life interests
etc.

(*g*) *Re Michell's Trusts* (1878), 9 Ch. D. 5, C. A.; *Maclurcan v. Lane*, *Melhuish v. Maclurcan* (1858), 5 Jur. (N. S.) 56; *Re Allnutt, Pott v. Brassey* (1882), 22 Ch. D. 275; *Re De Ros' Trust, Hardwicke v. Wilmot* (1885), 31 Ch. D. 81; *Re Coghlan, Broughton v. Broughton*, [1894] 3 Ch. 76; and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 459.

(*h*) *Re Owen's Trust* (1855), 1 Jur. (N. S.) 1069; *Burn-Murdoch v. Charlesworth* (1875), 23 W. R. 743; *Daves v. Tredwell* (1881), 18 Ch. D. 354, C. A.; and see title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 459.

(*i*) *Re Van Straubenzee, Boustead v. Cooper*, [1901] 2 Ch. 779 (where it was held that there is no ground for applying the rule in *Howe v. Dartmouth (Earl)*, *Howe v. Aylesbury (Countess)* (1802), 7 Ves. 137 (see title WILLS), to property settled by such a covenant); see *Hope v. Hope* (1855), 1 Jur. (N. S.) 770; *Brooke v. Hicks* (1864), 10 L. T. 404.

(*k*) *Williams v. Williams* (1782), 1 Bro. C. C. 152; *Taylor v. Dickenson* (1826), 1 Russ. 521; *Ibbetson v. Grote* (1858), 25 Beav. 17; *Childers v. Eardley* (1860), 28 Beav. 648; *Parkinson v. Dashwood* (1861), 30 Beav. 49; *Evans v. Jennings* (1862), 1 New Rep. 178; *Edwards v. Broughton* (1863), 32 Beav. 667; compare *Re Stephenson's Trust, Ex parte Stephenson* (1853), 3 De G. M. & G. 969, C. A.; *Re Neal's Trusts* (1857), 4 Jur. (N. S.) 6; but see *Re Frowd's Settlement* (1864), 4 New Rep. 54; *Re Crawshaw, Walker v. Crawshaw*, [1891] 3 Ch. 176. An assignment of an interest in property for the time being subject to the trusts of a settlement is not a contract to assign any interest that may subsequently be acquired (*Re Walpole's Marriage Settlement, Thomson v. Walpole*, [1903] 1 Ch. 928); and an agreement to settle property to which the covenantor "may be" entitled does not bind future property (*Re Ridley's Agreement, Ridley v. Ridley* (1911), 55 Sol. Jo. 838).

(*l*) *Lewis v. Madocks* (1810), 17 Ves. 48.

(*m*) *Hilbers v. Parkinson* (1883), 25 Ch. D. 200; *Re Dunsany's Settlement, Nott v. Dunsany*, [1906] 1 Ch. 578, C. A.; *Re Pearse's Settlement, Pearse v. Pearse*, [1909] 1 Ch. 304. As to cases where property cannot be assured to the trustees by reason of a restraint on alienation, see pp. 554, 555, *post*.

SECT. 4.
Covenants
to Settle
After-
acquired
Property.

Property
 not within
 the trusts.

covenant, and in accordance with this principle the covenant has been held, in the absence of express words, not to attach to a life interest (*n*), nor to an annuity (*o*), nor to investments which represent savings of income which is not subject to the covenant (*p*). Property acquired by a wife under her husband's will has also been held to be outside the covenant (*q*), and so is a mere *spes successionis* or a contingent claim for damages which could not arise till after the husband's death (*r*), or a joint interest given to the husband and wife (*s*). The question, however, in each case must be whether, on the true construction of the covenant, a particular property falls within it or not (*t*).

(iii.) *Property Acquired after the Termination of the Coverture.*

Intention and
 extent of
 covenant.

991. The primary object of a covenant to settle the future property of a wife is to prevent it falling under the control of the husband, so that, in the absence of expressions showing a contrary intention, only property accruing to the wife during the intended coverture comes within its operation (*a*). This is so even though

(*n*) *Townshend v. Harrowby* (1858), 4 Jur. (N. S.) 353.

(*o*) *White v. Briggs* (1848), 22 Beav. 176, n.; *St. Aubyn v. Humphreys* (1856), 22 Beav. 175; *Re Dowding's Settlement Trusts, Gregory v. Dowding*, [1904] 1 Ch. 441. While the bonus payable to the tenant for life on a sale under the Irish Land Act, 1903 (3 Edw. 7, c. 37), and the Irish Land Act, 1904 (4 Edw. 7, c. 34), is not an incident or by-product of the life estate, and is caught by the covenant (*Tremayne v. Rashleigh*, [1908] 1 Ch. 681), such a bonus is an estate or interest in settled land, and, if the terms of the covenant to settle after-acquired property do not cover interests in settled land, the bonus is not caught by the covenant (*Re Annaly's (Lady) Trusts, Annaly (Lady) v. Bourke* (1904), 92 L. T. 13; *Re Power's Estate*, [1907] 1 I. R. 51).

(*p*) *Finlay v. Darling*, [1897] 1 Ch. 719; *Re Clutterbuck's Settlement, Bloxam v. Clutterbuck*, [1905] 1 Ch. 200, approved in *Mackenzie v. Allardes*, [1905] A. C. 285, and dissenting from *Re Bendy, Wallis v. Bendy*, [1895] 1 Ch. 109, which must be taken to be overruled; compare *Hughes v. Jones* (1863), 1 Hem. & M. 765; *Churchill v. Denny* (1875) L. R. 20 Eq. 534.

(*q*) *Dickinson v. Dillwyn* (1869), L. R. 8 Eq. 546; *Carter v. Carter* (1869), L. R. 8 Eq. 551. In two cases, where the construction of the covenant was somewhat doubtful, it was held not to attach to any gifts from the husband to the wife (*Coles v. Coles*, [1901] 1 Ch. 711; *Kingan v. Matier*, [1905] 1 I. R. 272), but this is not a rule of construction (*Re Ellis's Settlement, Ellis v. Ellis*, [1909] 1 Ch. 618; *Re Plumptre's Marriage Settlement, Underhill v. Plumptre*, [1910] 1 Ch. 609).

(*r*) *Re Simpson, Simpson v. Simpson*, [1904] 1 Ch. 1, C. A.

(*s*) *Edye v. Addison* (1863), 1 Hem. & M. 781.

(*t*) *Scholfield v. Spooner* (1884), 26 Ch. D. 94, C. A.; *Re Ellis's Settlement, Ellis v. Ellis, supra*; see *Re Mackenzie, Mackenzie v. Edwards-Moss*, [1911] 1 Ch. 578.

(*a*) *Re Edwards, a Person of Unsound Mind, Re London, Brighton and South Coast Railways Act* (1873), 9 Ch. App. 97, C. A.; *Holloway v. Holloway* (1877), 25 W. R. 575; *Dickinson v. Dillwyn, supra*; *Carter v. Carter, supra*; *Howell v. Howell, Howell v. James* (1835), 4 L. J. (CH.) 242; *Godsal v. Webb* (1838), 2 Keen, 99; *Reid v. Kenrick* (1855), 1 Jur. (N. S.) 897; *Alleyne v. Hussey* (1873), 22 W. R. 203; *Re Ooghlohn, Broughton v. Broughton*, [1894] 3 Ch. 76. *Stevens v. Van Voorst* (1853), 17 Beav. 305, *contra*, is overruled on this point. The fictitious survivorship created by the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 33 (see title WILLS), does

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to Settle
After-
acquired
Property.

the covenant relates only to property coming from a specified source (b). On the same principle, a covenant to settle property to be acquired during the intended coverture does not attach to property the title to which has accrued after the making of a decree for judicial separation (c), or, perhaps, of a decree *nisi* for divorce (d). This reasoning does not, however, apply to covenants by the husband to settle property coming to him in right of his wife, and such property is bound even if acquired by him after the termination of the coverture (e).

992. The covenant does not attach to property over which the covenantor possesses only a general power of appointment, unless and until the power is so exercised as to bring the property within the covenant (f).

Powers of
appointment.

not prolong the coverture so as to bring within the terms of the covenant property actually acquired after the termination of the coverture (*Pearce v. Graham* (1863), 9 Jur. (N. S.) 568; see *Re Blundell*, *Blundell v. Blundell*, [1906] 2 Ch. 222, 229).

(b) *Re Campbell's Policies* (1877), 8 Ch. D. 686.

(c) *Dawes v. Greyke* (1885), 30 Ch. D. 500; *Davenport v. Marshall*, [1902] 1 Ch. 82, distinguished in *Re Bankes*, *Reynolds v. Ellis*, [1902] 2 Ch. 333, on the ground that the decree of separation in *Re Bankes*, *Reynolds v. Ellis*, *supra*, was an order of an Italian court, which did not have the effect that an order of the English Divorce Court has under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 25, of putting the wife in the position of a *feme sole* as regards property; and see title CONFLICT OF LAWS, Vol. VI., pp. 277—280.

(d) *Re Pearson's Trusts* (1872), 26 L. T. 393. In *Sinclair v. Fell*, [1913] 1 Ch. 155, however, WARRINGTON, J., held that funds coming to a wife after the decree *nisi*, but before the decree was made absolute, came to her "during the intended coverture," and were caught by the covenant, on the ground that the cases of *Norman v. Villars* (1877), 2 Ex. D. 359, C. A., and *Hulse v. Tavernor* (1871), L. R. 2 P. & D. 259, decided that marriage continues during the interval between a decree *nisi* and a decree absolute, and that *Re Pearson's Trusts*, *supra*, must be considered as overruled. *Re Pearson's Trusts*, *supra*, was apparently decided in reliance on *Prole v. Soudy* (1868), 3 Ch. App. 220; see title HUSBAND AND WIFE, Vol. XVI., pp. 334, 593. *Prole v. Soudy*, *supra*, and *Wilkinson v. Gibson* (1867), L. R. 4 Eq. 162, decided that the right of a husband to deal with his wife's property ceases from the date of the decree *nisi* (*Allcard v. Walker*, [1896] 2 Ch. 369, 384). If this view is correct, the decision in *Re Pearson's Trusts*, *supra*, may be justified by the test applied in *Davenport v. Marshall*, *supra*, at p. 85, that is to say, on the footing that the intention is to exclude the husband, and, if no question arises of excluding him because he is already excluded owing to the decree *nisi*, the covenant is not intended to apply and is inoperative.

(e) *Hughes v. Young* (1863), 9 Jur. (N. S.) 376; *Fisher v. Shirley* (1889), 43 Ch. D. 290; see *Prebble v. Boghurst* (1818), 1 Swan. 309 (where a covenant to settle all lands of which the covenantor should at any time during his natural life become seised was given its natural meaning).

(f) *Ewart v. Ewart* (1853), 1 Eq. Rep. 536; *Townshend v. Harrowby* (1858), 4 Jur. (N. S.) 353; *Bower v. Smith* (1871), L. R. 11 Eq. 279. A similar rule applies where there is a gift of property on such trusts as the covenantor shall appoint, with a gift over in favour of the covenantor in default of appointment. In *Re Gerard* (Lord), *Oliphant v. Gerard* (1888), 58 L. T. 800, NORTH, J., held that the covenant did not attach, and that the power could, consequently, be so exercised as to defeat it. In *Re O'Connell*, *Mawle v. Jagoe*, [1903] 2 Ch. 574, KEENE, J., relying on *Steward v. Poppleton*, [1877] W. N. 29, took the contrary view, but in *Tremayne v. Rashleigh*, [1908] 1 Ch. 681, EVE, J., followed *Townshend v. Harrowby*, *supra*, distinguishing *Steward v. Poppleton*, *supra*,

SECT. 4.

Covenants
to Settle
After-
acquired
Property.Reversionary
interests.

993. A covenant which binds the wife to settle all her present and future property binds reversionary interests or contingent reversionary interests, whether in real or personal estate, to which she is then entitled or which she acquires during coverture, notwithstanding that the reversion does not fall in or the contingency happen during the coverture (g). It similarly binds defeasible interests then possessed or acquired by her during coverture, provided that such interests eventually, either during or after the coverture, fall into possession (h). Even if there are technical difficulties in the way of getting a conveyance, such property is bound in the hands of everyone, including the heir-at-law or the legal personal representatives of the husband or wife, as the case may be (i).

Existing
interests.

Present interests, whether in possession or remainder, are not bound by a covenant to settle property to which the covenantee is to become entitled during the coverture (k). Nor does an

and dissenting from *Re O'Connell*, *Mawle v. Jagoe*, [1903] 2 Ch. 574; and in *Vetch v. Elder*, [1908] W. N. 137, SWINFEN EADY, J., followed *Tremayne v. Rashleigh*, [1908] 1 Ch. 681; and see note (d), p. 554, *post*.

(g) *Re Mackenzie's Settlement* (1867), 2 Ch. App. 345; *Rose v. Cornish* (1867), 16 L. T. 786; *Butcher v. Butcher* (1851), 14 Beav. 222; *Spring v. Pride* (1864), 4 De G. J. & Sm. 395, C. A.; *Caldwell v. Fellowes* (1870), L. R. 9 Eq. 410; *Agar v. George* (1876), 2 Ch. D. 706; *Cornmell v. Keith* (1876), 3 Ch. D. 767; *Re Roy's Settlement*, *Jebb v. Roy* (1906), 50 Sol. Jo. 256; *Lloyd v. Prichard*, [1908] 1 Ch. 265; *Re Mudge*, [1913] W. N. 161; see *Giles v. Homes* (1846), 15 Sim. 359; *Re Hewett, Hewett v. Hallett*, [1894] 1 Ch. 362, 365. *Atcherley v. Du Moulin* (1855), 2 K. & J. 186, and *Dering v. Kynaston* (1868), L. R. 6 Eq. 210, where it was held that contingent interests are not within such a covenant, are overruled.

(h) *Brooks v. Keith* (1861), 1 Drew. & Sm. 462; *Sweetapple v. Horlock* (1879), 11 Ch. D. 745; *Re Jackson's Will* (1879), 13 Ch. D. 189; *Re Ware, Cumberlege v. Cumberlege-Ware* (1890), 45 Ch. D. 269.

(i) *Lloyd v. Prichard*, *supra*.

(k) *Rebbell v. Boghurst* (1818), 1 Swan. 309, 321; *Hoare v. Hornby* (1843), 2 Y. & C. Ch. Cas. 121; *Ottier v. Melville* (1848), 2 De G. & Sm. 257; *Willon v. Colvin* (1856), 3 Drew. 617; *Archer v. Kelly* (1860), 1 Drew. & Sm. 300; *Churchill v. Shepherd* (1863), 33 Beav. 107; *Re Pedder's Settlement Trusts* (1870), L. R. 10 Eq. 585; *Re Clinton's Trust, Halloway's Fund, The Same, Weare's Fund* (1872), L. R. 13 Eq. 295; *Re Jones' Will* (1876), 2 Ch. D. 362; *Re Atkinson's Trusts, Ex parte Fitzroy*, [1895] 1 I. R. 230, following *Re Garnett, Robinson v. Gandy* (1886), 33 Ch. D. 300, C. A. (where it was held that the setting aside by the court of a release executed without proper advice did not confer a new title, but merely removed a bar to an existing title); compare *Re Blockley, Blockley v. Blockley* (1884), 49 L. T. 805. It is, however, in every case a question of the language of the particular instrument; see *Graftley v. Humpage* (1838), 1 Beav. 46; *James v. Durant* (1830), 2 Beav. 177; S. C., *sub nom. James v. James*, 9 L. J. (Ch.) 85; *Blythe v. Granville* (1842), 13 Sim. 190; *MacLurcan v. Lane, Melhuish v. MacLurcan* (1858), 5 Jur. (N. S.) 56; *Re Hughes's Trusts* (1863), 4 Giff. 432 (also reported *sub nom. Re Hill*, 9 Jur. (N. S.) 942); *Rose v. Cornish*, *supra*; *Re Viant's Settlement Trusts* (1874), L. R. 18 Eq. 436; *Williams v. Mercier* (1884), 10 App. Cas. 1; compare *Re Wass, Ex parte Evans* (1852), 2 De G. M. & G. 948, C. A. In these cases covenants or agreements by the husband, or to which he was a party, to settle property to which the wife, or the husband in her right, during the intended coverture should become entitled, were held to include property to which the wife was entitled at the date of the covenant, the words of futurity being satisfied by the interest acquired by the husband immediately on marriage. To some extent at

interest in remainder or reversion in existence at the time of the marriage become subject to a covenant to settle future property merely by reason of a change in the interest, as, for example, if a contingent interest becomes vested during the coverture (*l*), but if such an interest, whether vested subject to a liability to be divested or contingent, falls into possession during the coverture, it is bound by the covenant (*m*).

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994. Property existing at the date of the covenant is not brought within its operation subsequently by reason of an increase in value (*n*), nor by change of investment (*o*) or character, as, for instance, by the sale for a lump sum of an annuity which was not subject to the settlement (*p*).

Increase in
value or
change of
character of
property.

SUB-SECT. 4.—*Express Exceptions from the Covenant.*

995. It is customary to exclude from the covenant to settle after-acquired property funds which do not exceed a specified amount acquired at any one time from any one source (*q*). Even if the words "from any one source" are not inserted they are implied, and any particular fund to which the covenantor becomes entitled does not fall within the covenant unless by itself it amounts to the specified sum (*r*).

Limitation
as to amount,
time and
source.

A legacy and a share of residue given by the same will are derived under different titles and must not be added together and treated as one sum for the purpose of seeing whether the specified

any rate these decisions were also founded on the language of other parts of the instrument (*Williams v. Mercier* (1884), 10 App. Cas. 1), or on expressions found in instruments other than the settlement (*Hamilton v. James* (1877), 11 L. R. Eq. 223); and see *Re Wyndham's Trusts* (1865), L. R. 1 Eq. 290, distinguishing *Graftey v. Humpage* (1838), 1 Beav. 46; see also *Bute (Marquis) v. Harman* (1846), 9 Beav. 320 (where a reversionary interest had been unintentionally omitted from the settlement).

(*l*) *Re Michell's Trusts* (1878), 9 Ch. D. 5, C. A.

(*m*) *Re London Dock Co., Ex parte Blake* (1853), 16 Beav. 463; *Brooks v. Keith* (1861), 1 Drew. & Sm. 462; *Re Worsley's Trusts* (1867), 16 L. T. 826; *Archer v. Kelly* (1860), 1 Drew. & Sm. 300; *Re Michell's Trusts, supra*; *Spring v. Pride* (1864), 4 De G. J. & Sm. 395, C. A.; see *Blythe v. Granville* (1842), 13 Sim. 190; *Re Clinton's Trust, Holloway's Fund, The Same, Weare's Fund* (1872), L. R. 13 Eq. 295; *Re Williams' Settlement, Williams v. Williams*, [1911] 1 Ch. 441. In *Re Bland's Settlement, Bland v. Perkin*, [1905] 1 Ch. 4, followed in *Re Yardley's Settlement, Milward v. Yardley* (1908), 124 L. T. Jo. 315, it was held that the words "become entitled" meant become entitled in interest and not in possession.

(*n*) *Re Browne's Will* (1869), L. R. 7 Eq. 231; compare *Re Garnett, Robinson v. Gandy* (1886), 33 Ch. D. 300, C. A.

(*o*) *Mackenzie v. Allardes*, [1905] A. C. 285, per Lord MACNAGHTEN, at p. 293

(*p*) *Churchill v. Denny* (1875), L. R. 20 Eq. 534.

(*q*) For a form, see *Encyclopædia of Forms and Precedents*, Vol. XIII., p. 649.

(*r*) *Re Hooper's Trust* (1865), 11 Jur. (N. S.) 479; *Hood v. Franklin* (1873), L. R. 16 Eq. 496; but see *St. Leger v. Magniac*, [1880] W. N. 183 (where the covenant was to settle property to which the wife should become entitled "at one time," and this was held to cover sums of money coming from different sources but falling into possession at the same time); see also *Re Browne's Will, supra*; and see note (*m*), *supra*.

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amount is reached (*a*), nor in making the computation may there be taken into consideration the value of property which cannot be affected by the covenant at all (*b*), or to which the covenantor becomes entitled under the same instrument, but not at one and the same time (*c*). If property in excess of the specified amount is bequeathed upon such trusts as the covenantor shall appoint, with a gift over to a stranger in default of appointment, it is open to the covenantor to defeat the covenant by a series of appointments in his own favour, each of less than the specified amount (*d*). If, however, a covenantor has by his own act reduced below the specified amount a fund which would otherwise be bound, it is not withdrawn from the operation of the covenant (*e*).

Estimate of
value.

In estimating whether the specified amount is reached, the beneficial receipt of the covenantor and not the amount of the gift must be considered (*f*). Where the interest is reversionary, the value is estimated not by its actual value as a reversion, but by the value it would have if in possession, though in fact it is not so (*g*). A reversionary interest which falls in after the termination of the coverture is not brought within the operation of the covenant because the sum then received exceeds the specified amount (*h*).

Excepted
property.

996. It is usual to except out of the operation of the covenant jewels and personal chattels, but this must be done by express words, as no such exception is implied (*i*).

An exception of property otherwise "settled" is sometimes inserted; in such a case all property given to the wife for her separate use is excluded (*k*). Even without such express exception

(*a*) *Re Middleton's Will* (1868), 16 W. R. 1107; compare *Re Davies, Harrison v. Davis*, [1897] 2 Ch. 204. A legacy out of general estate and another out of real estate should, however, be aggregated together for the purposes of the covenant (*Re Pares, Re Scott Chad, Scott Chad v. Pares*, [1901] 1 Ch. 708). This last case did not purport to differ from *Re Middleton's Will, supra*, but it is difficult to see how the two can be reconciled. See also *Re Mackenzie's Settlement* (1867), 2 Ch. App. 345.

(*b*) *Forster v. Davies* (1861), 4 De G. F. & J. 133, C. A.

(*c*) *Buller v. Hornby* (1871), 25 L. T. 901.

(*d*) *Bower v. Smith* (1871), L. R. 11 Eq. 279. If the gift over is to the donee of the power, there is a conflict of judicial opinion as to whether the covenant can be evaded by a series of appointments; see *Re O'Connell, Mawle v. Jagoe*, [1903] 2 Ch. 574; *Steward v. Poppleton*, [1877] W. N. 29, for authority that it cannot be evaded; and, for the opposite view, see *Townshend v. Harrowby* (1858), 4 Jur. (N. S.) 353; *Re Gerard (Lord), Oliphant v. Gerard* (1888), 58 L. T. 800; *Tremayne v. Rashleigh*, [1908] 1 Ch. 681; and see note (*f*), p. 551, *ante*.

(*e*) *Hood v. Franklin* (1873), L. R. 16 Eq. 496.

(*f*) *Re Pares, Re Scott Chad, Scott Chad v. Pares, supra*.

(*g*) *Re Mackenzie's Settlement, supra*; *Cornwell v. Keith* (1876), 3 Ch. D. 767; *Re Clinton's Trust, Holloway's Fund, The Same, Wear's Fund* (1872), L. R. 13 Eq. 295, 306.

(*h*) *Re Weistead, Weistead v. Leeds* (1882), 47 L. T. 331. As to an endowment policy effected by a husband in favour of his wife, see *Re Harcourt, White v. Harcourt* (1911), 105 L. T. 747.

(*i*) *Willoughby v. Middleton* (1862), 2 John. & H. 344. Consumable goods are not included (*ibid.*).

(*k*) *Coventry v. Coventry* (1863), 32 Beav. 612; *Whitgreave v. Whitgreave*

the covenant does not attach to property given subject to an effectual restraint on anticipation, which is equivalent to a restraint on alienation (l). But, if the covenant, on its true construction, does attach to property subsequently acquired by the wife, the intention of the donor of the property that it shall not be bound cannot operate to exclude it (m).

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SUB-SECT. 5.—*Express Covenant by the Husband.*

997. A covenant by the husband alone (n), which does not purport to bind the wife, applies only to property which becomes subject to the control of the husband in right of the wife. It does not affect, therefore—

Covenant by
the husband
alone.

(1) property which the husband fails to reduce into possession during the coverture (o);

(2) reversionary property of the wife, which does not fall into possession till after the husband's death (p);

(3) property given to the wife for her separate use (q).

SUB-SECT. 6.—*Express Covenant by Husband and Wife Jointly.*

998. On the other hand, a general covenant by all parties (r) that

Covenant by
husband and
wife jointly.

(1864), 33 Beav. 532; *Kane v. Kane* (1880), 16 Ch. D. 207; *Re Beres Settlement Trusts*, *Beres v. Benyon* (1888), 59 L. T. 626; *Lloyd v. Prichard*, [1908] 1 Ch. 265.

(l) *Re Currey*, *Gibson v. Way* (1886), 32 Ch. D. 361; see *Brooks v. Keith* (1861), 1 Drew. & Sm. 462; *Re Sarel* (1864), 4 New Rep. 321. If, however, the restraint attaches only to income (*Shute v. Hogge* (1888), 58 L. T. 546), or is effectual only while the property is reversionary, then, on the legacy or benefit becoming payable or transferable, it is bound by the covenant (*Re Bankes*, *Reynolds v. Ellis*, [1902] 2 Ch. 333; *Russell v. Lawder*, [1904] 1 I. R. 328). As to restraint on anticipation, see, further, title HUSBAND AND WIFE, Vol. XVI., pp. 359 *et seq.*

(m) *Scholfield v. Spooner* (1884), 26 Ch. D. 94, C. A., overruling on this point *Re Mainwaring's Settlement* (1866), L. R. 2 Eq. 487 (which had been followed in the Irish case of *Re Portadown, Dungannon and Omagh Junction Rail. Co.*, *Ex parte Young* (1867), 15 W. R. 979); *Re Wharton*, *Wharton v. Bumby* (1910), 102 L. T. 531.

(n) As to the cases in which the wife may be bound by the covenant of the husband, see pp. 556, 557, *post*.

(o) *Ellison v. Elwin* (1843), 13 Sim. 309; *Borton v. Borton* (1849), 16 Sim. 552; *Re Webb's Trusts* (1877), 46 L. J. (CH.) 769; but see *Eush v. Dalway* (1747), 1 Ves. Sen. 19; and see title HUSBAND AND WIFE, Vol. XVI., pp. 333.

(p) *Young v. Smith* (1865), L. R. 1 Eq. 180; *Reid v. Kenrick* (1855), 1 Jur. (N. S.) 897; compare *Cramer v. Moore* (1855), 3 Sm. & G. 141 (where the covenant by the husband being executory could not be enforced by the next of kin); *Farrer v. Grant* (1829), 7 L. J. (O. S.) (CH.) 95.

(q) *Douglas v. Congreve* (1836), 1 Keen, 410; *Thornton v. Bright* (1836), 2 My. & Cr. 230, 255; *Drury v. Scott* (1840), 4 Y. & C. (EX.) 264; *Travers v. Travers* (1840), 2 Beav. 179; *Ramsden v. Smith* (1854), 32 Beav. 299; *Hammond v. Hammond* (1854), 19 Beav. 29; *Duncan v. Cannan* (1855), 4 W. R. 2; *Sloper v. Cottrell* (1856), 6 E. & B. 497; *Shewell v. Dwarria* (1858), John. 172; *Grey v. Stuart* (1860), 2 Giff. 398; *Brooks v. Keith* (1861), 1 Drew. & Sm. 462; *Coventry v. Coventry* (1863), 32 Beav. 612; *Young v. Smith* (1865), L. R. 1 Eq. 180; *Gataker v. Reynardson* (1865), 12 L. T. 134; *Dawes v. Tredwell* (1881), 18 Ch. D. 354, C. A.; *Re Macpherson*, *Macpherson v. Macpherson* (1886), 55 L. J. (CH.) 922.

(r) For form of covenant by both husband and wife, see *Encyclopædia of Forms and Precedents*, Vol. XIII., p. 649.

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future property which may devolve on the wife shall be brought into settlement binds—

- (1) reversionary interests of the wife acquired during the coverture, but not falling into possession till after its termination (s);
- (2) all interests that come to the wife for her separate use (t).

SUB-SECT. 7.—*General Words of Agreement.*

What parties
bound by the
covenant.

999. Having regard to the different effects of a covenant by the husband alone and a covenant binding on both husband and wife, the question frequently arises on the construction of covenants to settle after-acquired property whether the covenant is the covenant of the husband alone or of both the husband and wife. If there is a joint covenant in express terms by both husband and wife, no difficulty can arise; but if there is a covenant in express terms by the husband alone, it is necessary to go further and consider by whom is the act to be done that is covenanted to be done. Whenever the covenant or agreement is simply and in terms the covenant or agreement of the husband, the husband alone is bound; but where the covenant in terms is not a mere exclusive covenant of the husband, but is an agreement between all the parties, which agreement, being under seal, is in point of fact a covenant by all the parties, then it is not merely limited to a covenant by the husband, but all parties who have entered into the agreement are bound to perform it (u).

Effect of
words of
general
agreement.

1000. In deciding whether the covenant is by the husband alone or by all parties to the settlement, if the covenant is prefaced by the words "it is hereby agreed and declared," these words operate to show that what is comprised in the clause of which these words are the commencement is what all parties intend and agree shall be done. They do not, however, by themselves amount to a covenant by all the agreeing parties, but the party who is to do the thing is the party who is alone bound to perform the agreement (a). If, therefore, the covenant is a covenant by the husband that he will settle or concur in settling, it is a covenant by him alone, notwithstanding that it is prefaced by words of general agreement (b).

Covenant
by husband
alone.

Covenant on
behalf of
more than
one party.

1001. On the other hand, where words of general agreement have prefaced a covenant by the husband alone that he and his wife will

(s) *Butcher v. Butcher* (1851), 14 Beav. 222; *Rose v. Cornish* (1867), 16 L. T. 786; *Dickinson v. Dillwyn* (1869), L. R. 8 Eq. 546; *Cowper-Smith v. Anstey*, [1877] W. N. 28.

(t) *Tawney v. Ward* (1839), 1 Beav. 563; *Milford v. Peile* (1854), 17 Beav. 602; *Willoughby v. Middleton* (1862), 2 John. & H. 344; *Campbell v. Bainbridge* (1868), L. R. 6 Eq. 269; *Re Allnutt*, *Pott v. Brassey* (1882), 22 Ch. D. 275; *Re De Ros' Trust*, *Hardwicke v. Wilmot* (1885), 31 Ch. D. 81. As to property given subject to restraint on anticipation, see pp. 554, 555, *ante*.

(u) *Townshend v. Harrowby* (1858), 4 Jur. (N. S.) 353.

(a) *Ramsden v. Smith* (1854), 2 Drew. 298.

(b) *Ibid.*; *Daves v. Tredwell* (1881), 18 Ch. D. 354, C. A.; *Re Rickman*, *Stokes v. Rickman* (1899), 80 L. T. 518; *Reid v. Kenrick* (1855), 1 Jur. (N. S.) 897; *Re Macpherson*, *Macpherson v. Macpherson* (1886), 55 L. J. (CH.) 922; but see *Master v. De Croismar* (1848), 11 Beav. 184.

settle his future property (c), or that property coming to the wife, or to him in her right, shall be settled, the agreement has been treated as an agreement of both parties (d). In the absence of words of general agreement, a covenant by the husband alone is his contract only (e), but joint and several covenants to settle by the husband and wife bind both parties (f). If, however, the wife is a party to and assents to the deed, then a covenant by the husband alone, even though it is not prefaced by words of general agreement, that he will settle the wife's property (g) or that the husband and wife shall settle the wife's property (h), or even that the wife's property shall be settled (i), has been held to amount to a covenant by the husband and wife and to bind her property.

In the case of settlements made on or after the 1st January, 1908, it seems that a covenant by the husband binds the wife's property if, being of full age, she executes the settlement or confirms it after attaining full age (k).

SECT. 4.
Covenants to Settle After-acquired Property.

When words of general agreement omitted.

SUB-SECT. 8.—Effect of Married Women's Property Acts.

1002. A covenant by a wife to settle after-acquired property, being an agreement for a settlement respecting the property of a married woman, is not affected by the Married Women's Property Act, 1882 (l).

Effect of Married Women's Property Acts.

It was originally held that a covenant by the husband to settle after-acquired property, even though unaccompanied by any obligation binding the wife, attached to and bound as against the wife all property which but for the statute (m) would have come to the husband *jure mariti* (n). No settlement or agreement for a

(c) *Townshend v. Harrowby* (1858), 4 Jur. (N. S.) 353; *Stevens v. Van Voorst* (1853), 17 Beav. 305.

(d) *Butcher v. Butcher* (1851), 14 Beav. 222; *Willoughby v. Middleton* (1862), 2 John. & H. 344; *Campbell v. Bainbridge* (1868), L. R. 6 Eq. 269; *Re D'Estampes' Settlement*, *D'Estampes v. Crowe* (1884), 53 L. J. (CH.) 1117; *Re Bland's Settlement*, *Bland v. Perkin*, [1905] 1 Ch. 4.

(e) *Douglas v. Congreve* (1836), 1 Keen, 410; *Thornton v. Bright* (1836), 2 My. & Cr. 230; *Hammond v. Hammond* (1854), 19 Beav. 29; *Young v. Smith* (1865), L. R. 1 Eq. 180; *Re Smith, Robson v. Tidy*, [1900] W. N. 75 (covenant by the husband that he and all other necessary parties should convey).

(f) *Tawney v. Ward* (1839), 1 Beav. 563; *Milford v. Peile* (1854), 17 Beav. 602.

(g) *Lee v. Lee* (1876), 4 Ch. D. 175 (where the property which was the subject of the agreement was specific and was the property of the wife).

(h) *Re De Ros' Trust*, *Hardwicke v. Wilmot* (1885), 31 Ch. D. 81.

(i) *Re Haden, Coling v. Haden*, [1898] 2 Ch. 220.

(k) Married Women's Property Act, 1907 (7 Edw. 7, c. 18), ss. 2, 4.

(l) 45 & 46 Vict. c. 75, s. 19; and see title HUSBAND AND WIFE, Vol. XVI., pp. 348 *et seq.*, 367, 368. Where there was a covenant by the intending wife to settle future acquired property, except interests settled to her separate use, it was held that the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), did not enlarge the exception and that interests not expressly settled to her separate use were bound by the covenant, although she took them as a *feme sole*, under the statutory provisions (*Re Stonor's Trusts* (1883), 24 Ch. D. 195; *Re Whitaker, Christian v. Whitaker* (1887), 34 Ch. D. 227, C. A.).

(m) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75); see *ibid.*, ss. 2, 5.

(n) *Hancock v. Hancock* (1888), 38 Ch. D. 78, C. A., overruling *Re*

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settlement, however, unless made before the 1st January, 1908 (*o*), by a husband or intended husband either before or after marriage, respecting the property of any woman he may marry or have married, is valid unless, being of full age, she executes the settlement, or confirms it after she attains full age (*p*). If, however, the wife in such a case dies an infant, the husband's covenant binds any interest to which he may become entitled in her property after her death (*q*).

Part IV.—Capacity of Parties.

SECT. 1.—*In General.*

Capacity in
general.

1003. In general, any person who can hold and dispose of property can make a settlement of property (*r*).

Aliens.

Real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject (*s*).

Bankrupts.

The property of any person who has been adjudicated bankrupt passes from him and vests in the trustee in his bankruptcy (*t*). It follows that he cannot make any disposition of his property by way of settlement, and any disposition, if made, can be impeached by the trustee (*u*).

Quende's Trusts (1885), 54 L. J. (CH.) 786; *Stevens v. Trevor-Garrick*, [1893] 2 Ch. 307; *Re Shelton, Chancellor v. Brown* (1891), 7 T. L. R. 638; *Buckland v. Buckland*, [1900] 2 Ch. 534.

(*o*) The date when the Married Women's Property Act, 1907 (7 Edw. 7. c. 18), came into operation. Before the 1st January, 1908, the general personal estate of a female infant was bound by a settlement made on her marriage (*Simson v. Jones* (1831), 2 Russ. & M. 365, 376). This rule was not altered by the passing of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75) (*Stevens v. Trevor-Garrick, supra*; *Buckland v. Buckland, supra*); and see title INFANTS AND CHILDREN, Vol. XVII., p. 102. In cases where the female infant's property was bound, subsequent repudiation by her did not affect the settlement (*Stevens v. Trevor-Garrick, supra*; *Buckland v. Buckland, supra*; compare *Re Daniel's Trust* (1953), 18 Beav. 309). The rule never applied to a wife's real property or to personalty given to her for her separate use (*Simson v. Jones, supra*). As to non-separate personal property of the wife, see title HUSBAND AND WIFE, Vol. XVI., pp. 325 *et seq.*

(*p*) Married Women's Property Act, 1907 (7 Edw. 7. c. 18), s. 2 (1).

(*q*) *Ibid.*, s. 2 (2). Settlements or agreements for settlements under the Infant Settlements Act, 1855 (18 & 19 Vict. c. 43) (see title INFANTS AND CHILDREN, Vol. XVII., pp. 103, 104), are not affected (Married Women's Property Act, 1907 (7 Edw. 7. c. 18), s. 2 (3)).

(*r*) See titles CONTRACT, Vol. VII., pp. 335 *et seq.*; PERSONAL PROPERTY, Vol. XXII., p. 412; REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 298 *et seq.*; SALE OF LAND, pp. 308 *et seq.*, *ante*.

(*s*) Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 2; see title ALIENS, Vol. I., p. 309. For various forms of clauses for settlements on marriage with an alien, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 240; Vol. XVI., p. 672.

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 20. As to what property is available for the benefit of creditors, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 143 *et seq.*

(*u*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 183, and the cases there cited.

A convict (a) is incapable of alienating or charging any property or of making any contract (b). This disability endures until the death of the convict or the completion of his sentence or until his pardon (c), but is suspended while he is lawfully at large under any licence (d).

SECT. 1.
In General.
Convicts.

A settlement by a lunatic or idiot in consideration of marriage is good if the other party is not aware of the settlor's insanity (e). A voluntary settlement by a lunatic, or even a settlement for valuable consideration, if the other contracting party is aware of his insanity, is voidable and may be set aside (f).

Lunatics.

A woman married on or after the 1st January, 1883, may dispose, by will or otherwise, of all her real and personal property, whenever acquired, as if she were a *feme sole*, and a woman married before that date may so dispose of all real and personal property her title to which accrued after that date (g).

Married women.

SECT. 2.—Infants.

SUB-SECT. 1.—Settlements Subject to Confirmation.

1004. An infant, whether male or female, cannot, apart from statute, make a binding settlement or agreement for a settlement of his or her real estate (h), and a male infant never has been and a female infant is no longer bound by a settlement or agreement for a settlement of personal estate (i). If a settlement or agreement does not bind an infant, no validity is given to it by the consent of the parent or guardian or by the intervention of the court, apart from statute (k).

Infants.

(a) For the definition of a convict, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 429; and see, generally, *ibid.*, pp. 428 *et seq.*; title PRISONS, Vol. XXII., pp. 260 *et seq.*

(b) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 8; and see title CONTRACT, Vol. VII., p. 342.

(c) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 7.

(d) *Ibid.*, s. 30; see title PRISONS, Vol. XXIII., p. 266, note (t).

(e) Compare *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599, C. A.

(f) *Manning v. Gill* (1872), L. R. 13 Eq. 485; and see *Imperial Loan Co. v. Stone*, *supra*; title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 397, 400.

(g) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1. As to dispositions of property by married women, generally, see title HUSBAND AND WIFE, Vol. XVI., pp. 376 *et seq.*

(h) *Salsbury v. Bagott* (1677), 2 Swan. 603; *Nightingale v. Ferrers (Earl)* (1733), 3 P. Wms. 206; *Durnford v. Lane* (1781), 1 Bro. C. C. 106; *Clough v. Clough* (1801), 5 Ves. 710; *Lecky v. Knox* (1809), 1 Ball & B. 210; *Milner v. Harewood (Lord)* (1811), 18 Ves. 259; *Simson v. Jones* (1831), 2 Russ. & M. 365; *Pimm v. Insall* (1849), 1 Mac. & G. 449; *Honywood v. Honywood* (1855), 20 Beav. 451; *Field v. Moore*, *Field v. Browne* (1855), 7 De G. M. & G. 691, C. A.; *Cooke v. Cooke* (1887), 38 Ch. D. 202. As to the settlements of an infant wife under the Married Women's Property Act, 1907 (7 Edw. 7, c. 18), see pp. 557, 558, *ante*; and, as to the capacity of infants, generally, see title INFANTS AND CHILDREN, Vol. XVII., pp. 63 *et seq.*

(i) *Nelson v. Stocker* (1859), 4 De G. & J. 458, C. A.; *Kingsman v. Kingsman* (1880), 6 Q. B. D. 122, C. A. As to the position of a female infant, see note (o), p. 558, *ante*.

(k) *Field v. Moore*, *Field v. Browne*, *supra*; and see title INFANTS AND CHILDREN, Vol. XVII., p. 102; *Clough v. Clough*, *supra*; *Milner v. Harewood (Lord)*, *supra*; *Stamper v. Barker* (1820), 5 Madd. 157. As to

SECT. 2.

Infants.

Settlement
may be
confirmed.

If the settlement or agreement is for the benefit of the infant, as it would probably be considered to be, it is not void but only voidable (*l*), and may be confirmed by the infant on attaining full age (*m*). Such confirmation may be by deed (*n*), or may be inferred from acquiescence (*a*), or from conduct (*l*).

There is no jurisdiction to compel a settlement to be made by an infant on marriage (*c*), though, in the case of an adult marrying an infant ward of court, the court may impose terms that a settlement be made by the adult (*d*).

SUB-SECT. 2.—*Settlements under Statutory Power.*

Extent of
statutory
power.
Infant
Settlements
Act.

1005. Every male infant who has attained the age of twenty years, or female who has attained the age of seventeen years (*e*), may, with the sanction of the court, make a valid settlement of all property belonging to him or her or over which he or she has any power of appointment (*f*), unless there is an express declaration that such power shall not be exercised during infancy (*g*).

the statutory authority of the court under the Infant Settlements Act, 1855 (18 & 19 Vict. c. 43), see the text, *infra*.

(*l*) *Smith v. Lucas* (1881), 18 Ch. D. 531; *Wilder v. Pigott* (1882), 22 Ch. D. 263; *Cooke v. Cooke* (1887), 38 Ch. D. 202; *Cooper v. Cooper* (1888), 13 App. Cas. 88; *Duncan v. Dixon* (1890), 44 Ch. D. 211.

(*m*) *Smith v. Lucas*, *supra*; and see title INFANTS AND CHILDREN, Vol. XVII., pp. 101, 102. As to repudiation, see *ibid.*, p. 102; *Re Fardon's Trusts* (1885), 31 Ch. D. 275, C. A.; and see *Smith v. Lucas*, *supra*; *Re Wheatley, Smith v. Spence* (1884), 27 Ch. D. 606. *Willoughby v. Middleton* (1862), 2 John. & H. 344, must be considered as overruled on this point.

(*n*) *Wilder v. Pigott*, *supra*; *Re Hodson, Williams v. Knight*, [1894] 2 Ch. 421; *Cooke v. Cooke*, *supra* (where it was held that for the purpose of the rule against perpetuities (see title PERPETUITIES, Vol. XXII., pp. 300 *et seq.*) the date of the settlement, not of the confirmation, must be regarded).

(*a*) *Ashton v. M'Dougall* (1842), 5 Beav. 56; but see *Rawlins v. Birkett* (1856), 25 L. J. (Ch.) 837.

(*b*) Making a claim or taking a benefit under the settlement is conduct amounting to confirmation (*Barrow v. Barrow* (1858), 4 K. & J. 409; *Greenhill v. North British and Mercantile Insurance Co.*, [1893] 3 Ch. 474), as is transferring one of two funds bound by the settlement to the trustees thereof (*Davies v. Davies* (1870), L. R. 9 Eq. 468). The appointment of new trustees of the settlement does not, however, by itself amount to an election to confirm it (*Haywood v. Tidy* (1890), 63 L. T. 679; but see *Merryweather v. Jones* (1864), 4 Giff. 509); and, as to confirmation by conduct, compare *Harvey v. Ashley* (1748), 3 Atk. 607; *Milner v. Harewood (Lord)* (1811), 18 Ves. 259.

(*c*) See title INFANTS AND CHILDREN, Vol. XVII., p. 103.

(*d*) *Re Potter* (1869), L. R. 7 Eq. 484. *Secus*, if both parties are infants (*Field v. Moore, Field v. Browne* (1855), 7 De G. M. & G. 691, 711, C. A.).

(*e*) Infant Settlements Act, 1855 (18 & 19 Vict. c. 43), s. 4. An infant marrying under the prescribed age may, on attaining it, make a settlement with the sanction of the court (*Re Phillips (an Infant)* (1887), 34 Ch. D. 467; but see *Re Leigh, Leigh v. Leigh* (1888), 40 Ch. D. 290, 297, C. A.).

(*f*) This enables an appointment to be made which will take effect on failure of the limitations in the settlement in favour of the infant (*Re Scott, Scott v. Hanbury*, [1891] 1 Ch. 298).

(*g*) Infant Settlements Act, 1855 (18 & 19 Vict. c. 43), s. 1; and see title INFANTS AND CHILDREN, Vol. XVII., p. 103. The Infant Settlements Act, 1855 (18 & 19 Vict. c. 43), is only permissive and does not enable the court to force a settlement on the infant against the wishes of the guardian *ad litem*, who may withdraw the application at any time; see

1006. The application for the sanction of the court to the proposed settlement may be made on the application of the infant or his guardian by summons (*h*), to be served on such persons interested in the property as the court may require (*i*). If there is no guardian, the court may or may not require a guardian to be appointed, as it may think fit (*i*).

SECT. 2.

Infants.

Applications
for sanction
of court.

The costs of all parties, including those of the husband even in a case where the settlement relates only to the wife's property, are paid out of the funds to be transferred to the trustees (*k*).

Costs.

1007. The evidence to be filed on the application should show—

Evidence
required.

- (1) the age of the infant;
- (2) whether the infant has any parents or guardians;
- (3) with whom or under whose care the infant is living, and if the infant has no parents or guardians, what near relations the infant has;
- (4) the rank and position in life of the infant and parents;
- (5) what the infant's property and fortune consist of;
- (6) the age, rank, and position in life of the person to whom the infant is about to be married;
- (7) what property, fortune, and income such person has;
- (8) the fitness of the proposed trustees and their consent to act.

The proposals for the settlement of the property, both of the infant and of the other party to the intended marriage, must also be submitted to the judge (*l*), who refers the matter to chambers (*m*).

1008. The court approves such terms of settlement as it authorises in the cases of its wards (*n*), that is to say, as a general rule, it gives its sanction to any arrangement which a prudent

Provisions
inserted.

Re Potter (1869), L. R. 7 Eq. 484. It applies to post-nuptial as well as ante-nuptial settlements (*Powell v. Oakley* (1865), 34 Beav. 575; *Re Sampson and Wall, Infants* (1884), 25 Ch. D. 482, C. A.). It does not remove any disability of coverture (*Seaton v. Seaton* (1888), 13 App. Cas. 61; and see p. 559, *ante*), nor does it remove the general incapacity of an infant to alienate his or her interest, so as to enable him or her to exercise during minority a disposing power conferred by the settlement (*Re Armit's Trusts* (1871), 5 L. R. Eq. 352). As to disentailing assurances, see title INFANTS AND CHILDREN, Vol. XVII., pp. 103, 104; compare *Re Scott, Scott v. Hanbury*, [1891] 1 Ch. 298.

(*h*) R. S. C., Ord. 55, r. 2 (10). It was originally provided that the application should be by petition (Infant Settlements Act, 1855 (18 & 19 Vict. c. 43), s. 3).

(*i*) *Ibid.*

(*k*) *De Stacpoole v. De Stacpoole, De Stacpoole v. Stapleton, Re De Stacpoole, De Stacpoole v. Seymour* (1887), 37 Ch. D. 139, following *Anon.* (1828), 4 Russ. 473.

(*l*) R. S. C., Ord. 55, r. 26. As to the necessity of evidence of the propriety of the marriage, see *Re Dalton* (1856), 6 De G. M. & G. 201; *Re Strong* (1856), 2 Jur. (N. S.) 1241, C. A. It seems that the application does not make the infant a ward of court (*Re Dalton, supra*; *Re Strong, supra*; title INFANTS AND CHILDREN, Vol. XVII., p. 103, note (*c*)).

(*m*) *Re Olive* (1863), 8 L. T. 567; *Ex parte Smith* (1874), 22 W. R. 294. As to the procedure in chambers in the Chancery Division, see title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 130, 131.

(*n*) As to wards of court, see title INFANTS AND CHILDREN, Vol. XVII., pp. 146 *et seq.*

SECT. 2.
Infants.

father would approve of (*o*). In ordinary cases the husband would probably take the first life interest in his own property, and the wife the first life interest in hers for her separate use without power of anticipation (*p*): then would follow the usual trusts for the issue of the marriage (*q*). In default of issue, the husband's property is generally settled on him absolutely, and the property of the wife as she shall appoint by will, and in default of appointment on her absolutely should she survive her husband, otherwise on her statutory next of kin (*r*).

Special clauses.

The court has sanctioned the insertion of a covenant to settle after-acquired property of the infant (*a*), and habitually provides for the event of a second marriage (*b*). The court has also approved of a name and arms clause, but has declined to sanction a proviso that no person professing the Roman Catholic religion should take any interest under the settlement (*c*). The court has also declined to allow a limitation in favour of collaterals, or a benefit conferred on the guardian of the infant whose property is settled (*d*). As a rule, the court sanctions a fair range of investments (*e*).

Effect of settlement by the court.

1009. The settlement of a fund by the court does not preclude the *cestuis que trust* under the settlement from afterwards complaining of a breach of trust by the trustees of the fund prior to the settlement (*f*).

(*o*) *Martin v. Foster* (1855), 7 De G. M. & G. 98, C. A., *per* TURNER, L.J., at p. 102. This applies to cases where the marriage with the ward involves no, or at most a purely technical, contempt of court. For the exclusion of the husband where the marriage involves contempt of court, see title INFANTS AND CHILDREN, Vol. XVII., p. 149.

(*p*) The court generally introduces a restraint on anticipation, but various circumstances may exist which may induce the court not to adopt that course (*Blackie v. Clark* (1852), 15 Beav. 595, 607).

(*q*) Where a settlement made provision for issue out of the wife's fortune only in the event of her dying in the husband's lifetime, the court declined to imply a trust for the issue on the death of the husband in the wife's lifetime (*Pringle v. Pringle* (1856), 22 Beav. 631).

(*r*) *Ex parte Smith* (1874), 22 W. R. 294; and see 3 Davidson, *Precedents in Conveyancing*, 3rd ed., 654. As to next of kin, see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 16 *et seq.*

(*a*) *Re Johnson, Moore v. Johnson*, [1891] 3 Ch. 48; see *Infant Settlements Act*, 1855 (18 & 19 Vict. c. 43), s. 1; compare *Re Hoare's Trusts* (1862), 4 Giff. 254.

(*b*) *Wells v. Price* (1800), 5 Ves. 398; *Millet v. Rowse* (1802), 7 Ves. 419; *Bathurst v. Murray* (1802), 8 Ves. 74; *Birkett v. Hibbert* (1834), 3 My. & K. 227; *Rudge v. Winnall* (1848), 11 Beav. 98 (where provision was made for the children of a future marriage); *Winch v. James* (1798), 4 Ves. 386; *Halsey v. Halsey* (1804), 9 Ves. 471 (where provision was made for the interests of a second husband).

(*c*) *Re Williams* (1860), 6 Jur. (N. S.) 1064. As to name and arms clauses, see pp. 697 *et seq.*, *post*; and as to change of name and arms, generally, see title NAME AND ARMS, CHANGE OF, Vol. XXI., pp. 349 *et seq.*

(*d*) *Re M'Clintock* (1860), 10 I. Ch. R. 469.

(*e*) Of late, however, some judges have refused to go outside trust securities, as to which see title TRUSTS AND TRUSTEES.

(*f*) *Zambaco v. Cassavetti* (1871), L. R. 11 Eq. 439.

Part V.—Consideration for Settlements.

SECT. 1.—*In General.*

SECT. 1.

In General.

1010. Settlements may either be for valuable consideration or voluntary (*g*). In general, unless the consideration is plainly illusory (*h*), the court does not inquire into its adequacy (*i*), and treats the settlement as made for value (*k*). Consideration for settlements.

SECT. 2.—*Marriage.**Marriage as consideration.*

1011. Marriage by-itself, irrespective of any pecuniary benefit or consideration, constitutes a valuable consideration for a settlement (*l*). However, to make the consideration good, the marriage contemplated must be one which the parties are legally capable of contracting (*m*). If the contemplated marriage is one which cannot be legally contracted, the settlement is at best a voluntary settlement (*n*). In such a settlement trusts to take effect from and after the solemnisation of the marriage will fail *in toto*, marriage being construed to mean a legal and effectual marriage, and evidence of the knowledge and intention of the parties not being admissible to show that the words used mean something else (*c*). Moreover, if the domicile of the parties remains unchanged, it

(*g*) For a definition of "valuable consideration," see *Currie v. Misa* (1875), 1. R. 10 Exch. 153, Ex. Ch., *per LUSH, J.*, at p. 162; *Wigan v. English and Scottish Law Life Assurance Association*, [1909] 1 Ch. 291, 297; *Glegg v. Bromley*, [1912] 3 K. B. 474; and see titles CONTRACT, Vol. VII., p. 383; GUARANTEE, Vol. XV., pp. 450--454. The necessary concurrence of a husband and wife to a deed, or at least to the levying of a fine of lands in which they were jointly interested, upon which fine the operation of the deed depended, and the consent of each to the alterations made by the deed and fine, was a valuable consideration to support it in favour of the other (*Parker v. Carter* (1845), 4 Hare, 400, 409); and a wife's equity to a settlement has supported a settlement made by her husband upon her (*Fenner v. Taylor* (1833), 2 L. J. (CH.) 99). As to a wife's equity to a settlement, see title HUSBAND AND WIFE, Vol. XVI., p. 334. As to voluntary conveyances, see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 92 *et seq.*

(*h*) *Kelson v. Kelson* (1853), 10 Hare, 385; *Cornish v. Clark* (1872), L. R. 14 Eq. 184.

(*i*) *Townend v. Toker* (1866), 1 Ch. App. 446.

(*k*) *Myddleton v. Kenyon (Lord)* (1794), 2 Ves. 391, 410; *Harman v. Richards* (1852), 10 Hare, 81.

(*l*) *Ex parte Marsh* (1744), 1 Atk. 158; *Churckman v. Harvey* (1757), Amb. 335, 340; *Prebble v. Bognhurst* (1818), 1 Swan. 309, 319; and see *R. v. Lopen (Inhabitants)* (1788), 2 Term Rep. 577. As to how far marriage is valuable consideration within stat. (1571) 13 Eliz. c. 5, s. 5, see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 82. A marriage that takes place on the faith of a voluntary settlement may supply an *ex post facto* consideration (*Prodgers v. Langham* (1663), 1 Sid. 133; *Brown v. Carter* (1801), 5 Ves. 862; *Guardian Assurance Co. v. Avonmore (Viscount)* (1872), 6 L. R. Eq. 391); and see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., p. 101.

(*m*) *Ford v. De Pontès* (1861), 30 Beav. 572; *Coulson v. Allison* (1860), 2 De G. F. & J. 521. As to what marriages are legal, see title HUSBAND AND WIFE, Vol. XVI., pp. 278 *et seq.*

(*n*) *Seale v. Lowndes* (1868), 17 L. T. 555.

(*o*) *Chapman v. Bradley* (1863), 4 De G. J. & Sm. 71, C. A.; *Pawson v. Brown* (1879), 13 Ch. D. 202; *Phillips v. Probyn*, [1899] 1 Ch. 811;

SECT. 2. makes no difference that the marriage is legal in the country in which it is celebrated (*p*).
Marriage.

If, however, a settlor who is *particeps criminis* makes an effectual and completed gift in favour of the other party, the courts will not assist him to set the deed aside merely on the ground of the illegality of his intentions, and his representatives are in no better position (*q*).

SECT. 3.—*To Whom the Marriage Consideration Extends.*

Persons
within the
consideration.
Volunteers.

1012. The husband and wife and children or other issue (*r*) of the marriage are within the consideration of marriage (*s*).

All persons, other than the husband and wife and issue of the marriage, for whom provision is made by a settlement, such as children of a former marriage (*t*), an illegitimate child (*a*), children of a future marriage (*b*), next of kin (*c*), collateral relations (*d*), an adopted child who was also a relation (*e*), a stranger (*f*), are volunteers whose interests, if the subject is land, are liable to be defeated in favour of a subsequent purchaser for valuable consideration (*g*), or, whether land or personalty, of the creditors of the

Neale v. Neale (1898), 79 L. T. 629, C. A. (which case in effect overrules *Neale v. Mitchell & Co.* (1897), 14 T. L. R. 154).

(*p*) *Chapman v. Bradley* (1853), 4 De G. J. & Sm. 71, C. A. As to what marriages are recognised by English law, see title CONFLICT OF LAWS, Vol. VI., pp. 252, 253.

(*q*) *Ayerst v. Jenkins* (1873), L. R. 16 Eq. 275.

(*r*) *Macdonald v. Scott*, [1893] A. C. 642, 650.

(*s*) *Nairn v. Prowse* (1802), 6 Ves. 752; *Parkes v. White* (1805), 11 Ves. 209, 228; *A.-G. v. Jacobs Smith*, [1895] 2 Q. B. 341, C. A.; see *Harvey v. Ashley* (1748), 3 Atk. 607, 610.

(*t*) *Price v. Jenkins* (1876), 4 Ch. D. 483; (1877), 5 Ch. D. 619, C. A.; *Re Greer* (1877), 11 L. R. Eq. 502; *Re Cameron and Wells* (1887), 37 Ch. D. 32; *A.-G. v. Jacobs Smith*, *supra*; *Carruthers v. Peake* (1911), 55 Sol. Jo. 291. *Ithell v. Beane* (1749), 1 Ves. Sen. 215, *Newstead v. Searles* (1738), 1 Atk. 265, and *Gale v. Gale* (1877), 6 Ch. D. 144, cannot, having regard to *De Mestre v. West*, [1891] A. C. 264, P. C., and *A.-G. v. Jacobs Smith*, *supra*, be relied on for the proposition that the case of children by a former marriage is an exception to the general rule.

(*a*) *De Mestre v. West*, *supra*, overruling *Clarke v. Wright* (1861), 6 H. & N. 849, Ex. Ch. As to illegitimate children, see, further, p. 579, *post*. As to illegitimate children, generally, see title BASTARDY, Vol. II., pp. 425 *et seq.*

(*b*) *Re Oullin's Estate* (1864), 14 L. Ch. R. 506; *Wollaston v. Tribe* (1869), L. R. 9 Eq. 44; *De Mestre v. West*, *supra*, explaining *Clayton v. Wilton (Earl)* (1813), 6 M. & S. 67, n.

(*c*) *Re D'Angibau, Andrews v. Andrews* (1880), 15 Ch. D. 228, C. A.; *Re Plumpre's Marriage Settlement, Underhill v. Plumpre*, [1910] 1 Ch. 609; compare *Godsal v. Webb* (1838), 2 Keen, 99; *Gibbs v. Grady* (1871), 41 L. J. (CH.) 163.

(*d*) *Reeves v. Reeves* (1725), 9 Mod. Rep. 128, 132; *Johnson v. Legard* (1818), 3 Madd. 283; (1822), Turn. & R. 281; *Cormick v. Trapaud* (1818), 6 Dow. 60, H. L.; *Cotterell v. Homer* (1843), 13 Sim. 506; *Stackpoole v. Stackpoole* (1843), 4 Dr. & War. 320; see *Staplehill v. Bully* (1703), Prec. Ch. 224; *Wollaston v. Tribe*, *supra*. *Hale v. Lamb* (1764), 2 Eden, 292, cannot now be considered correct on this point.

(*e*) *Smith v. Cherhill* (1867), L. R. 4 Eq. 390.

(*f*) *Sutton v. Chetwynd (Viscount)* (1817), 3 Mer. 249.

(*g*) Under stat. (1584—5) 27 Eliz. c. 4. As to the law under this statute as modified by the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 92 *et seq.*

settlor (*h*); and they cannot enforce a contract for settlement against the settlor (*i*), though a completed trust in favour of volunteers cannot be set aside by a settlor (*k*).

1013. If the order of the limitations in a settlement is such that the limitations which are not within the marriage consideration are covered by those that are, so that those which are within the marriage consideration cannot take effect in the form and manner provided by the instrument without also giving effect to the others, then the marriage consideration extends to all the limitations (*l*).

It has also been held that in a settlement, in contemplation of marriage, of the estate of the husband or wife, he or she to whom the estate to be settled belongs, being the grantor of the estates created by the settlement, cannot be deemed to have thereby purchased any one of them, but the party to whom the estate does not belong may be regarded as having purchased by the marriage all those limitations of the estate for which he or she can be proved, or fairly inferred, to have stipulated, such as the limitations in favour of themselves, respectively, or their issue (*m*); and so with respect to limitations in favour of the collateral relations of the party to whom the estate does not belong, it may be presumed that such party stipulated, as part of the marriage bargain, for their

SECT. 3.
To Whom
the
Marriage
Considera-
tion
Extends.

Extension to
parties not
strictly
within the
consideration.

Presumed
purchasers.

(*h*) *Smith v. Cherrill* (1867), L. R. 4 Eq. 390.

(*i*) *Sutton v. Chetwynd (Viscount)* (1817), 3 Mer. 249; *Re Plumptre's Marriage Settlement*, *Underhill v. Plumptre*, [1910] 1 Ch. 609; *Godsal v. Webb* (1838), 2 Keen, 99. *Vernon v. Vernon* (1732), 1 Bro. Parl. Cas. 267, and *Lechmere v. Carlisle (Earl)* (1733), 3 P. Wms. 211, 223, are not inconsistent with this view, as they only decide that a voluntary bond may be enforced against a legal personal representative if no creditors are prejudiced. But trustees with whom a contract is made are entitled to enforce a contract to create a trust contained in a marriage settlement for the benefit of the wife and the issue of the marriage (*Pullan v. Koe*, [1913] 1 Ch. 9).

(*k*) *Kekewich v. Manning* (1851), 1 De G. M. & G. 176, C. A.; *Paul v. Paul* (1882), 20 Ch. D. 742, C. A., overruling *Paul v. Paul* (1880), 15 Ch. D. 580; *Re Flavell*, *Murray v. Flavell* (1883), 25 Ch. D. 89, C. A.; *Osborn v. Bellman* (1860), 6 Jur. (N. S.) 1325; see titles EQUITY, Vol. XIII., pp. 97, 98; GIFTS, Vol. XV., pp. 418 *et seq.*; TRUSTS AND TRUSTEES; and see p. 567, *post*.

(*l*) *Newstead v. Searles* (1738), 1 Atk. 265; *Clayton v. Wilton (Earl)* (1813), 6 M. & S. 67, n., as explained by *Mackie v. Herbertson* (1884), 9 App. Cas. 303, 336, and *De Mestre v. West*, [1891] A. C. 264, P. C.; see *Re Cullin's Estate* (1864), 14 I. Ch. R. 506; *Re Sheridan's Estate* (1878), 1 L. R. Ir. 54. These cases all arose under stat. (1584—5) 27 Eliz. c. 4, but the principle might be held to apply in other instances. In *Cotton v. King* (1726), 2 P. Wms. 358, and *King v. Cotton* (1732), 2 P. Wms. 674, the question appears to have been whether a second husband could set aside a voluntary settlement executed by his wife before the marriage in favour of the children of her first marriage, and it was held that he could not.

(*m*) *Barham v. Clarendon (Earl)* (1852), 10 Hare, 126 (husband who settled his own property held not to be a purchaser in respect of an ultimate limitation to himself in fee); *Re Browne's Estate* (1863), 13 I. Ch. R. 283 (husband settling his own lands held not to be a purchaser of the life estate therein limited to him by the settlement); compare *Dilkes v. Broadmead* (1860), 2 De G. J. F. & J. 566 (where a limitation to the wife of her own property for her life to her separate use without power of anticipation was held not to be a voluntary settlement for the benefit of the wife, inasmuch as the husband derived a benefit from the manner in which the property was settled).

SECT. 3.
To Whom
the
Marriage
Considera-
tion
Extends.

Third parties
 joining.

Mutual
 covenants for
 the benefit of
 a volunteer.

insertion in the settlement, and so may properly be regarded as having purchased them on behalf of those who are intended to be benefited thereby. But an intended wife cannot be inferred to have stipulated on behalf of the relations of the intended husband, nor the intended husband on behalf of the relations of the intended wife (*n*).

1014. If third parties, that is to say, persons other than the intended husband and wife, whose concurrence is necessary to give effect to the settlement, join as parties to it, their concurrence is sufficient to constitute a consideration for trusts in favour of other branches of the family or of strangers (*o*).

So, too, if one agrees with another to make a provision for a volunteer in consideration of the other doing the like, the contract is not voluntary (*p*), and, if it is enforced by either party, the volunteer gets the benefit of it (*q*), though the volunteer could not enforce it against either of the contracting parties, since they are at liberty either to vary or abandon their contract (*r*).

SECT. 4.—Separation.

Separation

1015. If a husband and wife agree to live apart and a deed is executed in pursuance of such agreement, and the parties live apart from the time of the execution of the deed, there is consideration for the deed, and neither party can be heard to say that it was not executed for value (*s*).

SECT. 5.—Resettlements.

Resettle-
 ments.

1016. An ordinary resettlement, even if it should not contain provisions which would amount to a valuable consideration, is supported by the court as a family arrangement (*a*).

(*n*) *Clarke v. Wright* (1861), 6 H. & N. 849, Ex. Ch.; *Heap v. Tonge* (1851), 9 Hare, 90, 104; *Ford v. Stuart* (1852), 15 Beav. 493, 500.

(*o*) *Jenkins v. Keymis* (1668), 1 Lev. 150, 237; *Osgood v. Strobe* (1724), 2 P. Wins. 245, 256; *Goring v. Nash* (1744), 3 Atk. 186; *Stephens v. Trueman* (1748), 1 Ves. Sen. 73; *Roe d. Hamerton v. Milton* (1767), 2 Wils. 356; *Pulvertoft v. Pulvertoft* (1811), 18 Ves. 84, 92. These decisions are not affected by *Mackie v. Herbertson* (1884), 9 App. Cas. 303, and *De Mestre v. West*, [1891] A. C. 284, P. C. (A.-G. v. Rathdonnell (Baron)), [1896] W. N. 141, 143; see notes (*t*), (*a*), p. 564, *ante*.

(*p*) *Bentley v. Mackay* (1862), 31 Beav. 142.

(*q*) *Davenport v. Bishopp* (1843), 2 Y. & C. Ch. Cas. 451; affirmed (1845), 1 Ph. 698.

(*r*) *Re Anstis, Chetwynd v. Morgan, Morgan v. Chetwynd* (1886), 31 Ch. D. 596, C. A.; *Hill v. Gomme* (1839), 5 My. & Cr. 250.

(*s*) *Re Weston, Davies v. Tagart*, [1900] 2 Ch. 164; see *Aldridge v. Aldridge* (1888), 13 P. D. 210. The law as stated in the text seems to express correctly the modern view. The former view was that a separation deed was voluntary, unless there was some valuable consideration on both sides apart from the mere covenants and promises to live apart and not molest one another; as to this, see title HUSBAND AND WIFE, Vol. XVI., pp. 443, 444; and see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 82, 83. As to the law relating to separation deeds generally, see title HUSBAND AND WIFE, Vol. XVI., pp. 439 *et seq*.

(*a*) As to the nature and purpose of resettlements, see pp. 690, 691, *post*; and, as to family arrangements generally, see title FAMILY ARRANGEMENTS, Vol. XIV., pp. 540 *et seq*.

SECT. 6.—*Voluntary Settlements.*SUB-SECT. 1.—*In General.*SECT. 6.
Voluntary
Settle-
ments.

In general.

1017. If an effectual settlement is made by the settlor having done everything which, according to the nature of the property to be settled, is necessary to transfer the property and render the settlement binding upon him (*b*), the court decrees the performance of the trust thereby created, although the settlement is gratuitous and not for valuable consideration, but such a settlement may be set aside either at the instance of creditors (*c*), or by subsequent purchasers for value (*d*), or by the trustee in bankruptcy of the settlor (*e*).

Assuming, however, that a voluntary deed is unaffected by any statutory enactment and is complete, *bonâ fide*, and valid, there is no distinction between such a deed and one executed for valuable consideration. The estates and limitations created in such a deed have the same operation and effect as in a deed executed for value, and must be construed in the same manner, and it carries with it all the same incidents and rights attached to the property conveyed as are carried by a deed executed for value, the grantee in this respect standing exactly in the same situation as if he had paid value for the property conveyed (*f*).

Similarity to
settlements
for value.SUB-SECT. 2.—*Post-nuptial.*

1018. A post-nuptial settlement, unless made in pursuance of an agreement capable of proof and made prior to the marriage (*g*), is

Post-nuptia.
settlements.

(*b*) As to the general requisites of an effectual declaration of trust, see titles GIFTS, Vol. XV., p. 429; TRUSTS AND TRUSTEES; and see title EQUITY, Vol. XIII., p. 98. For forms of voluntary settlements, see Encyclopædia of Forms and Precedents, Vol. XIII., pp. 580—608. An incomplete voluntary settlement may be annulled by the settlor (*Beatson v. Beatson* (1841), 12 Sim. 281).

(*c*) Under stat. (1571) 13 Eliz. c. 5; see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 78 *et seq.*

(*d*) Under stat. (1584—5) 27 Eliz. c. 4. Since the passing of the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), a subsequent purchaser, in the case of conveyances made after the 29th June, 1893, has only superiority of title over a prior voluntary grantee where the prior grant was not made *bonâ fide*; see title FRAUDULENT AND VOLUNTARY CONVEYANCES, Vol. XV., pp. 92 *et seq.*

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 275 *et seq.*

(*f*) *Dickinson v. Burrell*, *Dickinson (Ann) v. Burrell*, *Stourton v. Burrell* (1866), L. R. 1 Eq. 337, 343. Such a settlement is irrevocable; see title GIFTS, Vol. XV., p. 418.

(*g*) See p. 534, *ante*. For forms for post-nuptial settlements, see Encyclopædia of Forms and Precedents, Vol. XIII., pp. 607, 608. The settlement is only protected so far as it corresponds with the ante-nuptial articles (*Jason v. Jervis* (1685), 1 Vern. 284; *Cormick v. Trapaud* (1818), 6 Dow, 60, H. L.); see *Hogarth v. Phillips* (1858), 4 Drew. 360 (where a post-nuptial settlement contained a recital of an ante-nuptial agreement, but it was proved that none had been made). A settlement made after a marriage in Scotland does not become an ante-nuptial settlement by reason of the re-celebration of the marriage in England (*Ex parte Hall* (1812), 1 Ves. & B. 112).

SECT. 6.
Voluntary
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ments.

a voluntary settlement (*h*). If, however, the settlement is the result of a bargain made after the marriage between husband and wife, each of them having interests, no matter how much, or of what degree, by which their respective interests are altered, then the post-nuptial settlement is not without valuable consideration (*i*).

An advance by a stranger to pay the settlor's debts is sufficient valuable consideration to support a post-nuptial settlement in favour of his wife and children (*k*).

To whom
consideration
extends.

Although a post-nuptial settlement may thus be made for valuable consideration as between husband and wife, the consideration does not extend to the children of the marriage, who are volunteers and cannot enforce the settlement, unless they are parties to it (*l*), or there is an executed trust in their favour (*m*).

SUB-SECT. 3.—*Self-protective.*

Protection
of settlor.

1019. Settlements are sometimes made for the protection of the settlor himself (*n*). Such a settlement is liable to be impeached on any of the grounds on which any other voluntary settlement may be impeached (*o*). It may also be set aside at the instance of the settlor, and, in cases where it is executed shortly after the coming of age of the settlor, it is difficult to support it (*p*). If the settlor is competent to understand and does understand the deed, it will not be set aside merely because it contains provisions which are unusual, or which the court may think ought not to have

(*h*) *Goodright d. Humphreys v. Moses* (1775), 2 Wm. Bl. 1019; *Evelyn v. Templar* (1787), 2 Bro. C. C. 148; *Doe d. Barnes v. Roe* (1838), 6 Scott, 525; *Currie v. Nind* (1836), 1 My. & Cr. 17; *Shurmur v. Sedgwick, Crossfield v. Shurmur* (1883), 24 Ch. D. 597. There is no distinction in cases of post-nuptial settlements between a gift to wife and children and a gift to a stranger (*Holloway v. Headington* (1837), 8 Sim. 324, commenting on *Ellis v. Nimmo* (1835), L. & G. temp. Sugd. 333); and, as to children, see the text, *infra*. For a case where articles signed after marriage were held inoperative, see *Pownall v. Anderson* (1856), 2 Jur. (N. S.) 857.

(*i*) *Teasdale v. Brailhwaite* (1876), 4 Ch. D. 85; affirmed (1877), 5 Ch. D. 630, C. A.; *Re Foster and Lister* (1877), 6 Ch. D. 87, dissenting from *Butterfield v. Heath* (1852), 15 Beav. 408; *Schreiber v. Dinkel* (1884), 54 L. J. (CH.) 241; *Re Lynch, Lynch v. Lynch* (1879), 4 L. R. Ir. 210, C. A.; *Re Bell's Estate* (1883), 11 L. R. Ir. 512; see *White v. Thornborough* (1715), 2 Vern. 702; *Brown v. Jones* (1744), 1 Atk. 188, 190; *Stileman v. Ashdown* (1742), 2 Atk. 477; *Ramsden v. Hylton* (1751), 2 Ves. Sen. 304; *Parker v. Carter* (1845), 4 Hare, 400, 409; *Harman v. Richards* (1852), 10 Hare, 81; *Hewison v. Negus* (1853), 16 Beav. 594; *Carter v. Hind* (1853), 22 L. T. (O. S.) 116; *Whitbread v. Smith* (1854), 3 De G. M. & G. 727, 739, C. A.; *Stephens v. Green, Green v. Knight*, [1895] 2 Ch. 148, C. A.

(*k*) *Bayspoole v. Collins* (1871), 6 Ch. App. 228; compare *Ex parte Hall* (1812), 1 Ves. & B. 112; *Ford v. Stuart* (1852), 15 Beav. 493; *Townend v. Toker* (1866), 1 Ch. App. 446.

(*l*) *Green v. Paterson* (1886), 32 Ch. D. 95, C. A.; *Joyce v. Hutton* (1860), 11 I. Ch. R. 123; compare *Gandy v. Gandy* (1885), 30 Ch. D. 57, C. A.

(*m*) *Joyce v. Hutton* (1861), 12 I. Ch. R. 71, C. A.; *Green v. Paterson, supra*.

(*n*) For forms of self-protective settlements, see *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 592 *et seq.*

(*o*) See p. 567, *ante*; and see, further, title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 146 *et seq.*; and see pp. 570, 571, *post*.

(*p*) *Everitt v. Everitt* (1870), L. R. 10 Eq. 405.

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Settle-
ments.

been inserted (g); but those who induce the execution of the deed are bound to show either that the deed is in all respects proper, or, if it contains anything special or unusual, that the settlor understood and approved of it (r), and, if it should appear that the settlor did not understand, the settlement will be set aside (s). Where the settlor has understood the settlement, but his attention has not been called to the omission of any power of disposition in default of issue, the settlement may be rectified by the insertion of such a power (t). It is desirable, but not necessary, that a settlement of this nature should contain a power of revocation (a).

SUB-SECT. 4.—*In Favour of Objects of Settlor's Bounty.*

1020. In cases where a voluntary settlement is made for the purpose of conferring a benefit on some person other than the settlor, the relation between the settlor and the object of his bounty may be of such a confidential character as to give rise to a presumption that the grant is the result of undue influence brought to bear by the grantee (b). If no such confidential relation exists, and the presumption does not arise, it is still incumbent on the person claiming under the settlement to show that the transaction was fair and proper and was understood by the settlor (c). Thus, where a settlement has been clearly improvident, as, for example, when the bulk of the settlor's property was settled so as to deprive him of all interest in (d) or all control over the management of (e) the settled property, it has been set aside.

Presumption
of undue
influence.Burden of
proof.

The absence of a power of revocation does not invalidate a voluntary settlement, but it is a circumstance to be taken into account, and is a circumstance of more or less weight according to the facts of the particular case (f).

Power of
revocation.

(g) *Dutton v. Thompson* (1883), 23 Ch. D. 278, C. A.; see *Jarratt v. Aldam* (1870), L. R. 9 Eq. 463.

(r) *Phillips v. Mullings* (1871), 7 Ch. App. 244.

(s) *Prideaux v. Lonsdale* (1863), 1 De G. J. & Sm. 433, C. A.; *Dutton v. Thompson*, *supra*; *Moore v. Prance* (1851), 9 Hare, 299. But where the settlor, having a general accurate knowledge of what he was about to do, refused to receive a detailed description of the provisions because he relied on his solicitors to look into them on his behalf, the court declined to set aside a deed (*Lovell v. Wallis*, No. 2 (1884), 50 L. T. 681).

(t) *James v. Couchman* (1885), 29 Ch. D. 212.

(a) *Everitt v. Everitt* (1870), L. R. 10 Eq. 405. As to the effect of stat. (1584—5) 27 Eliz. c. 4, on a voluntary settlement containing a power of revocation, see title FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 101, 102.

(b) See *ibid.*, pp. 103 *et seq.*; and see title CONTRACT, Vol. VII., pp. 357 *et seq.* As to settlements containing mutual covenants in favour of volunteers, see p. 566, *ante*.

(c) *Huquenin v. Baseley* (1807), 14 Ves. 273; *Coutts v. Acworth* (1869), L. R. 8 Eq. 558.

(d) *Anderson v. Elsworth* (1861), 3 Giff. 154; *Phillipson v. Kerry* (1863), 32 Beav. 628.

(e) *Nanney v. Williams* (1856), 22 Beav. 452, 460; *Wollaston v. Tribe* (1869), L. R. 9 Eq. 44.

(f) *Forshaw v. Welsby* (1860), 30 Beav. 243; *Toker v. Toker* (1863), 3 De G. J. & Sm. 487, C. A.; *Mountford v. Keene* (1871), 24 L. T. 925; *Hall v. Hall* (1873), 8 Ch. App. 430; *Henshall v. Fereday* (1873), 29 L. T. 46, C. A.; *Henry v. Armstrong* (1881), 18 Ch. D. 668.

Part VI.—Beneficial Interests Arising under Settlements of Personality.

SECT. 1.

Life
Interests.
—
Life interests.

SECT. 1.—*Life Interests.*

1021. In a marriage settlement of personality the first life interest in the settled property is usually taken by the husband or wife according as he or she brings the property into settlement. If both bring property into settlement, each, as a rule, takes the first life interest in the property settled by or on behalf of him or her; and, after the death of either spouse, the survivor (*g*) is generally given a life interest in the entire fund (*h*).

Wife's
interests.

The wife's life interest, whether in property brought into the settlement by herself or by her husband, is generally expressed to be for her separate use (*i*) subject to restraint on anticipation (*k*).

Protected
life interests
of husband.

1022. An owner of property cannot settle it so as to reserve to himself a life interest determinable on his bankruptcy (*l*), though he may settle his own property so as to prevent himself from alienating or charging his life interest therein (*m*). A person bringing property into settlement may settle it so as to give to any other person taking an interest under the settlement a life interest determinable on bankruptcy (*n*), and it is by no means unusual to give the husband such a protected life interest in the property brought into the settlement by his wife (*o*).

(*g*) A divorced woman survives her coverture (*Re Crawford's Settlement, Cooke v. Gibson*, [1905] 1 Ch. 11).

(*h*) See *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 289 *et seq.* Receipt of income by trustees is not payment thereof to a beneficiary (*Johnstone v. Lumb* (1846), 15 Sim. 308).

(*i*) As to the separate use, see title HUSBAND AND WIFE, Vol. XVI., pp. 341 *et seq.*

(*k*) As to the effect of the restraint on anticipation, see title HUSBAND AND WIFE, Vol. XVI., pp. 363 *et seq.*; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 146.

(*l*) *Re Brewer's Settlement, Morton v. Blackmore*, [1896] 2 Ch. 503; and see, generally, title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 150, 151.

(*m*) *Brooke v. Pearson* (1859), 27 Beav. 181; *Re Detmold, Detmold v. Detmold* (1889), 40 Ch. D. 585; *Re Walsh's Estate*, [1905] 1 I. R. 261; *Re Perkins' Settlement Trusts, Leicester-Warren v. Perkins*, [1912] W. N. 99.

(*n*) *Mackintosh v. Pogose*, [1895] 1 Ch. 505; and as to conditions for forfeiture on bankruptcy, see, generally, titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 146, 147, 150, 151; FRAUDULENT AND VOIDABLE CONVEYANCES, Vol. XV., pp. 86, 87.

(*o*) For a form, see *Encyclopædia of Forms and Precedents*, Vol. XIII., p. 449. Where the husband took a life interest determinable on bankruptcy followed by a gift after his death on failure of issue of the marriage to the wife's next of kin, the husband's trustee in bankruptcy was held entitled to the income during the interval between the husband's bankruptcy and death (*Upton v. Brown* (1879), 12 Ch. D. 872; see *Frank v. Mackay* (1873), 7 I. R. Eq. 287). Where the trust was after the death of the wife to pay the income to the husband until he should become bankrupt or until his death, and after the decease of the survivor of the husband and wife the children of the marriage took absolutely, the husband having become bankrupt and survived the wife, the children were held entitled to the income between the death of the wife and the

SECT. 1.
Life
Interests.
Form of
Limitation.

Such a determinable interest is generally given by directing that the trustees shall hold the income in trust for the husband for life or until he shall do or attempt to do or suffer something whereby the same or part of the same would, if belonging absolutely to him, become forfeited to, vested in or payable to some person or persons other than himself (*p*). Such a clause, though future in terms, applies to a bankruptcy existing at the date of the settlement or at the time when the interest would, but for the bankruptcy, have fallen into possession (*a*). If the forfeiture is expressed to take effect on alienation only, a proceeding *in invitum*, such as the filing by a creditor of a bankruptcy petition, does not operate as a forfeiture (*b*). The filing by a debtor of a petition, which is not followed by adjudication, does not work a forfeiture of his life interest under a limitation "until he should do or suffer something whereby the income, if payable absolutely to him, would become vested in any other person" (*c*). The word "suffer" or any similar word, put in contradistinction to the word "do," applies to a proceeding *in*

death of the husband (*Re Akeroyd's Settlement, Roberts v. Akeroyd*, [1893] 3 Ch. 363, C. A.; compare *O'Donoghue v. O'Donoghue*, [1906] 1 I. R. 482). The gift over takes effect on bankruptcy in the lifetime of the wife (*Re Akeroyd's Settlement, Roberts v. Akeroyd, supra; Re Muggerridge's Trusts* (1860), John. 625).

(*p*) Encyclopædia of Forms and Precedents, Vol. XIII., pp. 447, 460. A settlement on marriage of an interest determinable on alienation does not terminate such interest (*Lockwood v. Sikes* (1884), 51 L. T. 562; *Re Selby, Church v. Tancred*, [1903] 1 Ch. 715; but see *Re Porter, Coulson v. Capper*, [1892] 3 Ch. 481); but a covenant in a separation deed by a husband that the wife shall receive the income of the settled property is an equitable assignment of his interest so that a forfeiture occurs (*Re Spearman, Spearman v. Lowndes* (1900), 82 J. T. 302, C. A.). No forfeiture is committed by giving effect to a power of advancement contained in the settlement which confers the determinable life interest (*Re Hodgson, Weston v. Hodgson*, [1913] 1 Ch. 34). As to the construction of forfeiture clauses on alienation or bankruptcy under wills, see title WILLS.

(*a*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 148. *Secus*, if the bankruptcy is annulled in the interval between the time when the title to the fund accrues to the bankrupt and the time when it would have become payable to him but for the bankruptcy (*ibid.*). The object of construing words which grammatically refer only to the future as including the past is to give effect to the intention manifested, and past charges are not therefore made a ground of forfeiture in the face of a recital in the settlement that charges had been created (*West v. Williams*, [1899] 1 Ch. 132, C. A.).

(*b*) *Lear v. Leggett* (1830), 1 Russ. & M. 690; *Pym v. Lockyer* (1841), 12 Sim. 394. The fact that the income is expressed to be given to the husband and his assigns during his life does not bring an involuntary alienation within the clause (*Re Kelly's Settlement, West v. Turner* (1888), 59 L. T. 494), but a charging order obtained by a creditor terminates an interest limited until the execution of some assignment or act whereby the interest might be incumbered (*Montefiore v. Behrens* (1865), L. R. 1 Eq. 171). On the other hand, a gift over, if the beneficiary should be precluded from personal enjoyment by any legal disability, takes effect only on a personal disability being imposed by the law *in invitum*, such as bankruptcy or conviction for felony, not on a disability voluntarily created, such as an alienation or charge (*Re Carew, Carew v. Carew*, [1896] 2 Ch. 311, C. A.).

(*c*) *Re Moon, Ex parte Dawes* (1886), 17 Q. B. D. 275, C. A.; compare *Re Weibking, Ex parte Ward*, [1902] 1 K. B. 713 (where it was held that the words "become bankrupt" meant "be adjudicated a bankrupt"); but see *Re Walker, Ex parte Gould* (1884), 13 Q. B. D. 454; *Re Amherst's Trusts* (1872), L. R. 13 Eq. 464.

SECT. 1.

**Life
Interests.****Form of
limitation.**

invitum (d), and includes the case of a charging order obtained by a creditor against the trust fund (e), or the termination of the life interest after divorce under an order of the Divorce Court (f). The word "forfeited" in a gift over in case the settled property should be "forfeited to or become vested in any other person" means liable to be taken away, not merely actually taken away (g). A trust until insolvency means until the beneficiary is unable to pay his debts (h).

**Life interests
by implica-
tion.**

1023. A settlement on a husband and wife during their joint and natural lives has been held to mean during their joint lives and the natural lives of each of them (i).

Where there has been a trust of income for the separate use of the wife, with a gift over in the event of her dying in her husband's lifetime, the wife has been held to take a life interest by implication (k).

In some cases, on the construction of the particular instrument, trusts for the benefit of a parent and children have been held to confer only a life interest on the parent (l).

**Limitations
conferring
absolute
interests.**

1024. A settlement of personal property on a person for life, with remainder to his or her executors and administrators, gives the donee of the life interest the property absolutely, the limitation to executors and administrators being the same as to personal property as a limitation to heirs as to real estate (m), and this is so notwithstanding the interposition between the life interest and the ultimate remainder of a power of appointment by the donee of the life interest by deed or will (n), or by will only (o). There is, however, a difference between a limitation to executors and administrators and a limitation to next of kin, and where property

(d) *Re Throckmorton, Ex parte Eyston* (1877), 7 Ch. D. 145, C. A.

(e) *Roffey v. Bent* (1867), L. R. 3 Eq. 759. Where lands were settled until the tenant for life should commit, or knowingly permit or suffer to be committed, any act whereby his interest in the lands might become the property of a third party, or until the lands should be taken in execution, the interest was held not to be forfeited by a judgment being obtained and a writ of *fi. fa.* issued against the tenant for life (*Re Ryan* (1887), 19 L. R. Ir. 24).

(f) *Re Carew's Settlement, Gellibrand v. Carew* (1910), 55 Sol. Jo. 140.

(g) *Re Levy's Trusts* (1885), 30 Ch. D. 119.

(h) *De Tastet v. Le Tavernier, De Tastet v. Smith, Smith v. De Tastet* (1836), 1 Keen, 161; *Freeman v. Bowen* (1865), 35 Beav. 17; *Billson v. Crofts* (1873), L. R. 15 Eq. 314; *Nixon v. Verry* (1885), 29 Ch. D. 196; compare *Montefiore v. Enthoven* (1867), L. R. 5 Eq. 35, where the limitation was until the beneficiary should become bankrupt or take the benefit of any Act for the relief of insolvent debtors.

(i) *Smith v. Oakes* (1844), 14 Sim. 122.

(k) *Tunstall v. Trappes* (1830), 3 Sim. 308, 312; *Allin v. Crawshaw* (1851), 9 Hare, 382; *Sweetman v. Butler*, [1908] 1 I. R. 517. For cases where the wife has been held, on the construction of the settlement, to take a greater interest, see *Clarke v. Hackwell* (1788), 2 Bro. C. C. 304; *Smith v. King* (1826), 1 Russ. 363.

(l) *Chambers v. Atkins* (1823), 1 Sim. & St. 382; *Fowler v. Hunter* (1829), 3 Y. & J. 506.

(m) *Anderson v. Dawson* (1808), 15 Ves. 532.

(n) *Holloway v. Clarkson* (1843), 2 Hare, 521.

(o) *Devall v. Dickens* (1845), 9 Jur. 550; *St. John v. Gibson* (1847), 12 Jur. 373; *Page v. Soper* (1853), 11 Hare, 321.

was settled on a wife for life, and then as she should appoint by will, and in default of appointment for her next of kin, it was held that she took only a life interest with a power of appointment by will (*p*).

SECT. 1.
**Life
Interests.**

SECT. 2.—*Powers of Appointment.*

1025. As a rule, in personalty settlements the settled fund is held by the trustees after the death of the survivor of the husband and wife upon trust for the children or more remote issue of the marriage in such shares and for such interests as the husband and wife by deed, revocable or irrevocable, jointly appoint, and in default of such appointment as the survivor by deed, revocable or irrevocable, or by will or codicil, shall appoint (*q*). The extension of this power to the more remote issue of the marriage was rendered necessary by the inconvenience of a limitation to children of the marriage only, which prevented parents from providing for their grandchildren (*a*), so that the issue of a child predeceasing the parent might be left unprovided for, it being impossible to appoint either to the issue or to the personal representatives of the deceased child (*b*). The donee of the power must be careful in exercising it to select only such objects of the power as are within the limits prescribed by the rule against perpetuities (*c*).

Powers of
appointment
and revoca-
tion.

If the appointment under such a power is made by will and the appointee dies in the lifetime of the donee of the power, the appointed share lapses and goes as unappointed among the surviving objects of the power (*d*).

Death of
appointee
during life
of donee.

1026. The power is usually expressed to be to appoint to one or more exclusively of the others or other of the children or issue, although every power is now *primâ facie* exclusive (*e*).

Usual form.

A power to appoint to children at such ages as the donee of the power shall appoint authorises an appointment to a child *en ventre sa mère* at the date of the appointment (*f*), and such a child can take by virtue of an appointment made under a power to appoint to issue born before the date of appointment (*g*).

Posthumous
children.

(*p*) *Anderson v. Dawson* (1808), 15 Ves. 532; see *Wolterbeek v. Barrow* (1857), 23 Beav. 423.

(*q*) See *Encyclopædia of Forms and Precedents*, Vol. XIII., p. 426. As to powers of appointment among a class, see title **POWERS**, Vol. XXIII., p. 23; as to powers of revocation, see *ibid.*, pp. 46, 48; and, as to the invalid exercise of powers, see *ibid.*, pp. 49 *et seq.*

(*a*) *Alexander v. Alexander* (1755), 2 Ves. Sen. 640; *Smith v. Camelford* (1795), 2 Ves. 698; *Kennerley v. Kennerley* (1852), 10 Haro, 160.

(*b*) *Maddison v. Andrew* (1747), 1 Ves. Sen. 57; *Re Susanti's Trusts* (1877), 26 W. R. 93.

(*c*) As to who are lawful appointees, see title **PERPETUITIES**, Vol. XXII., pp. 356 *et seq.*

(*d*) *Griffiths v. Gale* (1844), 12 Sim. 327; *Holyland v. Lewin* (1884), 26 Ch. D. 266, C. A.; see title **WILLS**.

(*e*) Powers of Appointment Act, 1874 (37 & 38 Vict. c. 37), s. 1. For various forms of powers of appointment, see *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 300, 341, 386, 417, 592, 597.

(*f*) *Fearon v. Desbrisay* (1851), 14 Beav. 635.

(*g*) *Re Farncombe's Trusts* (1878), 9 Ch. D. 652 (where the power of appointment was conferred by will, but there seems no reason to doubt that the same view would be taken in the case of a power conferred by

SECT. 2.

**Powers
of Appoint-
ment.**Maintenance,
education and
advancement.

The donee is generally authorised to make provision for the maintenance, education, and advancement of the objects of the power. The statutory powers as to maintenance^(h) are available as to interests taken by infants under a power of appointment, but the donee of the power can only make provision for advancement under express authority for the purpose. A power of appointment by will given to a husband and wife is not well exercised by an appointment made during the joint lives by the will of the actual survivor⁽ⁱ⁾.

SECT. 3.—*Hotchpot Clause.*The hotchpot
clause.

1027. What is called a hotchpot clause^(k) precludes appointees of a share of the fund from participating in the unappointed fund without treating the appointed shares as received in or towards satisfaction of the shares to which they would be entitled if the whole fund were to go in default of appointment^(l).

If the power of appointment extends to issue more remote than children, the hotchpot clause should be expressly made to apply to such issue^(m).

Application.

1028. The hotchpot clause applies to appointments of life or reversionary interests which must be valued for the purpose in the best way possible; and, if the parties cannot agree, there must be an inquiry at chambers to determine such value⁽ⁿ⁾.

The ordinary hotchpot clause in settlements does not apply to advancements^(o).

Applica-
tion where
two settled
funds.

1029. If two distinct funds are settled for the same purposes by two distinct deeds, each containing a hotchpot clause, each hotchpot

deed; and, as to the rights of posthumous children, see, further, titles DESCENT AND DISTRIBUTION, Vol. XI., pp. 11, note (a), 16; INFANTS AND CHILDREN, Vol. XVII., p. 120, note (d); REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 223; WILLS.

(h) See pp. 684, 685, *post*; title INFANTS AND CHILDREN, Vol. XVII., pp. 87 *et seq.*

(i) *Re Moir's Settlement Trusts* (1882), 46 L. T. 723; see title POWERS, Vol. XXIII., p. 22; and, as to the exercise of powers generally, see *ibid.*, pp. 14 *et seq.*

(k) For examples, see *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 417, 427, Vol. XV., pp. 405, 464, 468, 547.

(l) In the absence of a hotchpot clause the appointee of a share in a fund is entitled to share in the unappointed residue (*Wilson v. Piggott* (1794), 2 Ves. 351; *Alloway v. Alloway* (1843), 4 Dr. & War. 380; *Walmsley v. Vaughan* (1857), 1 De G. & J. 114; *Wombwell v. Hanrott* (1851), 14 Beav. 143; *Foster v. Cautley* (1855), 6 De G. M. & G. 55; *Re Alfreton Estates Trusts* (1883), 31 W. R. 702; *Close v. Coote* (1880), 7 L. R. Ir. 564, C. A.); see also title DESCENT AND DISTRIBUTION, Vol. XI., pp. 20, 21. The rule may, however, be excluded by clear expression of intention on the part of the appointor (*Fortescue v. Gregor* (1800), 5 Ves. 553; *Foster v. Cautley*, *supra*), or by the appointee agreeing to take under the appointment in lieu of his share in the unappointed property (*Olune v. Apjohn* (1866), 17 L. Ch. R. 25; *Armstrong v. Lynn* (1875), 9 I. R. Eq. 186).

(m) *Langslow v. Langslow* (1856), 21 Beav. 552; *Hewitt v. Jardine* (1872), L. R. 14 Eq. 58.

(n) *Bucker v. Scholefield* (1862), 1 Hem. & M. 36; *Eales v. Drake* (1875), 1 Ch. D. 217; but see *Williamson v. Jeffreys* (1854), 18 Jur. 1071.

(o) *Re Fox, Wodehouse v. Fox*, [1904] 1 Ch. 480. As to advancement, see pp. 685, 686, *post*; title INFANTS AND CHILDREN, Vol. XVII., pp. 92 *et seq.*

clause applies only to the fund settled by the deed containing it (*p*); and where a settlement declared express trusts of one fund, with a hotchpot clause referring to that fund, the hotchpot clause was held not to be incorporated with reference to a second and distinct fund by a general reference to the trusts, powers, provisoes, and agreements expressed in reference to the former fund (*q*). A settlement, however, may in the absence of express words contain a plain indication of intention that the hotchpot clause shall apply to all funds thereby settled (*r*).

SECT. 8.
Hotchpot
Clause.

1030. If a will contains a hotchpot clause, advances to children made by a testator during his lifetime or by the trustees of his will after his death, but before the actual distribution, must be brought into account (*s*). The clause only applies as between children, and cannot be used to enlarge the share of a beneficiary who is not a child (*t*).

Hotchpot
clause in will.

SECT. 4.—Trusts in Default of Appointment.

1031. In default of and subject to any appointment the settled property is generally, in settlements made on marriage, directed to go to all the children or any the child of the marriage (*u*) who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry under that age, and if more than one in equal shares (*a*). This form of vesting

Children
attaining
twenty-one
or marrying.

(*p*) *Montague v. Montague* (1852), 15 Beav. 565; *Wellesley (Lady) v. Mornington (Lord)* (1855), 1 Jur. (N. S.) 1202; see also pp. 708, 709, *post*.

(*q*) *Re Bristol (Marquis), Grey (Earl) v. Grey*, [1897] 1 Ch. 946; *Re Cavendish, Grosvenor v. Butler*, [1912] 1 Ch. 794; *Re Marke Wood, Senior, Re Marke Wood Minor, Wodehouse v. Wood*, [1913] 1 Ch. 303.

(*r*) *Hutchinson v. Tottenham*, [1898] 1 I. R. 403; *Re Perkins, Perkins v. Bagot* (1892), 41 W. R. 170 (a case of a will); compare *Stares v. Penton* (1867), L. R. 4 Eq. 40; *Middleton v. Windross* (1873), L. R. 16 Eq. 212.

(*s*) *Hilton v. Hilton* (1872), L. R. 14 Eq. 468; *Smith v. Conder* (1878), 9 Ch. D. 170; compare *Fox v. Fox* (1870), L. R. 11 Eq. 142 (where a testator directed that any sums paid by his executors to the trustees of a daughter's marriage settlement in pursuance of a covenant by him should be brought into hotchpot). As to advancement generally, see title INFANTS AND CHILDREN, Vol. XVII., pp. 92 *et seq.*; and, as to clauses in wills for bringing advances into hotchpot, see title WILLS.

(*t*) *Meinertzen v. Walters* (1872), 7 Ch. App. 670; *Stewart v. Stewart* (1880), 15 Ch. D. 539.

(*u*) An ultimate trust for children of the intended husband has been held to include children by a subsequent marriage, notwithstanding a limitation to him in default of children of the then intended marriage (*Isaac v. Hughes, Same v. Same* (1870), L. R. 9 Eq. 191); and a trust for children to be born of the marriage includes children in existence at the date of the settlement (*Slingsby v. —* (1718), 10 Mod. Rep. 398; *Hewet v. Ireland* (1718), 1 P. Wms. 426); and see *Cook v. Cook* (1706), 2 Vern. 545.

(*a*) See *Encyclopædia of Forms and Precedents*, Vol. XIII., p. 427. Where no provision was made for children, but the settled property was to go as the survivor of the husband and wife should appoint, it was held that they were able to put an end to the settlement by a joint appointment (*Macarmick v. Buller* (1787), 1 Cox, Eq. Cas. 357). If limitations or trusts giving a vested interest at birth are employed, they are accompanied by a kind of shifting clause, which is called an accruer clause. By this clause, on the death of a child under twenty-one, and, if a daughter, without being married, his or her share devolves on the other children or child. In construing a clause of this nature there is no distinction between a deed and a will (*Re Friend's Settlement, Cole v. Alcott*, [1906] 1 Ch. 47);

SECT. 4.
Trusts in
Default
of Appoint-
ment.

the shares of children makes the attainment of the age of twenty-one or marriage (as to daughters) the decisive test as to whether the children shall take or not (*b*). The rule of convenience which has been established in the case of wills (*c*) that, where there is a provision for members of a class contingently on their attaining twenty-one simply, so soon as any child would, if the class were not susceptible of increase, be entitled to call for payment, the class shall become incapable of increase, applies also to settlements, at any rate if made by voluntary deed (*d*), though by reason of the previous life estate in the parent it is not as a rule called into play in a marriage settlement.

A trust in a marriage settlement in favour of children at any later age than twenty-one is void for remoteness (*e*).

Marriage
with consent.

1032. The provision for daughters is sometimes made dependent on their marrying with the consent of their parents, or of the trustees of the settlement (*f*). In such a case, if the consent required is that of a class of persons who, without the fault or default of the beneficiary, have ceased to exist and cannot be brought into existence, as in the case of the consent of the parents being required and one or both being dead at the time of the marriage, the consent may be dispensed with (*g*); but the consent is not dispensed with on the ground that the class of persons whose consent is required is not actually in existence at the time of marriage, if such a class could have been brought into existence, as where the consent required is that of trustees or guardians (*h*).

A direction that the shares of daughters shall be settled is inserted only to provide for the daughters' children, if any, and if any daughter has no children the object for cutting down her interest is gone, and she takes absolutely (*i*).

and see *Cole v. Sewell* (1848), 2 H. L. Cas. 186, 236. The court construes "survivors" as "others" if there is a sufficient context to enable this to be done (*Re Friend's Settlement*, *Cole v. Alcott*, [1906] 1 Ch. 47; *Re Palmer's Settlement Trusts* (1875), L. R. 19 Eq. 320), though otherwise the words must bear their grammatical meaning (*Cole v. Sewell*, *supra*); see title WILLS. Survivorship has also been referred to the period of vesting (*Re Acott's Settlement* (1850), 28 L. J. (CH.) 383), and of distribution (*Reid v. Reid* (1862), 30 Beav. 388). As to shifting clauses generally, see pp. 693 *et seq.*, *post*.

(*b*) *Chamberlain v. Napier* (1880), 15 Ch. D. 614, 632. The period for vesting should not be suspended for more than twenty-one years (*Re Morse's Settlement* (1855), 21 Beav. 174; *Re Nash's Settlement Trusts* (1882), 30 W. R. 406); see title PERPETUITIES, Vol. XXII., p. 338. A reference to marriage without more has been held to mean marriage during minority (*Lang v. Pugh* (1842), 1 Y. & C. Ch. Cas. 718).

(*c*) See title WILLS.

(*d*) *Re Knapp's Settlement*, *Knapp v. Vassall*, [1895] 1 Ch. 91. *Semble*, it applies to settlements for value (*ibid.*).

(*e*) See title PERPETUITIES, Vol. XXII., pp. 338, 339.

(*f*) Such a condition is enforceable if it is accompanied by a gift over on marriage without the required consent (*Re Whiting's Settlement*, *Whiting v. De Rulzen*, [1905] 1 Ch. 96, C. A.); and see titles GIFTS, Vol. XV., p. 423; WILLS.

(*g*) *Dawson v. Oliver-Massey* (1876), 2 Ch. D. 753, C. A.; *Green v. Green* (1845), 2 Jo. & Lat. 529.

(*h*) *Re Brown's Will*, *Re Brown's Settlement* (1881), 18 Ch. D. 61, C. A. As to gifts of legacies conditional on marriage with consent, see, further, title WILLS.

(*i*) *Re Sidway Hall Estate* (1877), 37 L. T. 457; and see title WILLS.

1033. As in the case of portions (*k*), so in the case of provision for issue, the rule is that if the settlement clearly and unequivocally throughout all its provisions makes the right of a child depend upon its surviving both its parents, the court has no authority to control that disposition (*l*); if, however, the settlement is in any of its provisions ambiguously expressed, so as to leave it in any degree uncertain whether it was intended that the right of a child should depend upon the event of its surviving both its parents, then the court is bound by authority to declare, upon what may be called the presumed intention in instruments of this nature, that the interest of a child, though not to take effect in possession until after the death of both parents, did, upon the limitations in the settlement, vest in sons at twenty-one and in daughters at twenty-one or marriage (*m*).

SECT. 4.
Trusts in
Default
of Appoint-
ment.
—
Vesting.

1034. Where trusts are declared in favour of the issue of a marriage the question frequently arises whether the meaning of the word is confined to children of the marriage, or whether and to what extent it includes grandchildren. The word "issue" occurring in a deed and in a will (*n*) *prima facie* includes all descendants, and must be construed in its largest sense (*o*). If, however, issue are pointed out as persons to take with reference to the share of the parent a gift which, so far as regards the parent, fails, they take on the principle which may be called the *quasi*-representative principle; that is to say, the children of each parent whose share fails take that parent's

Persons
within the
term "issue."

(*k*) See pp. 593, 594, *post*, and the cases there cited.

(*l*) *Bright v. Rowe* (1834), 3 My. & K. 316; *Jeffery v. Jeffery* (1840), 17 Sim. 26; *Barnett v. Blake* (1862), 2 Drew. & Sm. 117; *Beale v. Connolly* (1874), 8 I. R. Eq. 412; *Lloyd v. Cocker* (1854), 19 Beav. 140; compare *Re Edgington's Trusts* (1855), 3 Drew. 202 (where a gift over to children "then living" was held to refer to the period at which the prior life interest determined).

(*m*) *Perfect v. Curzon* (Lord) (1820), 5 Madd. 442; *Toires v. Franco* (1830), 1 Russ. & M. 649; *Re Orlebar's Settlement Trusts* (1875), L. R. 20 Eq. 711; *Martin v. Dale* (1884), 15 L. R. Ir. 345; compare *Bree v. Perfect* (1844), 1 Coll. 128. The doctrine of the court is to accelerate, if possible, the period of vesting unless there is something in the document to show an intention to postpone enjoyment until the happening of some event personal to the parties interested themselves (*Darley v. Perreval*, [1900] 1 I. R. 129); and see title WILLS.

(*n*) With regard to wills the court always looks at the intention of the testator, and adopts in practice, if not in theory, a more benignant rule of construction than in the case of an executed settlement, which it always takes as it finds it (*Re Warren's Trusts* (1884), 26 Ch. D. 208, 217). For cases under wills where the word "issue" has been restricted to children, see *Re Hopkins' Trusts* (1878), 9 Ch. D. 131; title WILLS. The word has also been restricted to children in marriage articles, which are treated only as a memorandum of instruction (*Swift v. Swift* (1836), 8 Sim. 168; *Thompson v. Simpson* (1841), 1 Dr. & War. 459; *Campbell v. Sandys* (1803), 1 Sch. & Lef. 281).

(*o*) *Re Warren's Trusts* (1884), 26 Ch. D. 208; *Hobbs v. Tuthill*, [1895] 1 I. R. 115 (commenting on *Re Dixon's Trusts* (1869), 4 I. R. Eq. 1, and *Re Denis' Trusts* (1875), 10 I. R. Eq. 81); *South v. Searle* (1856), 2 Jur. (n. s.) 390; *Harrison v. Symons* (1866), 14 W. R. 959; *Donoghue v. Brooks* (1875), 9 I. R. Eq. 489; compare *Haydon v. Wilshere* (1789), 3 Term Rep. 372.

SECT. 4.
Trusts in
Default
of Appoint-
ment.

Parent dead
at date of
settlement.

Where no
gift over in
default of
appointment.

Where trusts
for issue not
implied.

share, but grandchildren are not admitted to take in competition with children (*p*).

There may also be such a context in a deed as to limit the word "issue" to children (*q*).

A substitutional gift in favour of the issue of a named parent, in the event of such parent dying in the settlor's lifetime, does not fail by reason of the parent being dead at the date of the settlement (*a*).

1035. When a settlement, by which the property is given to a class, contains no gift over in default of appointment, but gives a power to appoint in what shares and in what manner the members of that class shall take, the property vests, until the power is exercised, in all the members of the class, and they all take in default of appointment; but, if the instrument does not contain a gift of the property to any class, but only a power to give it among the members of the class as the donee of the power may think fit, those only can take in default of appointment who might have taken under the exercise of the power. In the latter case the court may imply an intention to give the property in default of appointment to those only to whom the donee of the power might give it (*b*). It follows that, in the former case, the representatives of a member of the class who dies in the lifetime of the donee of the power are entitled to participate in the property, even if the power of appointment is only testamentary (*c*). In the latter case, the representatives are entitled to participate if the power is one which the donee could have exercised in his lifetime (*d*), but not if the power is purely testamentary (*e*).

No trust was implied in favour of issue where a settlement of the personal estate of a female infant, executed on her marriage, gave an interest to the issue in the event of the husband surviving the wife, but made no provision for the contrary event, which happened (*f*); nor where there was a gift over in default of

(*p*) *Robinson v. Sykes* (1856), 23 Beav. 40, following *Ross v. Ross* (1855), 20 Beav. 645 (a case on a will); *Anderson v. St. Vincent (Viscount)* (1856), 2 Jur. (N. S.) 607; *Marshall v. Baker* (1862), 31 Beav. 608; *Barracough v. Shillito* (1884), 53 L. J. (CH.) 841.

(*q*) As where a gift to issue was followed by a gift to one child if there should be but one (*Re Biron's Contract* (1878), 1 L. R. Ir. 258, C. A.), or where a power of appointment given in the event of death without leaving lawful issue was followed by a gift over in default of appointment, in case there should be no children (*Re Heath's Settlement* (1856), 23 Beav. 193; *Gordon v. Hope* (1849), 3 De G. & Sm. 351).

(*a*) *Barnes v. Jennings* (1866), L. R. 2 Eq. 448; and see title WILLS.

(*b*) *Lambert v. Thwaites* (1866), L. R. 2 Eq. 161; *Fenwick v. Greenwell* (1847), 10 Beav. 412. In a marriage settlement where the power is to appoint among issue, such an inference would be certain, but in other cases it is a question of construction whether or not there is a general intention to benefit the class; see *Re Weekes' Settlement*, [1897] 1 Ch. 289; and see, further, title POWERS, Vol. XXIII., pp. 70, 71.

(*c*) *Lambert v. Thwaites*, *supra*.

(*d*) *Wilson v. Duguid* (1883), 24 Ch. D. 244; but see *Winn v. Fenwick* (1849), 11 Beav. 438, which case was, however, adversely commented on in *Lambert v. Thwaites*, *supra*, at p. 160, and probably went on grounds peculiar to the case.

(*e*) *Re Susanni's Trusts* (1877), 26 W. R. 93.

(*f*) *Pringle v. Pringle* (1856), 22 Beav. 631.

appointment "or there being no issue of the intended marriage" to the heir of the wife (g).

SECT. 4.
Trusts in
Default
of Appoint-
ment.

SECT. 5.—*Illegitimate Children.*

1036. *Primâ facie* any general description of descendants, or a class of descendants, such as "child," "son," or "issue," means legitimate descendants (h). There is, however, no objection to provision being made by deed (i) for illegitimate children born at the date of the settlement (k), provided that they are sufficiently identified as the *personæ designatæ* (l); but a provision by deed for future illegitimate children is void as being contrary to public policy (m), and it makes no difference whether such provision is made by the father or by the mother (n).

Illegitimate
children.

SECT. 6.—*Trusts in Default of Issue.*

1037. A settlor may of course declare any ultimate trusts of a fund settled by him, but as a rule the aim of the trusts in default of issue contained in a settlement is to return the settled property to the destination it would have had if no settlement had been made (o).

Trusts in
default of
issue.

The ordinary ultimate limitation of personal property settled by the husband is for the husband absolutely in default of issue (a).

Usual limi-
tations:
husband's
fund;
wife's fund.

The wife's fund is generally settled on such trusts as the wife shall by will or codicil appoint, and in default of and subject to any such appointment, if the wife shall survive the husband, in trust for the wife for her separate use (b), but so that during coverture she shall not have power to alienate the interest thereby given her otherwise than by testamentary appointment (c), but if the husband shall survive the

(g) *Re Regan's Estate* (1893), 31 L. R. Ir. 246; compare *Goldring v. Inwood* (1861), 3 Giff. 139; see title WILLS.

(h) *Wilkinson v. Adam* (1813), 1 Ves. & B. 422; *Dover v. Alexander* (1843), 2 Hare, 275; title DEEDS AND OTHER INSTRUMENTS, Vol. X., p. 438.

(i) For cases arising on the construction of wills, see title WILLS.

(k) Including a child *en ventre sa mère* at the date of the settlement (*Ebborn v. Fowler*, [1909] 1 Ch. 578, C. A., overruling *Re Shaw, Robinson v. Shaw*, [1894] 2 Ch. 573, on this point).

(l) Illegitimate children may take under a gift to children where there are no legitimate children at the date of the settlement (*Gabb v. Prendergast* (1865), 1 K. & J. 439; *Ebborn v. Fowler, supra*).

(m) *Blodwell v. Edwards* (1596), Cro. Eliz. 509; *Wilkinson v. Wilkinson* (1842), 1 Y. & C. Ch. Cas. 657; *Lomas v. Wright* (1833), 2 My. & K. 769.

(n) *Thompson v. Thomas* (1891), 27 L. R. Ir. 457. As to illegitimate children generally, see title BASTARDY, Vol. II., pp. 425 *et seq.*; and as to the presumption of legitimacy of the child of a married woman, see *ibid.*, pp. 427 *et seq.*

(o) Trusts in default of issue may arise on the dissolution of a marriage, there being no issue of the marriage (*Bond v. Taylor* (1861), 2 John. & H. 473). A gift over on the death of issue under age was held to take effect on there being no issue of the marriage (*Osborn v. Bellman* (1860), 2 Giff 593).

(a) See *Encyclopædia of Forms and Precedents*, Vol. XIII., p. 417.

(b) It has been held that a trust for such children of a future marriage as the wife, if she survives her husband, shall by will appoint does not interfere with her right to the trust funds under an absolute trust for her if she survives her husband and there is no issue of the intended marriage (*Hanson v. Cooke and Hanson* (1825), 4 L. J. (O. S.) (CH.) 45).

(c) Formerly, if the power of appointment by will given to a married woman was made conditional on her predeceasing her husband, a will duly

SECT. 6.
Trusts in
Default
of Issue.

wife, then in trust for such person or persons as under the Statute of Distribution (*d*) would have become entitled thereto at the death of the wife, if she had died a spinster absolutely entitled thereto intestate and domiciled in England, and if there should be more than one as tenants in common in the shares in which they would have taken under the same Statute (*e*).

Failure to give an absolute interest to a married woman in the event of her surviving her husband, so that the next of kin acquire an indefeasible interest, has been held a ground for rectification upon the unsupported testimony of the wife that her intention was only to protect the settled property during coverture (*f*).

Trust for
wife's next of
kin or
executors,
subject to
her life
interest.

1038. If the settlement gives the wife only a life interest with a power of appointment by will, and there is a trust for the next of kin in the event of her husband surviving her, the trust for the next of kin cannot be revoked or defeated by the wife during her life (*g*).

If the wife survives her husband, she takes an absolute interest in personalty settled upon trust for her for life, and in default of appointment by will in trust for her executors and administrators (*h*); while if she predeceases her husband and dies intestate, the property passes to her administrator, who may be the husband (*i*), and not to her next of kin to the exclusion of her husband (*k*).

executed and authorised at the time of execution would have failed to pass the settled property if the wife survived her husband and did not republish her will (*Price v. Parker* (1848), 16 Sim. 198; *Trimmell v. Fell* (1853), 16 Beav. 537; *Blaklock v. Grindle* (1868), L. R. 7 Eq. 215; *Willock v. Noble* (1875), L. R. 7 H. L. 580: and these cases were not affected by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75) (*Re Price, Stafford v. Stafford* (1885), 28 Ch. D. 709; *Re Cuno, Mansfield v. Mansfield* (1889), 43 Ch. D. 12, C. A.); see title WILLS); but republication is no longer necessary (Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 3).

(*d*) 22 & 23 Car. 2, c. 10; see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 16 *et seq.*

(*e*) See Encyclopædia of Forms and Precedents, Vol. XIII., p. 428.

(*f*) *Wollerbeek v. Barrow* (1857), 23 Beav. 423; *Smith v. Luffe* (1875), L. R. 20 Eq. 666; *Hanley v. Pearson* (1879), 13 Ch. D. 545; *Cook v. Fearn* (1879), 27 W. R. 212; *Edwards v. Bingham* (1879), 28 W. R. 89.

(*g*) *Anderson v. Dawson* (1808), 15 Ves. 532; *Paul v. Paul* (1882), 20 Ch. D. 742, C. A., affirming S. C. (1881) 19 Ch. D. 47, and overruling *Paul v. Paul* (1880), 15 Ch. D. 580.

(*h*) *Page v. Soper* (1853), 1 Eq. Rep. 540; compare *Malcolm v. O'Callaghan* (1835), 5 L. J. (CH.) 137.

(*i*) *Warburton v. Hadfield* (1837), 6 L. J. (CH.) 203; *Allen v. Thorp* (1843), 7 Beav. 72.

(*k*) *Daniel v. Dudley* (1841), 1 Ph. 1; *A.-G. v. Malkin* (1846), 2 Ph. 64; compare *Howell v. Gayler* (1842), 5 Beav. 157; *Morris v. Howes* (1845), 4 Hare, 599; *Mackenzie v. Mackenzie* (1851), 3 Mac. & G. 559. A limitation to the executors of a living person after the deaths of two other persons does not fail by reason of the deaths of such last-mentioned persons in the lifetime of the first (*Horseman v. Abbey* (1819), 1 Jac. & W. 381). The decision in *Bulmer v. Jay* (1830), 4 Sim. 48, affirmed by Lord BROUGHAM, L.C. (1834), 3 My. & K. 197, in which the next of kin of the wife were held entitled under a trust for her executors or administrators, turned upon the particular terms and provisions of the settlement, as controlling the natural and ordinary meaning of the words (*A.-G. v. Malkin, supra*). In *Smith v. Dudley* (1838), 9 Sim. 125, a trust of the wife's property for the executors or administrators of the wife's own family was held to be a gift to her next of kin, but in the same case a trust of the husband's property for his executors

1039. Under a trust of personality for the right heirs of the wife, her heir-at-law at the time of her death takes and not her next of kin (*l*).

SECT. 6.
Trusts in
Default
of Issue.

A trust for the next of kin of the wife, without more, is not a trust for the next of kin according to the Statute of Distribution (*m*), but a trust for her nearest blood relations, so that brothers and sisters take to the exclusion of the children of deceased brothers' and sisters (*n*). If, however, there is a reference to the Statute, either express or implied (*o*), those persons take who would have taken under the Statute had the wife died intestate (*p*).

Trusts for
wife's heirs or
next of kin.

1040. If the trust for next of kin contains any reference, express or implied, to the Statute of Distribution (*m*), the next of kin take as tenants in common (*q*), but in the absence of such a reference the usual rule in construing deeds applies, and they take as joint tenants (*r*). The description of next of kin of the wife can in no way apply to the husband, who cannot take under any such gift or limitation (*s*); nor (*t*) is he a person entitled under the Statute of Distribution (*m*). Similarly a wife is not next of kin to her husband (*u*). The trust being generally for persons who would be entitled under the Statute of Distribution (*a*) if the wife had

Trusts for
statutory
next of kin.

or administrators of his own family was held to give him the property absolutely.

(*l*) *Hamilton v. Mills* (1861), 29 Beav. 193. The husband cannot take under a limitation of personality to the right heirs of the wife (*Newenham v. Pittar* (1835), 7 L. J. (CH.) 300). As to who is the heir-at-law, see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 7 *et seq.*

(*m*) 22 & 23 Car. 2, c. 10; see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 16 *et seq.*

(*n*) *Elmsley v. Young* (1835), 2 My. & K. 82, 780; *Withy v. Mangles* (1843), 10 Cl. & Fin. 215, H. L.; *Re Gray's Settlement, Akers v. Sears*, [1896] 2 Ch. 802; *Rook v. A.-G.* (1862), 31 Beav. 313; and see ——— v. ——— (1815), 1 Madd. 36.

(*o*) A reference to intestacy implies a reference to the Statute of Distribution (*Re Gray's Settlement, Akers v. Sears, supra*, following *Garrick v. Camden (Lord)* (1807), 14 Ves. 372; and see *Cotton v. Scarancke* (1815), 1 Madd. 45). But a reference to death unmarried contains no such implication (*Hulton v. Forster* (1868), 3 Ch. App. 505, C. A.).

(*p*) *Re Gray's Settlement, Akers v. Sears, supra*; *Garrick v. Camden (Lord)*, *supra*; *Cotton v. Scarancke, supra*; *Kidd v. Frasier* (1851), 1 I. Ch. R. 518; but see *Re Webber's Settlement* (1850), 19 L. J. (CH.) 445.

(*q*) *Re Ranking's Settlement Trusts* (1868), L. R. 6 Eq. 601, following *Bullock v. Downes* (1860), 9 H. L. Cas. 1 (a case on a will); and see *Mortimore v. Mortimore* (1879), 4 App. Cas. 448.

(*r*) *Withy v. Mangles, supra*; *Lucas v. Brandreth* (No. 2) (1860), 28 Beav. 274; and see and compare titles PERSONAL PROPERTY, Vol. XXII., p. 403; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 200.

(*s*) *Watt v. Watt* (1796), 3 Ves. 244; *Bailey v. Wright* (1811), 18 Ves. 49; *Graffley v. Humpage* (1838), 1 Beav. 46. But where the wife was illegitimate it was held that the fund resulted to her and went to her husband as her personal representative (*Hawkins v. Hawkins* (1834), 7 Sim. 173).

(*t*) *Noon v. Lyon* (1875), 33 L. T. 199.

(*u*) *Worseley v. Johnson* (1753), 3 Atk. 758; *Kilner v. Leach* (1847), 10 Beav. 362; *Cholmondeley v. Ashburton (Lord)* (1843), 6 Beav. 86; *Re Fitzgerald* (1889), 58 L. J. (CH.) 662.

(*a*) 22 & 23 Car. 2, c. 10; see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 16 *et seq.*

NOTE 6.
Trusts in
Default
of Issue.

Period for
 ascertaining
 class.

survived her husband and had then died intestate, in cases where the wife predeceases her husband the question has frequently arisen whether the class is to be ascertained at the death of the wife or at the death of the husband. As a general rule, when a trust is created in favour of persons who take under the Statute of Distribution (b), and the only hypothesis stated is the death of some person intestate possessed of the personal property settled by the instruments creating the trust, the persons who take are the persons determined by the Statute and ascertained at the time, that is to say, at the death of the person in question (c). The trust, however, may be so worded as to show that the class of persons to be ascertained is not to be ascertained when the death did happen, but at some other time, as if the death had happened at such other time (d). The question in each case is a question of grammatical construction, and the authorities are not easy to reconcile, but on the whole the balance of judicial opinion in construing trusts for the persons who would be next of kin of a wife if she survived her husband has been in favour of ascertaining the class at the death of the husband (e).

(b) 22 & 23 Car. 2, c. 10; see title DESCENT AND DISTRIBUTION, Vol. XI., pp. 16 *et seq.*

(c) *Wheeler v. Addams* (1853), 17 Beav. 417; compare *Smith v. Smith* (1841), 12 Sim. 317; *Day v. Day* (1870), 18 W. R. 417; and see *Wharton v. Barker* (1858), 4 K. & J. 483; *Bullock v. Downes* (1860), 9 H. L. Cas. 1 (where the rule is stated with reference to wills).

(d) *Re King's Settlement, Gibson v. Wright* (1889), 60 L. T. 745, *per* CHITTY, J.

(e) Thus in *Pinder v. Pinder* (1860), 28 Beav. 44, where the trust was after the decease of the husband and failure of issue for the persons who would then be entitled to the personal estate of the wife in case she had survived her husband and died possessed of the same intestate, ROMILLY, M.R., was of opinion that the only fair way of reading the words was as if they ran "to the persons who would be entitled to the personal estate of the wife, in case she had survived her husband, and had then died intestate, possessed of the same estate," and that the class to take was the class of persons who would have taken if the wife had died at a time other than that at which she did die, that is, the day after her husband's death. In *Chalmers v. North* (1860), 28 Beav. 175, where the trust was for such persons as at the decease of the wife would under the Statute have been entitled to her personal estate, as her next of kin, in case she had survived her husband and had afterwards died intestate, the same judge came to the same conclusion. In *Druitt v. Seaward, Re Ainsworth, Ainsworth v. Seaward* (1885), 31 Ch. D. 234, where the ultimate trust under a will was for the persons who under the Statute would have been entitled thereto in case the testator's daughter having survived her husband had then died possessed thereof and intestate, PEARSON, J., held that the next of kin living at the wife's death were entitled, and expressed disapproval of the reasoning in *Chalmers v. North, supra*. In *Re Bradley, Brown v. Cottrell* (1888), 58 L. T. 631, where the trust was for the persons who under the Statute would, on the decease of the wife, have been entitled if she had survived her husband and had then died possessed thereof and intestate, STIRLING, J., followed *Druitt v. Seaward, Re Ainsworth, Ainsworth v. Seaward, supra*, and, while doubting *Chalmers v. North, supra*, distinguished *Pinder v. Pinder, supra*. In *Re King's Settlement, Gibson v. Wright* (1889), 60 L. T. 745, CHITTY, J., followed *Pinder v. Pinder, supra*, on the ground that the words there were undistinguishable from the words then before him. In *Clarke v. Hayne* (1889), 42 Ch. D. 529, where the trust after the decease of the husband and wife was for the persons who under

1041. If the trust is for the statutory next of kin of the wife if she had died intestate and "without having been married" or "without ever having been married," it has now been settled, after some conflict of judicial opinion, that the words should receive their ordinary and natural meaning, which would exclude issue of the wife, whether issue of the intended marriage who fail to attain a vested interest (f), or issue by a former (g) or subsequent marriage (h). There may, however, be a context (i) or special circumstances in connexion with the particular settlement that may lead to the conclusion that it cannot have been the intention to exclude children of the wife (k). If the words used are as if she had died intestate and "unmarried," the word "unmarried," in the absence of any context, is taken to bear its primary meaning of "never having been married" (l). "Unmarried" is, however, a word of flexible meaning, and may be construed according to the obvious intention

SECT. 6.
Trusts in
Default
of Issue.

Trust for statutory next of kin of wife as if she died without having been married.

the Statute would then be entitled in case the wife having survived her husband were to die possessed thereof and intestate, *KAY, J.*, declined to follow *Druitt v. Seaward, Re Ainsworth, Ainsworth v. Seaward* (1885), 31 Ch. D. 234, and *Re Bradley, Brown v. Cottrell* (1888), 58 L. T. 631, and held that the persons to take were those who would have been the wife's next of kin if she had died intestate immediately after her husband. In *Re Peirson's Settlement, Cayley v. De Wend* (1903), 88 L. T. 794, where the trust was for the persons who under the Statute would be entitled in case the wife having survived her husband had died possessed of the trust funds, *BYRNE, J.*, followed *Pinder v. Pinder* (1860), 28 Beav. 44. *Pinder v. Pinder, supra*, has thus been followed for more than fifty years, and it seems probable that, should the question be raised in the Court of Appeal, *Druitt v. Seaward, Re Ainsworth, Ainsworth v. Seaward, supra*, and *Re Bradley, Brown v. Cottrell, supra*, will be overruled.

(f) *Re Deane's Trusts*, [1900] 1 I. R. 332; *Re Brydone's Settlement, Cobb v. Blackburne*, [1903] 2 Ch. 84, C. A.; *Re Smith's Settlement, Wilkins v. Smith*, [1903] 1 Ch. 373. The two last-mentioned cases, following the decision of *JESSEL, M.R.*, in *Emmins v. Bradford, Johnson v. Emmins* (1880), 13 Ch. D. 493, negative the view which was taken in several cases (*Re Ball's Trust* (1879), 11 Ch. D. 270; *Upton v. Brown* (1879), 12 Ch. D. 872; *Re Arden's Settlement*, [1890] W. N. 204; *Stoddart v. Saville*, [1894] 1 Ch. 480; *Re Mare, Mare v. Howey*, [1902] 2 Ch. 112), that a general rule was laid down in *Wilson v. Atkinson* (1864), 4 De G. J. & Sm. 455, C. A., that such words of limitation were introduced merely to exclude the husband of the wife, and not to exclude any persons who might be her descendants.

(g) *Emmins v. Bradford, Johnson v. Emmins, supra*.

(h) *Hardman v. Maffett* (1884), 13 L. R. 1r. 499.

(i) As in *Wilson v. Atkinson, supra* (where the trust was followed by a declaration that an illegitimate daughter should for the purposes of the trust be deemed to be a lawful child of the wife, the settlement containing no express provision for children or issue).

(k) Such as the absence of any provision for the children or issue of the marriage (*Re Ball's Trust, supra*; *Stoddart v. Saville, supra*; *Re Arden's Settlement, supra*; *Re Forbes, Errington v. Sempell*, [1899] W. N. 6). It may be said, and doubtless was the case, that these cases proceeded on the rule supposed to have been laid down in *Wilson v. Atkinson, supra*; but in *Re Deane's Trusts, supra*, at p. 335, these cases are cited as examples of cases in which the absence of a context may in the particular instrument lead to the same result as the context led to in *Wilson v. Atkinson, supra*.

(l) *Blundell v. De Falbe* (1888), 57 L. J. (CH.) 576; see *Heywood v. Heywood* (1860), 29 Beav. 9; *Clarke v. Colls* (1861), 9 H. L. Cas. 601, 612, 645; and compare *Dalrymple v. Hall* (1881), 16 Ch. D. 715; *Re Sergeant; Mertens v. Walley* (1884), 26 Ch. D. 575 (cases on wills).

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of Issue.

of the persons using the word (*m*). Accordingly, where the effect of giving the word its primary meaning would be to favour collaterals at the expense of lineals, the court has interpreted it as meaning "not having a husband living at her death," thus admitting issue (*n*) and excluding an aftertaken husband (*o*).

A trust for the wife's next of kin on the death or remarriage of the husband, who took an interest for life or till remarriage if he survived his wife, takes effect on the cesser of the prior interests, and the marriage having been terminated by divorce, the next of kin took on the death of the wife in the lifetime of her husband (*p*).

Limitation
to represen-
tatives.

1042. Under a limitation to executors and administrators they take in their representative capacity, notwithstanding the addition of the words "for their use and benefit" (*q*).

Trusts for the representatives, or personal representatives, or legal personal representatives of a person have the same meaning and effect as trusts for the executors or administrators (*r*), unless sufficiently strong grounds can be found in the particular instrument for holding that the words are not used in their primary signification, but mean the next of kin (*s*).

(*m*) *Maugham v. Vincent* (1840), 9 L. J. (CH.) 329.

(*n*) *Ibid.*; *Re Norman's Trust* (1853), 3 De G. M. & G. 965, C. A. (where the expression used was "without being married," and KNIGHT BRUCE, L.J., said that the natural grammatical meaning was without having a husband at the time of death"); *Pratt v. Mathew* (1856), 8 De G. M. & G. 522, C. A.; *Re Saunders' Trust* (1857), 3 K. & J. 152; *Clarke v. Colls* (1861), 9 H. L. Cas. 601; *Re Woodhouse's Trusts*, [1903] 1 I. R. 126; compare *Day v. Barnard* (1860), 1 Drew. & Sm. 351 (the case of a will).

(*o*) *Re Saunders' Trust*, *supra*.

(*p*) *Re Mathew's Trusts* (1876), 24 W. R. 960.

(*q*) *Collier v. Squire* (1827), 3 Russ. 467; *Wellman v. Bowring* (1830), 3 Sim. 328; *Hames v. Hames* (1838), 2 Keen. 646; *Marshall v. Collett* (1835), 1 Y. & C. (EX.) 232; *Meryon v. Collett* (1845) 8 Beav. 386; *Johnson v. Routh* (1857), 3 Jur. (N. S.) 1048; *O'Brien v. Hearn* (1870), 18 W. R. 514.

(*r*) *Re Crawford's Trusts* (1854), 2 Drew. 230; *Re Best's Settlement Trusts* (1874), L. R. 18 Eq. 686; see *Topping v. Howard* (1851), 4 De G. & Sm. 268.

(*s*) *Bailey v. Wright* (1811), 18 Ves. 49 (limitation to next of kin or personal representative); *Briggs v. Upton* (1872), 7 Ch. App. 376 (direction to pay to legal personal representatives in due course of administration); *Robinson v. Evans* (1873), 43 L. J. (CH.) 82 (trust for person or persons who should happen to be legal personal representative or representatives at time of death); see *Walker v. Camden (Marquis)* (1848), 16 Sim. 329; see also *Lindsay v. Ellicott* (1876), 46 L. J. (CH.) 878 (where a direction for the exclusion of a brother and his representatives was held to exclude children of the brother, he being dead).

Part VII.—Beneficial Interests Arising under Settlements of Realty.

SECT. 1.—*Pin Money.*

SECT. 1.

Pin Money.

Pin money.

Secured on real estate.

1043. Pin money is an allowance made by a husband to his wife for her separate personal expenses (*t*). This allowance is generally secured by the limitation to the trustees during the joint lives of the husband and wife of a yearly rentcharge secured on the real estate of the husband in trust for the separate and inalienable use of the wife (*u*). Such a rentcharge accrues from day to day, and no provision for its apportionment is required (*v*). As a rule, the statutory means of compelling payment (*w*) are relied on, and no express provisions for that purpose are inserted in the settlement. It is usual to protect the trustees by providing that they shall only be bound to perform their trust at the express request of the wife (*x*). If the pin money is to be paid out of the husband's personalty, the trustees are directed out of the income thereof to be received by them to pay to the wife a yearly sum during the joint lives of the husband and wife for her separate use without power of anticipation (*a*).

Payable out of personal estate.

SECT. 2.—*Jointure.*

1044. A jointure is *prima facie* a provision for a wife after the death of her husband (*b*).

Jointure.

Such provision is made out of the lands of the husband, and is usually declared to be in lieu of dower and freebench (*c*). It is generally created by limiting to the use of the wife, if she shall survive her husband, a yearly rentcharge without power of anticipation during the then intended coverture (*d*).

How secured.

(*t*) *Howard v. Digby (Earl)* (1834), 2 Cl. & Fin. 634, 654, H. L. For the law relating to pin money generally, see title HUSBAND AND WIFE, Vol. XVI., p. 357; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 220.

(*u*) For forms of rentcharges to secure pin money, see *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 296, 307, 369.

(*v*) Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 2.

(*w*) For these, see *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), s. 44; title RENTCHARGES AND ANNUITIES, Vol. XXIV., pp. 514 *et seq.*

(*x*) See *Encyclopædia of Forms and Precedents*, Vol. XIII., p. 311.

(*a*) See *ibid.*, p. 507.

(*b*) *Re De Hoghton, De Hoghton v. De Hoghton*, [1896] 2 Ch. 385; see *Jamieson v. Trevelyan* (1854), 10 Exch. 269 (which turned on the peculiar language of the will then in question); and see title POWERS, Vol. XXIII., pp. 80 *et seq.*

(*c*) As to the nature and condition of these estates, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 189. As to powers of jointuring, see title POWERS, Vol. XXIII., pp. 80 *et seq.* When the jointure was expressed to be in lieu of dower and thirds, the widow was barred from any share of undisposed-of personal estate (*Coyne v. Duigan*, [1894] 1 I. R. 138; see title DESCENT AND DISTRIBUTION, Vol. XI., p. 18).

(*d*) See *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 296, 308. As regards the deduction of income tax in the case of jointures and annuities or rentcharges generally, see title RENTCHARGES AND ANNUITIES,

SECT. 2.
Jointure.
Recovery.

The rentcharge need not be made apportionable (e), and, except in cases where the jointure is created under a power contained in an instrument executed before 1882 (f), the statutory means of recovering it may be relied on (g).

SECT. 3.—Annuities.

Annuities.

1045. If it is desired that a certain income may be secured to a person out of the rents and profits of land for life, or some other period, it is usual to limit the land to trustees to the use that the proposed annuitant shall receive a yearly rentcharge of the proposed amount (h).

Duration.

The limitation should state the period during which the rentcharge is payable, but it is plain that in the case of a rentcharge arising out of land (i) the grant determines with the life of the grantee, unless the rentcharge is limited to him and his heirs (j).

Recovery.

It is no longer usual to insert express provisions as to the recovery of rentcharges, reliance being placed on the remedies afforded by statute (k).

SECT. 4.—Estates for Life.

Estates for life.

1046. In settlements of realty the first life interest is usually given to the settlor, whether husband or wife, though sometimes where the wife is settlor the first life estate is given to the husband (l).

Waste.

Such life estate is generally expressed to be without impeachment of waste, so as to enable the tenant for life for the time being

Vol. XXIV., pp. 501 *et seq.*; as to deductions in respect of estate duty, settlement estate duty, and legacy duty, see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., pp. 222, 231, 240.

(e) Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 2.

(f) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 44 (6).

(g) *Ibid.*, s. 44; and see title RENTCHARGES AND ANNUITIES, Vol. XXIV., pp. 514 *et seq.*

(h) Rentcharges and annuities are commonly limited to secure jointure and pin money, but they are sometimes used to make a provision for an eldest son during the life of the tenant for life on a family resettlement, or a provision for daughters during their lives; see Encyclopædia of Forms and Precedents, Vol. XIII., pp. 588 (jointure), 622 (rentcharge for daughter).

(i) In the case of an annuity arising out of personal estate, a gift of an annuity simply is a gift for life only, but the words used may cause the gift to be construed in a more extended sense (*Blewitt v. Roberts* (1841), Cr. & Ph. 274; *Kerr v. Middlesex Hospital* (1852), 2 De G. M. & G. 576; *Dawson v. Robinson* (1871), 25 L. T. 486). As to whether an annuity charged on a term of years is only for the life of the grantee or is co-extensive with the term, see *Re Gillman's Estate* (1876), 10 L. R. Eq. 92. As to the commencement and duration of rentcharges and annuities generally, see title RENTCHARGES AND ANNUITIES, Vol. XXIV., pp. 483 *et seq.*

(j) *Savery v. Dyer* (1752), Amb. 139. It may also be granted in fee simple (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 51).

(k) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 44; and see title RENTCHARGES AND ANNUITIES, Vol. XXIV., pp. 514 *et seq.*

(l) As to the limitation of life interests in realty, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 173.

to cut timber, open mines, and commit other wasteful acts for his own profit (*m*).

SECT. 4.
Estates
for Life.

SECT. 5.—Portions.

SUB-SECT. 1.—In General.

1047. Portions for children are generally understood to be sums of money secured to them out of property springing from or settled upon their parents (*n*). Such sums of money are commonly secured by limiting the settled lands to trustees for a long term upon trust by mortgage, or sale thereof, or otherwise, to raise sums for the younger children of the marriage. The portions are directed to be held in trust for such children on their attaining twenty-one, or, if females, marrying under that age, in such shares and proportions as the husband and wife may jointly appoint by deed, and subject thereto as the survivor may by deed or will appoint, and in default of any such appointment for the qualified children in equal shares (*o*).

Nature and
general terms.

SUB-SECT. 2.—What Children are Portionists.

1048. The object of the portions term being to make provision for the children other than the one who takes the settled estate, questions have frequently arisen as to who are the portionists when the position of the children has been changed, as, for instance, by the death of the firstborn son. Where the trusts of the term have been for the younger children, or the children other than an eldest son (*p*), or the children other than a son or sons who should by means of the settlement become entitled to the first estate of freehold or inheritance, it has been decided that the questions who is an eldest son and who are younger children ought *prima facie* to be decided at the time of the distribution of the portions fund (*q*), and in

General rule
as to meaning
of "eldest
son."

(*m*) Encyclopædia of Forms and Precedents, Vol. XIII., pp. 296, 308, 356, 360. As to waste and the rights of a tenant for life generally, see pp. 600 *et seq.*, *post*; and see titles EQUITY, Vol. XIII., p. 90; REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 167, 175, 176.

(*n*) *Jones v. Maggs* (1852), 9 Hare, 605. Portions charged by a father under a power contained in a settlement made by himself and a son take priority over any estate given to the son, unless a contrary intention is expressed or implied in the settlement (*Mills v. Mills* (1846), 3 Jo. & Lat. 242). As to powers of charging portions generally, see title POWERS, Vol. XXIII., pp. 82 *et seq.*

(*o*) See Encyclopædia of Forms and Precedents, Vol. XIII., pp. 297, 311. Where the ultimate trust of the sum raised was that it should go as part of the personal estate of the settlor, the sum, having been raised, was held to devolve as personalty, notwithstanding that when it was raised the settlor could not be compelled to pay it and that the estate charged with it might not have been well discharged (*Tucker v. Loveridge* (1858), 2 De G. & J. 650 C. A.). As to ademption of legacies by portions, see titles EQUITY, Vol. XIII., p. 128; WILLS.

(*p*) If the portions are provided for children "other than an eldest or only son," daughters take portions as being others than an eldest or only son, but a provision for children "besides an eldest or only son" requires the existence of a son to bring it into operation (*Walcott v. Bloomfield* (1843), 4 Dr. & War. 211; *Simpson v. Frew* (1856), 5 I. Ch. R. 517; *Re Fleming's Trusts* (1885), 15 L. R. Ir. 363; *L'Estrange v. Winniett*, [1911] 1 I. R. 62).

(*q*) *Collingwood v. Stanhope* (1860), L. R. 4 H. L. 43; *Hillson v. Thomas*

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construing the words "eldest son" the court is not bound to say that "eldest son" is the person who originally answered that description, as being the firstborn son, but that it really means the person who may have become, in the events that have happened, an eldest son, and who as such eldest son comes into actual enjoyment of the bulk of the estate (*r*); and a daughter taking the estate has been treated as an eldest son (*s*).

**Exclusion
of rule.**

The vesting of a portion by appointment or otherwise does not exclude this rule (*t*); but a payment when made in accordance with the terms of the settlement, or, where the period of distribution has been accelerated by the release of the prior life estate, upon the eldest son actually succeeding, is final and irrevocable (*a*), and the application of the rule may be excluded by the terms of the settlement (*b*).

**Persons
taking as
younger sons.**

1049. If the firstborn son joins with his father in resettling the estate, a younger son who actually comes into possession of the estate by virtue, not of the limitations of the original settlement, but of the subsequent dealings, is entitled to his portion as a younger son (*c*); so, also, where a settlement contained a power of revocation and reappointment to new uses, a younger son, to whom the estate was appointed, was held not to have taken any estate under the settlement in such a sense that he should be deemed an eldest son (*d*). The

(1862), 1 De G. J. & Sm. 18; *Morton's Trusts* (1888), [1902] 1 I. R. 310, n.

(*r*) *Chadwick v. Doleman* (1706), 2 Vern. 528; *Teynham (Lord) v. Webb* (1751), 2 Ves. Sen. 198; *Northumberland (Earl) v. Egremont (Earl)* (1759), 1 Eden, 435; *Loder v. Loder* (1754), 2 Ves. Sen. 530; *Broadmead v. Wood* (1780), 1 Bro. C. C. 77; *Matthews v. Paul* (1819), 3 Swan. 328; *Davies v. Huguenin* (1863), 1 Hem. & M. 730; *Gray v. Limerick (Earl)* (1848), 2 De G. & Sm. 370; *Ellison v. Thomas* (1862), 1 De G. J. & Sm. 18; *Simpson v. Frew* (1856), 5 I. Ch. R. 517; *Richards v. Richards* (1860), John. 754; *Re Flemyng's Trusts* (1885), 15 L. R. Ir. 363; compare *Re Bayley's Settlement* (1871), 6 Ch. App. 590. On the other hand, a child who was originally a younger child does not become an eldest son because at the time of distribution he is in fact the eldest child, if he does not take the bulk of the estate (*Re Wrottesley's Settlement*, *Wrottesley v. Fowler*, [1911] 1 Ch. 708, 713).

(*s*) *Northumberland (Earl) v. Egremont (Earl)*, *supra*; *Stirum v. Richards* (1861), 12 I. Ch. R. 323. As a rule, however, an elder daughter, where there is a son, is accounted a younger child (*Heneage v. Hunloke* (1742), 2 Atk. 456).

(*t*) *Chadwick v. Doleman*, *supra*; *Re Stawell's Trusts*, *Poole v. Riversdale*, [1909] 1 Ch. 534; reversed on the construction of the documents, [1909] 2 Ch. 239, C. A.; see also title POWERS, Vol. XXIII., pp. 86, 87.

(*a*) *Re Stawell's Trusts*, *Poole v. Riversdale*, *supra*.

(*b*) *Re Bankes*, *Alison v. Bankes* (1909), 101 L. T. 778; *Windham v. Graham* (1826), 1 Russ. 331; *Re Wise's Settlement*, *Smith v. Waller*, [1913] 1 Ch. 41.

(*c*) *Spencer v. Spencer* (1836), 8 Sim. 87; *Tennison v. Moore* (1850), 13 I. Eq. R. 424; *Wyndham v. Fane* (1853), 11 Hare, 287; *Macoubrey v. Jones* (1856), 2 K. & J. 684; *Adams v. Beck* (1858), 25 Beav. 648; *Re Smyth's Trusts*, *Ex parte Smyth* (1861), 12 I. Ch. R. 487; *Sing v. Leslie* (1864), 2 Hem. & M. 68; *Domville v. Winnington* (1884), 26 Ch. D. 382; *Re Fitzgerald's Settled Estates*, *Saunders v. Boyd*, [1891] 3 Ch. 394; *Re Wrottesley's Settlement*, *Wrottesley v. Fowler*, *supra*. *Peacocke v. Pares* (1838), 2 Keen, 689, cannot now be considered as law.

(*d*) *Wandesforde v. Carrick* (1871), 5 I. R. Eq. 486.

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test being that no child who takes the bulk of the estate shall take any benefit from the portions, the Court of Chancery has further held that, if under a settlement the firstborn child does not take the family estate, but it goes to a younger brother, the elder born is not to be regarded as the elder son, but the younger brother who is in possession of the family estate is to be regarded as the elder, and the actual elder brother as the younger in order to introduce him as a younger brother into the benefit of the portions provided for the younger children (e).

1050. The fact that the persons to take or be excluded are designated by name may or may not make a difference, according as the view is taken, on the construction of the particular instrument, that the named individual is intended, or that the named person is included or excluded as fulfilling a certain qualification (f).

Designation
by name.

SUB-SECT. 3.—Amount of Portions.

1051. The amount to be raised for portions is commonly made to vary with the number of children to be provided for (g), and questions have arisen, in cases where the number of portionists has been reduced before the period of distribution, whether the amount to be raised depends upon the original number of children or the number who actually take. The answer to this question is a matter of construction of each particular settlement. It may, however, be said that if the court finds upon the construction of a settlement that the intention of the parties was that, subject to the provisions therein, the whole of the settled property should be settled for the benefit of an eldest or only son, nothing can be taken from him but according to the intent of those provisions. Consequently, in the case, for instance, of an eldest and only son, another child having died at an immature age, the court is justified in saying that the trusts do not come into operation at all, because the money is not payable to anybody except to the legal personal representative of the deceased child (h). On the other hand, when the trusts are

Amount.

(e) *Collingwood v. Stanhope* (1869), L. R. 4 H. L. 43, 52; *Ellison v. Thomas* (1862), 1 De G. J. & Sm. 18; *Beale v. Beale* (1714), 1 P. Wms. 244; *Davies v. Huqenin* (1863), 1 Hem. & M. 730; *L'Estrange v. Winniett*, [1911] 1 I. R. 62; *Swinburne v. Swinburne* (1868), 17 W. R. 47; *Re Cavendish's Settlement*, *Grosvenor v. Buller (Lady)* (1912), 56 Sol. Jo. 344. A son who takes the estate cannot claim a portion on the ground that, by reason of the diminution of the value of the estate, it is insufficient even to provide the portions (*Reid v. Hoare* (1884), 26 Ch. D. 363); and an eldest son who, by virtue of his ownership of the estate itself and the right which he had concurrently with his father to charge the inheritance, has charged the inheritance with a sum equal to, or more than the amount of, his just share of the fund provided for the younger children, cannot claim to be a younger son and share again, taking a double portion of the fund (*Collingwood v. Stanhope*, *supra*; *Re Fitzgerald's Settled Estates*, *Saunders v. Boyd*, [1891] 3 Ch. 394; *Kooke v. Plunkett*, [1902] 1 I. R. 299).

(f) *Jermyn v. Fellows* (1735), Cas. temp. Talb. 93; *Savage v. Carroll* (1810), 1 Ball & B. 205; *Sandeman v. Mackenzie* (1861), 1 John. & H. 613; see *Wood v. Wood* (1867), L. R. 4 Eq. 48; *Re Prytherck*, *Prytherck v. Williams* (1889), 42 Ch. D. 590.

(g) See *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 297, 311.

(h) *Hubert v. Parsons* (1751), 2 Ves. Sen. 261; compare *Clarke v.*

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certain, and the amount to be raised is certain, and the events have happened on the occurrence of which the trusts are expressed to come into operation, then the whole amount is raised for the benefit of the surviving portionist (i). A portion which has once become vested is not divested by the death of the portionist before the period of distribution (k). The court, in order to give effect to the intention, which is presumed in the case of a marriage settlement, to make provision for every child of the marriage who requires it, may construe the instrument as regulating the provision according to the number of children attaining vested interests, and not according to the number of children born, though to do so may be a departure from the strict grammatical construction (l).

SUB-SECT. 4.—Time for Raising Portions.

The raising
of portions.

1052. Questions have frequently arisen as to the time when portions are to be raised, especially in cases where the portion vests in the lifetime of a parent, but is directed to be raised by means of a term to commence after the death of the parent. The question depends upon the construction of the language of the settlement in each case (m), but if, according to construction, the period has arrived when the portion is directed to be raised and paid, it must be raised although the act of doing so involves a considerable sacrifice and waste of property (n).

The results of the cases on this point have been summed up as follows (o):—

Fixed period.

Where a term is limited in remainder to commence in possession after the death of a parent, yet if the trust is to raise a portion payable at a fixed period, the child shall not wait for the death of the parent before the portion is raised, but at the fixed period may compel a sale of the term (p).

Jessop (1844), *Drury temp. Sug.* 301; and see *Hemming v. Griffith*, *Griffith v. Hemming* (1860), 2 Giff. 403.

(i) *Hemming v. Griffith*, *Griffith v. Hemming*, *supra*: *Knapp v. Knapp* (1871), L. R. 12 Eq. 238.

(k) *Willis v. Willis* (1796), 3 Ves. 51; *Vane v. Dungannon* (Lord) (1804), 2 Sch. & Lef. 118.

(l) *Rye v. Rye* (1878), 1 L. R. Ir. 413.

(m) *Massy v. Lloyd* (1863), 10 H. L. Cas. 248; *Codrington v. Foley* (Lord) (1801), 6 Ves. 364; *Smyth v. Foley* (1838), 3 Y. & C. (ex.) 142; and see title POWERS, Vol. XXIII., p. 84. The court ought to hold an equal mind in construing the instrument, and ought not to be eager to lay hold of circumstances (*Codrington v. Foley* (Lord), *supra*, approved in *Smyth v. Foley*, *supra*, at p. 158, and differing from *Stanley v. Stanley* (1737), 1 Atk. 549); see *Hall v. Carter* (1742), 2 Atk. 354 (where it was stated that the court would lay hold of the slightest circumstance in a settlement that showed an intention to postpone raising portions during the life of the father and mother).

(n) *Massy v. Lloyd*, *supra*.

(o) *Smyth v. Foley*, *supra*, per ALDERSON, B., at p. 157.

(p) *Hellier v. Jones* (1689), 1 Eq. Cas. Abr. 337; *Stanley v. Stanley*, *supra*; *Cotton v. Cotton* (1738), 3 Y. & C. (ex.) 149, n.; *Smith v. Evans* (1766), 2 Amb. 633; *Whaley v. Morgan* (1839), 2 Dr. & Wal. 330; *Michell v. Michell* (1842), 4 Beav. 549. A portion to be raised by means of a term ceases to be raisable when the term comes to an end (*Re Marshall's Estate*, [1899] 1 L. R. 96).

Where the period is not fixed by the original settlement, but depends on a contingency, the rule applies as soon as the contingency happens (g).

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Where not only the period, but the class of children in favour of whom the portions are to be raised, depends on a contingency, as where the term is limited to take effect in case the father dies without issue male by his wife, on the contingency happening on the death of either parent without issue male, the portions are to be raised immediately, and the term is saleable in the lifetime of the surviving parent (r).

Contingent period.

Contingent period and class.

Portions are not raised in the lifetime of the parents if there is a clear indication in the settlement to the contrary (s).

Lifetime of parents.

The court has declined to anticipate the time of payment in raising portions for the benefit of the heir (t); but, where some members of a class of portionists have become entitled to their shares, the court has directed the entire sum to be raised, the portions of the younger children being invested in Consols, they taking the benefit or the loss caused by any rise or fall (a). Each case would, however, doubtless depend on its own particular circumstances.

Anticipation in favour of class.

SUB-SECT. 5.—Method of Raising Portions.

1053. Where a trust of a term for raising portions directs a particular method of raising them, it implies a negative that they shall not be raised in any other way (b). If no method is directed, they may be raised by a sale or mortgage (c).

Method of raising portions.

If portions are originally charged on land, the land must bear the burden; they cannot be raised out of personalty (d).

Land bearing portions.

(g) *Staniforth v. Staniforth* (1704), 2 Vern. 460; *Hebblethwaite v. Cartwright* (1734), Cas. temp. Talb. 31.

(r) *Gerrard v. Gerrard* (1704), 2 Vern. 458; *Lyon v. Chandos (Duke)* (1747), 3 Atk. 416; *Smyth v. Foley* (1838), 3 Y. & C. (ex.) 142.

(s) The court has found indications that portions shall not be raised during the life of the parents in the following cases:—*Brome v. Berkley* (1728), 2 P. Wms. 484, approved (1729), 6 Bro. Parl. Cas. 108 (direction for maintenance, which precedes portion, after trust estate chargeable with portion is come into possession); *Corbett v. Maydwell* (1709), 2 Vern. 640 (portion for daughter unmarried or not provided for at father's death); *Churchman v. Harvey* (1757), Amb. 335 (the precedent estate of a jointress; compare *Brome v. Berkley*, *supra*; *Hall v. Carter* (1742), 2 Atk. 354); *Verney v. Verney (Earl)* (1761), 2 Eden, 25 (direction to pay portion after death of survivor of parents); *Wynter v. Bold* (1823), 1 Sim. & St. 507 (power for tenant for life to appoint portions by deed or will); see *Lawton v. Swetenham* (1852), 18 Beav. 98; see also note (m), p. 590, *ante*. *Butler v. Duncomb* (1718), 2 Vern. 760, can hardly be reconciled with some of the later cases.

(t) *Oldfield v. Oldfield* (1685), 1 Vern. 336; *Sheppard v. Wilson* (1845), 4 Hare, 392, 394.

(a) *Gillibrand v. Gould* (1833), 5 Sim. 149; *Leech v. Leech* (1842), 2 Dr. & War. 568; *Pearth v. Greenwood* (1880), 28 W. R. 417; but see *Sheppard v. Wilson*, *supra*; *Wynter v. Bold*, *supra*.

(b) *Ivy v. Gilbert* (1722), 2 P. Wms. 13; *Mills v. Banks* (1724), 3 P. Wms. 1. A portion to be raised by means of a term ceases to be raisable when the term comes to an end (*Re Marshall's Estate*, [1899] 1 I. R. 96).

(c) *Meynell v. Massey* (1686), 2 Vern. 1; *Kelly v. Bellow (Lord)* (1708), 4 Bro. Parl. Cas. 495; *Ashton v. —* (1718), 10 Mod. Rep. 401.

(d) *Edwards v. Freeman* (1728), 2 P. Wms. 435; *Burgoigne v. Fox*

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Direction to
raise out of
rents and
profits.

If there is a direction to raise portions out of rents and profits the court gives a liberal construction to the words and directs a sale (e), unless there are words to restrain the meaning and confine them to the receipts of the rents and profits as they accrue (f). The fact that a term is reversionary does not prevent a sale or mortgage thereof to raise portions (g).

Where the ordinary profits of a term cannot raise the portions, timber may be felled or a mine worked (h).

Alternative
methods of
raising.

If the power is to raise by sale or mortgage, or out of the rents and profits, the burden may be cast by the exercise of the trustees' discretion either on the inheritance or on the tenant for life. The question depends on the intention of the settlor as shown in the particular instrument, but the rule is that if trustees have a power to raise certain sums it is their duty to charge the principal of those sums on the inheritance and to secure the application of the annual profits during the tenancy for life to keep down the interest (i).

Sale.

A sale may be ordered at the instance of the heir as well as of the portionists (k).

Several
mortgages.

Portions for different children may be raised by several mortgages of different parts of the estate, and there is no necessity to comprise

(1738), 1 Atk. 575; *Lechmere v. Charlton* (1808), 15 Ves. 193. As to the construction of a power to charge portions, see title POWERS, Vol. XXIII., pp. 82 et seq.

(e) *Backhouse v. Middleton* (1670), 1 Cas. in Ch. 173; *Sheldon v. Dormer* (1694), 2 Vern. 309; *Blagrove v. Clunn* (1705), 2 Vern. 523; *Trafford v. Ashton* (1718), 1 P. Wms. 415; *Green v. Belchier* (1738), 1 Atk. 505; *Okeden v. Okeden* (1738), 1 Atk. 550; *Allan v. Backhouse* (1813), 2 Ves. & B. 65; see *Boote v. Blundell* (1815), 1 Mer. 193, 233. Where accumulated rents and profits were to be first applied in payment of portions, the trustees were held to be entitled to proceed by sale or mortgage only for the residue (*Warter v. Hutchinson* (1823), 1 Sim. & St. 276).

(f) *Green v. Belchier*, *supra*. Thus, a direction to raise portions out of rents, issues and profits, as well as by making leases for three lives, has been held to negative a power to raise them by sale or mortgage (*Ivy v. Gilbert* (1722), 2 P. Wms. 13; *Mills v. Banks* (1724), 3 P. Wms. 1; see *Evelyn v. Evelyn* (1732), 2 P. Wms. 659; and compare *Ridout v. Plymouth* (Earl) (1740), 2 Atk. 104; *Stone v. Theed* (1787), 2 Bro. C. C. 243; *Wilson v. Halliley* (1830), 1 Russ. & M. 590). An express prohibition against raising a charge by sale excludes the possibility of raising it by mortgage (*Bennett v. Wyndham* (1857), 23 Beav. 521); and see *Balfour v. Cooper* (1883), 23 Ch. D. 472. C. A. (where the trust was to raise portions out of rents and profits or by mortgage, and a mortgage could not be effected, and a receiver was appointed of the rents and profits and directed to apply them in reduction of the capital charges with payment of interest in the meantime).

(g) *Massy v. Lloyd* (1863), 10 H. L. Cas. 248; *Codrington v. Foley* (Lord) (1801), 6 Ves. 364 (but see *Reresby v. Newland* (1723), 2 P. Wms. 93); *Ravenhill v. Dunsey* (1723), 2 P. Wms. 179; *Whaley v. Morgan* (1839), 2 Dr. & Wal. 330; and see note (b), p. 591, *ante*.

(h) *Offley v. Offley* (1691), Prec. Ch. 26; *Bennett v. Wyndham*, *supra*; *Marker v. Kekewich* (1850), 8 Hare, 291; *Marker v. Marker* (1851), 9 Hare, 1; *Kekewich v. Marker* (1851), 3 Mac. & G. 311. In *Kekewich v. Marker*, *supra*, the court finally restrained the tenant for life from cutting timber on the ground that his doing so would interfere with the discretionary power of the trustees.

(i) *Kekewich v. Marker*, *supra*.

(k) *Warburton v. Warburton* (1701), 2 Vern. 420.

the whole estate in them (l); but, where the estate subject to the portions has become vested in the portionists in undivided shares, no one of the portionists is entitled to have the entire charge apportioned to the respective shares in the estate instead of having it raised out of the entirety (m).

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SUB-SECT. 6.—*Vesting of Portions.*

1054. If a portion charged on, or made payable out of the rents and profits of, land is made payable at a certain age, or on marriage, or other event personal to the party to be benefited, and such party dies before that time arrives, the portion must not be raised out of the land, but sinks for the benefit of the inheritance (n).

Portion payable on event personal to portionist.

If no time for payment is specified in the case of portions charged on land, they vest on the attainment of majority or marriage, on the principle that a portion is not to be held to vest till it is wanted (o). On the other hand, if portions are directed to be raised out of the rents and profits of land, but no time is mentioned for payment, they are payable presently and become an immediate vested interest, and the representatives of a child who dies in infancy are entitled to such child's portion (p).

Where no time specified.

Portions which are not charged on land, but are made payable out of personalty, even though the time of payment is fixed for twenty-one or marriage, vest at birth (q), unless the settlement contains a direction, either express or to be implied, to the contrary (r).

Portions payable out of personalty.

1055. If payment of the portion is postponed until the happening of an event referable not to the person of the party to be benefited, but to the circumstances of the estate, such as the death of the tenant for life, the portion is raisable after the death of the tenant for life, although the term out of which it has to be raised may never arise owing to the party to be benefited not being *in esse* at the

Portion payable on event not personal to portionist.

(l) *Mosley v. Mosley* (1800), 5 Ves. 248.

(m) *Otway-Cave v. Otway* (1866), L. R. 2 Eq. 725.

(n) *Evans v. Scott* (1847), 1 H. L. Cas. 43; *Poulet (Lady) v. Poulet (Lord)* (1685), 1 Vern. 204, 321; *Carter v. Bletsoe* (1708), 2 Vern. 617; *Prowse v. Abingdon* (1738), 1 Atk. 482, commenting on *Jackson v. Farrand* (1701), 2 Vern. 424; *Boycot v. Cotton* (1738), 1 Atk. 552; *Ruby v. Foot and Beamish* (1817), Beat. 581; *Edgeworth v. Edgeworth* (1829), Beat. 328; compare *Henty v. Wrey* (1882), 21 Ch. D. 332, 359, C. A. Compare, as to the vesting of legacies, title WILLS.

(o) *Warr v. Warr* (1703), Prec. Ch. 213; *Bruen v. Bruen* (1702), 2 Vern. 439; *Remnant v. Hood* (1860), 2 De G. F. & J. 396, C. A.; *Davies v. Huguenin* (1863), 1 Hem. & M. 730; *Haverty v. Curtis*, [1895] 1 I. R. 23 (where a portion payable on marriage or at such other time as the settlor should appoint was held to be vested on the death of the settlor without appointing, but liable to be divested on the death of the beneficiary unmarried).

(p) *Rivers (Earl) v. Derby (Earl)* (1688), 2 Vern. 72; *Evelyn v. Evelyn* (1732), 2 P. Wms. 659; *Cowper v. Scott* (1732), 3 P. Wms. 119.

(q) *Poulet (Lady) v. Poulet (Lord)*, *supra*; *Prowse v. Abingdon*, *supra*; *Gordon v. Raynes* (1732), 3 P. Wms. 134; *Mount v. Mount* (1851), 13 Beav. 333; *Jopp v. Wood* (1865), 2 De G. J. & Sm. 323; *Currie v. Larkins* (1864), 4 De G. J. & Sm. 245, C. A.

(r) *Mostyn v. Mostyn* (1844), 1 Coll. 161, 167; *Re Colley's Trusts* (1866), L. R. 1 Eq. 496; see *Re Dennis' Trusts* (1857), 6 I. Ch. R. 422.

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time of the death of the tenant for life (a), there being a strong presumption that in marriage settlements the shares of children are to become vested when they are wanted, that is to say, in the case of sons at twenty-one and of daughters at twenty-one or marriage (t).

The same rule applies where the portion is payable out of personalty (a).

**Intention of
instrument
prevails.**

The rule is, however, a rule of construction only, and if the settlement clearly and unequivocally makes the right of a child to a provision depend upon its surviving both or either of its parents, a court of equity has no authority to control that disposition, and in such cases the representatives of children dying in the lifetime of their parents do not participate in the fund, even though such deceased children may have attained twenty-one or married (b).

What amounts to a clear and unequivocal expression of intention depends on the language of the particular instrument in question, but a provision for the issue of children dying in their parents' lifetime will lead the court to exclude the rule (c).

SUB-SECT. 7.—Interest on Portions.

**Payment of
interest.**

1056. The settlement should state expressly whether portions are to carry interest, and if so, from what time and at what rate.

If there is no direction in the settlement as to interest, portions carry interest (d) from the time when they ought to be raised (e),

(s) *Evans v. Scott* (1847), 1 H. L. Cas. 43; *Emperor v. Rolfe* (1749), 1 Ves. Sen. 208; *Oholmondeley v. Meyrick* (1758), 1 Eden, 77; *Rooke v. Rooke* (1761), 2 Eden, 8; *Woodcock v. Dorset (Duke)* (1792), 3 Bro. C. C. 569; *Willis v. Willis* (1796), 3 Ves. 51; *Hope v. Clifden (Lord)* (1801), 6 Ves. 499; *Powis v. Burdett* (1804), 9 Ves. 428; *King v. Hake* (1804), 9 Ves. 439; *Howgrave v. Cartier* (1814), 3 Ves. & B. 79; *Fry v. Sherborne (Lord)* (1829), 3 Sim. 243; *Wakefield v. Maffet* (1885), 10 App. Cas. 422.

(t) *Re Wilmott's Trusts* (1869), L. R. 7 Eq. 532, per JAMES, V.-C., at p. 637.

(a) *Jeffreys v. Reynous* (1767), 6 Bro. Parl. Cas. 398; *Schenk v. Legh* (1804), 9 Ves. 300; *Perfect v. Curzon (Lord)* (1820), 5 Madd. 442; *Swallow v. Binns* (1855), 1 K. & J. 417; compare *Bayard v. Smith* (1808), 14 Ves. 470.

(b) *Howgrave v. Cartier* (1814), 3 Ves. & B. 79, 84; *Wingrave v. Palgrave* (1718), 1 P. Wms. 401; *Whatford v. Moore* (1837), 3 My. & Cr. 270; *Hotchkin v. Humfrey* (1817), 2 Madd. 65; *Fitzgerald v. Field* (1826), 1 Russ. 416; *Skipper v. King* (1848), 12 Beav. 29; *Jeffery v. Jeffery* (1849), 17 Sim. 26; compare *Gordon v. Raynes* (1732), 3 P. Wms. 134; *Worsley v. Granville (Earl)* (1751), 2 Ves. Sen. 331.

(c) *Re Wilmott's Trusts*, *supra*, commenting on *Mocatta v. Lindo* (1837), 9 Sim. 56, and *Mendham v. Williams* (1866), L. R. 2 Eq. 396; *Jeyes v. Savage* (1875), 10 Ch. App. 555; *Day v. Radcliffe* (1876), 3 Ch. D. 654; *Selby v. Whitaker* (1877), 6 Ch. D. 239, C. A.

(d) *Clayton v. Glengall (Earl)* (1841), 1 Dr. & War. 1. A contrary intention may of course be implied from the terms of the instrument creating the trust (*Bredin v. Bredin* (1841), 1 Dr. & War. 494; *Selby v. Gillum* (1836), 2 Y. & C. (ex.) 379). As to interest by way of maintenance on portions arising under a settlement by a parent or person in loco parentis, see title INFANTS AND CHILDREN, Vol. XVII., p. 119.

(e) *Roseberry (Viscount) v. Taylor* (1703), 6 Bro. Parl. Cas. 43; *Bagenal v. Bagenal* (1725), 6 Bro. Parl. Cas. 81; *Conway v. Conway* (1791), 3 Bro. C. C. 267; *Evelyn v. Evelyn* (1732), 2 P. Wms. 659, 669; see *Lyddon v. Lyddon* (1808), 14 Ves. 558; and see title POWERS, Vol. XXIII., p. 84.

but not from the time when the title to the portion vests (*f*). The interest should be paid annually and not allowed to accumulate (*g*).

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Where there is a power of charging interest on a portion it is considered as maintenance (*g*), and no interest is given on arrears (*h*).

1057. The donee of a power to charge has a right to fix the rate of interest (*i*), but this rule does not apply to a case where the trustees have a trust vested in them to raise a specific sum of money, and the only power given to anybody in connexion with the money so raised is to state in what proportion the money is to be divided between the parties and at what time it shall be payable (*k*).

Rate of
interest.

In the absence of any express direction a portion carries interest at the rate current in the country where the land charged is situate, which rate in England is 4 per cent. (*l*) and in Ireland 5 per cent. (*m*).

Current rate.

SECT. 6.—*Interests in Remainder.*

1058. Subject to the foregoing interests, real estate is commonly limited by a marriage settlement to the use of the first and all other sons of the intended marriage successively according to seniority in tail male (*n*), with remainder to the use of the daughters of the marriage in tail with cross remainders between them, but sometimes provision is made for sons of a subsequent marriage in priority to daughters of the intended marriage (*o*).

Ultimate
limitations
in settlement
of realty.

If it is not desired to preserve the estate in its entirety for an eldest son, the more usual course at the present day is to convey the land to trustees by the same or a separate deed upon trust for sale, and then to declare the trusts of the proceeds as in a settlement of personalty (*p*), but sometimes the land is limited to issue as both spouses or the survivor of them shall appoint, and in default of

(*f*) *Massy v. Lloyd* (1863), 10 H. L. Cas. 248; *Churchman v. Harvey* (1757), Amb. 335; see *Reynolds v. Meyrick* (1758), 1 Eden, 48; *Gardner v. Perry* (1851), 20 L. J. (CH.) 429 (where, however, the decision seems to have turned on the language of the particular instrument).

(*g*) *Boycot v. Cotton* (1738), 1 Atk. 552; see title POWERS, Vol. XXIII., p. 85.

(*h*) *Mellish v. Mellish* (1808), 14 Ves. 516.

(*i*) *Boycot v. Cotton*, *supra*; *Lewis v. Freke* (1794), 2 Ves. 507.

(*k*) *Balfour v. Cooper* (1883), 23 Ch. D. 472, C. A.

(*l*) *Young v. Waterpark (Lord)* (1842), 13 Sim. 199; *Balfour v. Cooper*, *supra*; *Re Drax, Savile v. Drax*, [1903] 1 Ch. 781, C. A.; see title POWERS, Vol. XXIII., p. 85.

(*m*) *Purcell v. Purcell* (1842), 1 Con. & Law. 371; *Simpson v. O'Sullivan* (1843), 3 Dr. & War. 446; *Balfour v. Cooper*, *supra*; *Denny v. Denny* (1868), 14 L. T. 854.

(*n*) For the nature, incidents, and mode of creation of estates in tail, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 241 *et seq.* For the descent of estates tail, see title DESCENT AND DISTRIBUTION, Vol. XI., p. 12. A limitation to first and other sons and the heirs male of their respective bodies in tail male gives estates in tail male to the first and other sons in succession, though under a similar limitation "to sons" the sons would take either as joint tenants for life with several inheritances in tail male or as tenants in common in tail male (*Re Olose's Estate*, [1910] 1 I. R. 357).

(*o*) See *Encyclopædia of Forms and Precedents*, Vol. XIII., p. 310.

(*p*) See *ibid.*, p. 458; and see pp. 573 *et seq.*, *ante*.

SECT. 6.
Interests in
Remainder.

Necessity of
apt words of
limitation.

Effect given
to intention
of instrument.

appointment to the use of the children of the marriage as tenants in common in tail(*q*) with cross remainders between them(*r*).

1059. In the case of a deed, unlike the case of a will, cross remainders cannot be raised by implication, however plainly the intention of the parties may have been expressed, for it is essential that there should be apt words of limitation(*s*). If, however, a deed contains express limitations by way of cross remainders, so that the court is not asked to supply words of limitation, the same rule of construction applies to both deeds and wills, and the court gives effect to the plain intention of the parties(*t*).

Thus, on a gift over on the death of a child without issue to the survivors or survivor of the children, the word "survivors" has been held to mean "others" in order to give effect to the obvious intention of the instrument(*u*). So, too, where cross remainders in tail had been clearly created by apt words of limitation as to the share or shares of any child or children dying without issue, and the question was as to what was included under the words "share" or "shares," the court, on the whole context, held them to apply to accrued as well as to original shares(*v*); and where equitable interests in a term *pur autre vie* were limited to several persons as tenants in common in *quasi*-tail, cross remainders in *quasi*-tail were implied between the tenants in common(*w*).

SECT. 7.—Ultimate Limitations.

Ultimate
limitations.

1060. The ultimate limitation in a settlement of realty, as in a settlement of personalty(*a*), is generally designed to bring the settled property back to its original ownership. It is usually expressed to be to the use of the settlor and his heirs and assigns for ever or to the use of the settlor in fee simple(*b*). Since the year 1833, the settlor under such a limitation takes the ultimate estate as a purchaser by virtue of the settlement and is not entitled

(*q*) This gives the children a vested remainder at birth, liable to be divested by the exercise of the power of appointment in the parents (*Doe d. Willis v. Martin* (1790), 4 Term Rep. 39).

(*r*) See Encyclopædia of Forms and Precedents, Vol. XIV., p. 361.

(*s*) *Cole v. Livingston* (1672), 1 Vent. 224; *Doe d. Tanner v. Dorvell* (1794), 5 Term Rep. 518; *Doe d. Foquett v. Worsley* (1801), 1 East. 416; *Doe d. Olift v. Birkhead* (1849), 4 Exch. 110, 125; *Bainton v. Bainton* (1865), 34 Beav. 563.

(*t*) *Doe d. Watts v. Wainwright* (1793), 5 Term Rep. 427; *Cole v. Sewell* (1848), 2 H. L. Cas. 186.

(*u*) *Doe d. Watts v. Wainwright*, *supra*; *Cole v. Sewell*, *supra*; *Re Palmer's Settlement Trusts* (1875), L. R. 19 Eq. 320. For cases under wills, see title WILLS. The rule both in deeds and wills is to adopt the construction which includes as many objects of the gift as possible consistently with the declared intention (*Bouverie v. Bouverie* (1847), 2 Ph. 349).

(*v*) *Doe d. Olift v. Birkhead* (1849), 4 Exch. 110, overruling *Edwards v. Alliston* (1827), 4 Russ. 78.

(*w*) *Re Battersby's Estate*, [1911] 1 I. R. 453.

(*a*) As to the ultimate trusts of settlements of personalty, see p. 579, *ante*.

(*b*) As to the necessity for proper words of limitation, see p. 529, *ante*; title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 165.

thereto as his former estate or part thereof (c). An ultimate limitation to issue or children without proper words of limitation confers only a life interest (d); but a limitation to the heirs of a deceased person confers an estate in fee on the heir (e).

SECT. 7.
Ultimate
Limitations.

Part VIII.—The Tenant for Life and the Remainderman.

SECT. 1.—Right to Possession.

1061. A legal tenant for life is entitled as of course to the possession and receipt of the rents and profits of the settled estate (f).

Legal and
equitable
tenants for
life.

An equitable tenant for life is not entitled as of right to possession, but he may obtain possession by applying to the Chancery Division of the High Court for and obtaining an order giving him possession. The trustees of the settlement ought not to hand over the possession except under such an order, or, if they choose to act without the leave of the court, they should take such security as will indemnify them thereafter for any breach by the tenant for life of those duties which the trustees ought themselves to perform (g).

The question of granting possession is in every case one for the discretion of the court, which has not been affected by the passing of the Settled Land Acts (h), though these Acts afford an additional ground for exercising the discretion in favour of a person who is a tenant for life (i) or has the statutory powers of a tenant for life (j). It is no objection that such person is a female (k), and in one case the assignee of the tenant for life was let into possession (l). The court requires the applicant to enter into a stringent undertaking to indemnify the trustees (m). It is no longer the usual

Exercise of
court's dis-
cretion.

Undertaking.

(c) Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), s. 3; and see titles DESCENT AND DISTRIBUTION, Vol. XI., pp. 8, 9; REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 213.

(d) *Holliday v. Overton* (1852), 15 Beav. 480; *Tatham v. Vernon* (1861), 7 Jur. (N. S.) 814.

(e) *Marshall v. Peascod* (1861), 2 John. & H. 73. For cases where the ultimate limitation is to the heirs of a living person, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 222, note (a). For limitations of terms of years to the heirs of the body as designating a particular person or persons, see *ibid.*, p. 268; *Ward v. Bradley* (1887), 2 Vern. 23.

(f) Notwithstanding the existence of a term to secure the payment of annuities (*Ferrand v. Wilson* (1845), 4 Hare, 344, 368).

(g) *Taylor v. Taylor, Ex parte Taylor* (1875), L. R. 20 Eq. 297.

(h) See note (c), p. 624, *post*.

(i) *Re Wythes, West v. Wythes*, [1893] 2 Ch. 369; *Re Bagot's Settlement, Bagot v. Kitloe*, [1894] 1 Ch. 177; see pp. 625, 626, *post*.

(j) *Re Richardson, Richardson v. Richardson*, [1900] 2 Ch. 778; *Re Money Kyrle's Settlement, Money Kyrle v. Money Kyrle*, [1900] 2 Ch. 839; *Re Wilkinson, Lloyd v. Steel* (1901), 85 L. T. 43; see pp. 626 *et seq.*, *post*.

(k) *Re Newen, Newen v. Barnes*, [1894] 2 Ch. 297.

(l) *Re Hunt, Pollard v. Geake*, [1901] W. N. 144, C. A.

(m) *Re Wythes, West v. Wythes, supra*; *Re Bagot's Settlement, Bagot v.*

SECT. 1.
Right to Possession.

practice to require security from a tenant for life on his being let into possession (n); but security has been ordered where the court was dissatisfied with the applicant's means (o), and when the land was subject to a term in the trustees to manage and apply the net income in paying off mortgages, the court also required from the tenant for life an undertaking to apply the surplus income, after discharging the expenses of management and keeping down the interest on mortgages, in paying off mortgages (p).

Application to court.

The application to the court may be by summons (q). The trustees are necessary respondents, though if one of them is a beneficiary it is preferable that the others should be separately represented (r). A mortgagee of the interest of the tenant for life ought to be a party, but not in ordinary circumstances a reversioner (s).

SECT. 2.—Custody of Title Deeds.

Legal tenant for life.

1062. A legal tenant for life of freeholds is entitled to the custody of the title deeds as a matter of right (t) and can recover possession of them from a contingent remainderman (a). The court does not interfere with this right, except in cases where he has been guilty of misconduct, so that the safety of the deeds has been endangered (b), or where the rights of others intervene, and it becomes necessary for the court to take charge of the title deeds in order to carry out the administration of the property (c).

Kittoe, [1894] 1 Ch. 177; *Re Money Kyrle's Settlement*, *Money Kyrle v. Money Kyrle*, [1900] 2 Ch. 839; *Re Hunt*, *Pollard v. Geake*, [1901] W. N. 144, C. A.

(n) *Temple v. Thring* (1887), 56 L. T. 283.

(o) *Re Hunt*, *Pollard v. Geake*, *supra*.

(p) *Re Money Kyrle's Settlement*, *Money Kyrle v. Money Kyrle*, *supra*.

(q) *Re Newen*, *Newen v. Barnes*, [1891] 2 Ch. 297.

(r) *Ibid.*, at p. 303.

(s) *Ibid.*, at p. 304; but see *Re Hunt*, *Pollard v. Geake*, *supra*.

(t) See title **REAL PROPERTY AND CHATTELS REAL**, Vol. XXIV., pp. 176. 177; *Allwood v. Heywood* (1863), 1 H. & C. 745; and see *Re Beddoe*, *Downes v. Cottam*, [1893] 1 Ch. 547, C. A., per LINDLEY, L.J., at p. 557. A husband who is entitled to the rents and profits of land in right of his wife, she being tenant for life but not to her separate use, is entitled to possession of the title deeds (*Re Pyatt*, *Ex parte Rogers* (1884), 26 Ch. D. 31, C. A.); but his trustee in bankruptcy has no absolute right to the custody (*ibid.*). This case is, however, likely to be infrequent having regard to the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

(a) *Allwood v. Heywood*, *supra*. As to custody of title deeds generally, see title **REAL PROPERTY AND CHATTELS REAL**, Vol. XXIV., pp. 239, 240.

(b) The fact that the tenant for life has taken the deeds out of the jurisdiction may be a ground for thinking that there is danger to them if they remain in his custody (*Jenner v. Morris* (1866), 1 Ch. App. 603); but the mere fact that he has for many years been resident abroad is no objection (*Leathes v. Leathes* (1877), 5 Ch. D. 221). If the *dicta* in *Reeves v. Reeves* (1725), 9 Mod. Rep. 128; *Ivie v. Ivie* (1738), 1 Atk. 429; and *Smith v. Cooke* (1746), 3 Atk. 378, 382, assert an unqualified right in the remainderman to have the title deeds brought into court, they will not now be followed; see *Ford v. Peering* (1789), 1 Ves. 72.

(c) *Leathes v. Leathes*, *supra*, dissenting from the view taken in *Pyncent v. Pyncent* (1747), 3 Atk. 571, and *Warren v. Rudall*, *Ex parte Godfrey*

1063. If the legal estate is in the trustees, the trustees are entitled to the title deeds while they have any active duties to perform (*d*); and, under the rule that where two have an equal interest in a deed, he who has it may keep it (*e*), a trustee is not entitled to have the deeds removed from the custody of a co-trustee (*f*).

SECT. 2.
Custody of Title Deeds.
Legal estate in trustees.

1064. An equitable tenant for life who had obtained possession of the title deeds has been allowed to retain them (*g*).

Equitable tenant for life.

As observed above (*h*), since the passing of the Settled Land Acts (*i*) there is a presumption in favour of the right of a tenant for life as therein defined (which definition clearly includes an equitable tenant for life (*k*)) to be let into possession. This right carries with it the right to custody of the title deeds (*l*), except in a case where the interest of the tenant for life has been mortgaged (*m*). The tenant for life, however, must undertake not to part with the deeds without the written consent of the trustees, and to produce the same on all reasonable occasions (*n*).

Undertaking.

(1860), 1 John. & H. 1, that the court never interferes as between a father, tenant for life, and a son entitled in remainder, but will interfere in the case of a stranger tenant for life. Where a sale has been ordered to raise portions, but the tenant for life refuses to produce the title deeds of the estate, a receiver of the rents and profits may be appointed; see *Brigstocke v. Mansel* (1818), 3 Madd. 47. If a suit is pending the court considers where, having regard to the purposes of the suit, the deeds can most conveniently be kept (*Stanford v. Roberts* (1871), 6 Ch. App. 307). Where deeds have been brought into court for the purposes of an action by the tenant for life, the court on the conclusion of the proceedings has ordered them to be delivered to him again (*Webb v. Lymington* (Lord), *Webb v. Webb* (1757), 1 Eden, 8; *Duncombe v. Mayer* (1803), 8 Ves. 320; see *Langdale (Lady) v. Briggs* (1856), 8 De G. M. & G. 391, C. A. (where this was done by consent on such terms as might be sufficient for the protection and security of the trustees and other persons beneficially interested); but see *Hicks v. Hicks* (1785), 2 Dick. 650; *Jenner v. Morris* (1866), 1 Ch. App. 603). The court, however, only delivers deeds out to the party who has deposited them (*Plunkett v. Lewis* (1847), 6 Hare, 65).

(*d*) *Barclay v. Collett* (1838), 4 Bing. (N. C.) 658; *Garner v. Hannington* (1856), 22 Beav. 627; see *Ex parte Holdsworth* (1838), 4 Bing. (N. C.) 386.

(*e*) *Foster v. Crabb* (1852), 12 C. B. 136.

(*f*) *Re Sisson's Settlement, Jones v. Trappes*, [1902] 1 Ch. 262.

(*g*) *Taylor v. Sparrow* (1865), 4 Giff. 703; see *Langdale (Lady) v. Briggs*, *supra*, at p. 416. In *Denton v. Denton* (1844), 7 Beav. 388, an action by the trustees for detinue was restrained on the tenant for life undertaking to bring the deeds into court.

(*h*) See p. 597, *ante*.

(*i*) See note (*e*), p. 624, *post*.

(*k*) *Re Wythes, West v. Wythes*, [1893] 2 Ch. 369; *Re Bagot's Settlement, Bagot v. Kittoe*, [1894] 1 Ch. 177; see, further, pp. 625, 626, *post*.

(*l*) *Re Burnaby's Settled Estates* (1889), 42 Ch. D. 621; *Re Wythes, West v. Wythes*, *supra*; *Re Richardson, Richardson v. Richardson*, [1900] 2 Ch. 778; *Re Money Kyrle's Settlement, Money Kyrle v. Money Kyrle*, [1900] 2 Ch. 839.

(*m*) *Re Newen, Newen v. Barnes*, [1894] 2 Ch. 297.

(*n*) See *Re Wythes, West v. Wythes*, *supra*; and *Re Money Kyrle's Settlement, Money Kyrle v. Money Kyrle*, *supra* (where the undertakings by the tenant for life are set out at length). As to the correct form of order, see *Re Paddon, Staincliffe v. Adlam*, [1909] W. N. 162.

SECT. 3.
Waste.

SECT. 3.—Waste.

SUB-SECT. 1.—Tenant for Life Impeachable for Waste.

Voluntary
waste.

1065. A tenant for life (o), unless made unimpeachable for waste (p), may not commit what is called voluntary waste, that is to say, any act which is injurious to the inheritance, either, first, by diminishing the value of the estate, or, secondly, by increasing the burden upon it, or, thirdly, by impairing the evidence of title (q). Thus, he may not plough up ancient pasture (r), pull down buildings, even though ruinous, without rebuilding, or erect new buildings, or suffer such new buildings, if erected, to be wasted (s). He may not open new mines, quarries or clay-pits, or work old abandoned pits or mines (a), but he may work mines or pits which have been previously opened in the sense that they have been worked, not necessarily for profit, so long as such previous working or use is not limited to any special or restricted purpose, such as the purpose of fuel or repair to some particular tenements (b).

Cutting
timber.

A tenant for life, even if he is impeachable for waste, can cut timber necessary for repairs in the exercise of his right to estovers or botes (c); he can also cut trees, with certain exceptions (d), other

(o) An action for waste will lie against tenant by the curtesy, tenant in dower, tenant for life, for years, or half a year (Co. Litt. 53 *a et seq.*). A tenant in tail cannot be impeached for waste, either legal or equitable. A tenant in tail after possibility of issue extinct, however, or a tenant in fee simple subject to an executory devise over, may be restrained from committing equitable, but not legal, waste (*Turner v. Wright* (1860), 2 De G. F. & J. 234; compare *A.-G. v. Marlborough (Duke)* (1818), 3 Madd. 498; and see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 167, 173, 175—177, 179, 187, 198, 209, 211). As to equitable waste, see pp. 603 *et seq.*, *post*.

(p) See pp. 602, 603, *post*.

(q) *Doe d. Grubb v. Burlington (Earl)* (1833), 5 B. & Ad. 507. Waste by impairing evidence of title is, however, a very peculiar head of the law which has not been extended in modern times (*Jones v. Chappell* (1875), L. R. 20 Eq. 539, 541).

(r) *Simmons v. Norton* (1831), 7 Bing. 640, 648; but see *St. Albans (Duke) v. Skipwith* (1845), 8 Beav. 354. In fee simple estates a continuance in pasture for twenty years during the life of the donor or testator impresses on land the character of ancient pasture (*Morris v. Morris* (1825), 1 Hog. 238, 241).

(s) Co. Litt. 53; see and compare title LANDLORD AND TENANT, Vol. XVIII., pp. 496 *et seq.*

(a) *Viner v. Vaughan* (1840), 2 Beav. 466. Mines the working of which has been for a time suspended, because of a diminished price to be got for the mineral or some other temporary cause, are to be regarded as opened mines (*Greville-Nugent v. Mackenzie*, [1900] A. C. 83, 90); and see title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 505, 506. As to the statutory powers to work mines, see pp. 656, 677, *post*.

(b) *Elias v. Snowdon Slate Quarries Co.* (1879), 4 App. Cas. 454; *Cowley (Earl) v. Wellesley* (1866), 35 Beav. 635, 639 (gravel dug from the waste land of a manor); *Miller v. Miller* (1872), L. R. 13 Eq. 263 (brickfield).

(c) Co. Litt. 53; and see titles COMMONS AND RIGHTS OF COMMON, Vol. IV., pp. 447, 466 *et seq.*; LANDLORD AND TENANT, Vol. XVIII., p. 429, note (b).

(d) *E.g.*, ornamental trees or germans, that is, stools of underwood, trees planted for the protection of the house, and quickset fences of whitethorn, fruit trees growing in a garden or an orchard, may not be cut by a tenant for life impeachable for waste (Co. Litt. 53); and see title LANDLORD AND TENANT, Vol. XVIII., pp. 429 *et seq.*

SECT. 3.
Waste.

than timber trees (*e*), or trees which would be timber if they were over twenty years of age, but timber trees under twenty years of age may be cut down in the course of the proper management of the estate for the purpose of allowing the growth of other timber (*f*). If timber is decaying, or injurious to the growth of other trees, so that to cut it is beneficial to the inheritance (*g*), the court can authorise a tenant for life to cut the timber. Where timber is properly cut under an order of the court, or otherwise (*h*), the proceeds follow the interests of the estate, that is to say, they are invested and the income given to the tenant for life impeachable for waste in the first place (*i*). On the death of such tenant for life, the proceeds become the property of the first tenant for life unimpeachable for waste (*k*), or the owner of the first estate of inheritance, whichever estate first comes into possession (*l*).

Proceeds
of timber
properly cut.

A tenant for life impeachable for waste, who takes upon himself to cut and sell timber without authority, does it at his peril, and can never be permitted to derive any advantage from his wrongful act (*m*). In such a case the timber cut or its produce belongs to the owner of the first vested estate of inheritance (*n*), notwithstanding

Proceeds of
timber wrong-
fully cut.

(*e*) As to what trees are timber, see title AGRICULTURE, Vol. I., p. 296; and see title CUSTOM AND USAGES, Vol. X., p. 259.

(*f*) *Pidgeley v. Rawling* (1845), 2 Coll. 275; *Bagot v. Bagot, Legge v. Legge* (1863), 32 Beav. 509, 517; *Cowley (Earl) v. Wellesley* (1866), L. R. 1 Eq. 656; *Honywood v. Honnywood* (1874), L. R. 18 Eq. 306; compare *Dunn v. Bryan* (1872), 7 L. R. Eq. 143. If there is a local usage to fell timber trees periodically when grown in woods with a view to ensure a succession of timber, and to preserve such woods, the tenant for life is entitled to cut such timber, and if it is a necessary implication from the terms of the settlement that the settlor intended such woods to be enjoyed as an annual source of revenue, he takes the proceeds of sale (*Dashwood v. Magniac*, [1891] 3 Ch. 306, C. A., considering the law laid down by JESSEL, M.R., in *Honywood v. Honnywood*, *supra*, that the tenant for life is entitled to cut timber on timber estates, i.e., estates which are cultivated merely for the produce of saleable timber, and where the timber is cut periodically; *Re Trevor-Batye's Settlement*, *Bull v. Trevor-Batye*, [1912] 2 Ch. 339).

(*g*) *Bewick v. Whitfield* (1734), 3 P. Wms. 267; *Hussey v. Hussey* (1820), 5 Madd. 44; *Seagram v. Knight* (1867), 2 Ch. App. 628.

(*h*) *Waldo v. Waldo* (1841), 12 Sim. 107; *Gent v. Harrison* (1859), John. 517.

(*i*) *Wickham v. Wickham* (1815), 19 Ves. 419, 423; *Tooker v. Annesley* (1832), 5 Sim. 235; *Waldo v. Waldo*, *supra*; *Phillips v. Barlow* (1844), 14 Sim. 263; *Gent v. Harrison*, *supra*; *Bagot v. Bagot, Legge v. Legge*, *supra*; *Honywood v. Honnywood*, *supra*; *Lowndes v. Norton* (1877), 6 Ch. D. 139; *Harley v. Pendarves*, [1901] 2 Ch. 498.

(*k*) *Waldo v. Waldo*, *supra*; *Phillips v. Barlow*, *supra*; *Gent v. Harrison*, *supra*; *Lowndes v. Norton*, *supra*.

(*l*) *Honywood v. Honnywood*, *supra*. The statement, *ibid.*, that the income is given to the successive owners of the estate until the owner of the first absolute estate of inheritance is reached, who can take away the money, must be taken to refer to the case of successive tenants for life impeachable for waste.

(*m*) *Williams v. Bolton (Duke)* (1784), 3 P. Wms. 268, n.; *Seagram v. Knight* (1867), 2 Ch. App. 628. For the right of the personal representatives of the tenant for life to timber, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 219.

(*n*) *Bowles's (Lewis's) Case* (1615), 11 Co. Rep. 79 b; *Whitfield v. Bewick* (1724), 2 P. Wms. 240; *Bewick v. Whitfield* (1734), 3 P. Wms. 267; *Honywood v. Honnywood*, *supra*, at p. 311.

SECT. 3.
Waste.

that other persons may come into existence who would be entitled to a first estate tail, and the existence of an intervening estate of freehold in a tenant for life without impeachment of waste does not prevent this (o); but if in such a case there is fraudulent collusion between the tenant for life and the owner of the inheritance in remainder, the court interferes, and orders the value of the timber which was wrongfully cut to be impounded and held for the benefit of the estate and all persons interested in it (p).

Windfalls.

Where timber is blown down in a storm, it belongs, at law, to the owner of the first vested estate of inheritance (q), but the rule is, in the absence of improper conduct on the part of the tenant for life, to treat the produce of such timber trees as capital and allow the income to the tenant for life (r). If trees on a settled estate, other than timber, are blown down, courts of equity, so far as may be, struggle to prevent accident interfering with the rights of the parties, and endeavour to place the tenant for life and the remaindermen in the same position as if the windfall had not occurred (s). Generally, a tenant for life is entitled to have the benefit of the sale of all such trees blown down by the wind as he would be entitled to cut himself (t).

SUB-SECT. 2.—*Tenant for Life Unimpeachable for Waste.*

Tenant for
life without
impeachment
for waste.

1066. If the tenant for life is made, as is the more usual course at the present day, tenant for life without impeachment of waste, he has as great power to commit legal waste as a tenant in tail has (a). He is entitled, therefore, to open new mines or pits, and to fell timber, and the produce of minerals or timber belongs to him, whether severed from the estate by his act or not, but not until severance (b). It follows that on a sale of the estate with timber he

(o) *Dashwood v. Magniac*, [1891] 3 Ch. 306, 387, C. A.: see *Pigot v. Bullock* (1792), 1 Ves. 479, 484; *Gent v. Harrison* (1859), John. 517, 524; *Re Cavendish, Cavendish v. Mundy*, [1877] W. N. 198, dissenting from the dictum of ROMILLY, M.R., in *Bagot v. Bagot*, *Legge v. Legge* (1863), 32 Beav. 509, 523, that the produce does not belong to the first tenant in tail *in esse* while there is a possibility of prior tenants in tail coming into existence.

(p) *Garth v. Cotton* (1753), 3 Atk. 751; *Birch-Wolfe v. Birch* (1870), L. R. 9 Eq. 683; *Re Cavendish, Cavendish v. Mundy*, *supra*.

(q) *Whitfield v. Bewit* (1724), 2 P. Wms. 240; *Aston v. Aston* (1750), 1 Ves. Sen. 396; *Garth v. Cotton*, *supra*; *Honywood v. Honywood* (1874), L. R. 18 Eq. 306.

(r) *Bagot v. Bagot*, *Legge v. Legge*, *supra*; *Bateman v. Hotchkin* (No. 2) (1862), 31 Beav. 486; *Re Harrison's Trusts*, *Harrison v. Harrison* (1884), 28 Ch. D. 220, 228, C. A.

(s) *Re Harrison's Trusts, Harrison v. Harrison*, *supra* (where larch plantations were so damaged by a gale that it became necessary to clear and replant the ground; the court directed the proceeds of sale of the larch trees to be invested, but fixed an annual sum, determined by the average income which would have been derived from the plantation if the gales had not occurred, to be paid to the tenant for life out of the income, and, if necessary, the capital of the invested fund).

(t) *Bateman v. Hotchkin* (No. 2), *supra*. It is a question of fact as regards each particular tree whether it has been blown down so as to be detached from the soil (*Re Ainslie, Swinburn v. Ainslie* (1885), 30 Ch. D. 485, C. A.).

(a) *Bowles's (Lewis) Case* (1615), 11 Co. Rep. 79 b; Co. Litt. 220 a.

(b) *Anon.* (1729), Mos. 237; *Pym v. Dor* (1785), 1 Term Rep. 55; *Wolf*

is not entitled to the produce of the timber (*c*). The exemption from liability for waste is a special power given to the tenant for life to appropriate part of the inheritance, and may be controlled or qualified, either impliedly or expressly, by special powers given to the trustees (*d*), or it may be restricted by exceptions (*e*). If the words are "without impeachment of any action of waste," no action can be brought, but it would seem that the tenant for life is not entitled to the thing severed (*f*). The privilege "without impeachment of waste" is annexed to the privity of the estate (*g*); it is consequently lost by change of the estate, as where a lessee for years accepts a confirmation to him for his life (*h*), but it devolves on the assignee of the estate (*i*).

SECT. 8.
Waste.
Extent of
privilege.

SUB-SECT. 3.—*Equitable Waste.*

1067. A tenant for life, though made unimpeachable for waste, is not, unless expressly authorised by the settlement, entitled to commit what is called equitable waste (*k*), that is to say, such an

Equitable
waste.

v. Hill (1806), 2 Swan. 149, n.; *Bridges v. Stephens* (1817), 2 Swan. 150, n.; *Williams v. Williams* (1808), 15 Ves. 419, 425.

(*c*) *Doran v. Wiltshire* (1792), 3 Swan. 699; *Bridges v. Stephens*, *supra*. This remains the law though the sale is made not under a power contained in the settlement, but under the statutory powers conferred by the Settled Land Act, 1882 (45 & 46 Vict. c. 38) (*Re Llewellyn, Llewellyn v. Williams* (1887), 37 Ch. D. 317). Formerly, where trustees sold settled lands under a power in the settlement, and the tenant for life, being unimpeachable for waste, sold the timber standing thereon for his own benefit, it was held to be a bad execution of the power so as to avoid the sale, but the law in this respect has been altered by the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 13; and see title POWERS, Vol. XXIII., p. 57.

(*d*) *Kekewich v. Marker* (1851), 3 Mac. & G. 311; *Briggs v. Oxford (Earl)* (1851), 5 De G. & Sm. 156; see *Lovat (Lord) v. Leeds (Duchess)* (No. 2) (1862), 2 Drew. & Sm. 75 (where an overriding trust to discharge mortgages out of the rents and profits of the settled estates was held not to interfere with the rights of a tenant for life to cut timber).

(*e*) *E.g.*, except in houses (*Aston v. Aston* (1749), 1 Ves. Sen. 264); voluntary waste excepted (*Garth v. Cotton* (1753), 3 Atk. 751); without impeachment of waste farther than wilful waste (*Wickham v. Wickham* (1815), 19 Ves. 419 (where the tenant for life was held entitled to the interest of money produced by the sale of decaying timber cut by the order of the court)); without impeachment of or for any manner of waste, save and except spoil or destruction, or voluntary or permissive waste, or suffering houses and buildings to go to decay, and in not repairing the same (*Vincent v. Spicer* (1856), 22 Beav. 380 (where it was declared that the tenant for life was entitled to cut such timber as the owner of an estate in fee simple, having not only a due regard to his own interest, but to the permanent advantage of the estate, might properly cut in due course of management)). But where a power was given to demise minerals, but so that the lessees should not be punishable for waste, the proviso was held to be repugnant to the power (*Daly v. Beckett* (1857), 24 Beav. 114).

(*f*) Co. Litt. 220 a; *Bowles's (Lewis) Case* (1615), 11 Co. Rep. 79 b.

(*g*) *Bowles's (Lewis) Case*, *supra*.

(*h*) *Ibid*.

(*i*) *Anon.* (1729), Mos. 237; *Watlington v. Waldron* (1853), 4 De G. M. & G. 259, C. A.; *Beaumont v. Salisbury (Marquis)* (1854), 19 Beav. 198; see *Davis v. Marlborough (Duke)* (1819), 2 Swan. 108, 144.

(*k*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (3); see title EQUITY, Vol. XIII., p. 90. This provision is retrospective (*Dibb v. Walker*, [1893] 2 Ch. 429, 433).

SMOT. 8.

Waste

Nature
of waste
restrained.

unconscientious or unreasonable use of his legal power as goes to the destruction of the thing settled (*l*). Thus the courts have restrained a tenant for life unimpeachable for waste from pulling down the mansion-house (*m*), or other houses (*n*), from grubbing up a wood so as to destroy it absolutely (*o*), from cutting underwood or saplings of insufficient growth, or at unseasonable times (*p*), and from cutting down timber planted or left standing for shelter or ornament (*q*) of the settled property (*r*).

Fixtures.

Fixtures which have become part of the inheritance cannot be removed by a limited owner without the commission of waste (*s*).

Tenant in
tail after
possibility of
issue extinct.

A tenant in tail after possibility of issue extinct, although from the nature of his estate unimpeachable for voluntary waste (*t*), has been restrained by the courts from committing equitable waste (*u*).

Ornamental
timber.

1068. In determining whether timber is or is not ornamental, the question for the court is not whether it is or is not ornamental in the opinion of the court, but whether on the evidence it was planted or left by the owner of the estate for the time being for the purposes of ornament or shelter (*v*). The taste of a testator, like his will, binds the parties, and if the object in planting timber, or leaving

(*l*) *Aston v. Aston* (1749), 1 Ves. Sen. 264.

(*m*) *Vane v. Barnard* (Lord) (1717), 2 Vern. 738.

(*n*) *Williams v. Day* (1680), 2 Cas. in Ch. 32; *Abraham v. Bubb* (1680), Freem. (CH.) 53; *Cook v. Winford* (1702), 1 Eq. Cas. Abr. 221, 400; see *Aston v. Aston*, *supra* (where it was said that the court would restrain the pulling down of farmhouses unless two were pulled down to make into one).

(*o*) *Aston v. Aston*, *supra*.

(*p*) *O'Brien v. O'Brien* (1751), Amb. 107; *Brydges v. Stephens* (1821), Madd. & G. 279; *Chamberlyne v. Dummer* (1782), 1 Bro. C. C. 166; (1792) 3 Bro. C. C. 549; see *Hole v. Thomas* (1802), 7 Ves. 589; *Dunn v. Bryan* (1872), 7 I. R. Eq. 143, 154.

(*q*) As to ornamental timber, see the text, *infra*.

(*r*) *Abraham v. Bubb*, *supra*; *Packington's Case* (1744), 3 Atk. 215; *O'Brien v. O'Brien* (1751), Amb. 107; *Chamberlyne v. Dummer*, *supra*; *Downshire (Marquis) v. Sandys (Lady)* (1801), 6 Ves. 107; *A.-G. v. Marlborough (Duke)* (1818), 3 Madd. 498; *Wombwell v. Belasyse* (1825), 6 Ves. 110 a, n.; *Tamworth (Lord) v. Ferrers (Lord)* (1801), 6 Ves. 419; *Wellesley v. Wellesley* (1834), 6 Sim. 497; *Morris v. Morris* (1847), 15 Sim. 505; *Turner v. Wright* (1860), John. 740; *Ford v. Tynte* (1864), 2 De G. J. & Sm. 127, C. A.; *Weld-Blundell v. Wolseley*, [1903] 2 Ch. 664. In *Coffin v. Coffin* (1821), Jac. 70, it is stated that in one case the court went so far as to restrain a man from cutting down trees that he had planted himself.

(*s*) *Bain v. Brand* (1876), 1 App. Cas. 762, 767; see *Re Ochesterfield's (Lord) Settled Estates*, [1911] 1 Ch. 237. As to what are fixtures, see title LANDLORD AND TENANT, Vol. XVIII., pp. 417 *et seq.* As to questions between the representatives of a tenant for life, who has annexed a chattel to the freehold, and the remainderman, see *ibid.*, p. 421, note (*f*); and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 221.

(*t*) See note (*o*), p. 600, *ante*.

(*u*) *Abraham v. Bubb*, *supra*; *Anon.* (1705), Freem. (CH.) 278; *Cooke v. Whaley* (1702), 1 Eq. Cas. Abr. 400; *A.-G. v. Marlborough (Duke)*, *supra*, at p. 538. Tenants in tail after possibility of issue extinct are not referred to in the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (3); see note (*k*), p. 603, *ante*.

(*v*) *Weld-Blundell v. Wolseley*, *supra*.

timber standing, is ornamental, the timber is protected whether the object is achieved or not (a).

SECT. 3.

Waste.

Test as to whether timber is or is not ornamental.

The test to be applied in each case is whether the settlor has by his disposition, or by his acts, indicated that there shall be a continuous enjoyment in succession of that which he has himself enjoyed, in which case it is against conscience that a tenant for life, claiming under his disposition, should by the exercise of a legal power defeat that intention. If, therefore, a testator or settlor occupies a mansion-house with trees planted or left standing for ornament around or about it, or keeps such a mansion-house in a state for occupation, and devises or settles it so as to go in a course of succession, he may reasonably be presumed to anticipate that those who are to succeed him will occupy the mansion-house; and it cannot be presumed that he meant it to be denuded of that ornament which he has himself enjoyed. The court, therefore, in such a case protects the trees against the acts of the tenant for life (b). What would be done by a prudent owner in the ordinary and proper course of management, is no measure of the obligation upon a tenant for life without impeachment of waste with reference to timber planted or left standing for ornament (c), and decaying timber, even though injurious to other trees, cannot be cut down if it is ornamental (d). If, however, a tempest has produced gaps in a

(a) *Downshire (Marquis) v. Sandys (Lady)* (1801), 6 Ves. 107; *Wombwell v. Belasyse* (1825), 6 Ves. 110 a, n.

(b) *Micklethwait v. Micklethwait* (1857), 1 De G. & J. 504, 524, C. A.; *Turner v. Wright* (1860), John. 740, 750; *Weld-Blundell v. Wolseley*, [1903] 2 Ch. 664, 669. This protection has been extended to groups of firs planted two miles away from a mansion-house (*Downshire (Marquis) v. Sandys (Lady)*, *supra*), and to rides and avenues cut through a wood at a considerable distance from the mansion-house, though not to the whole wood (*Wombwell v. Belasyse*, *supra*). But a whole wood may be considered ornamental (*Marker v. Marker* (1851), 9 Hare, 1, 21; see *Ford v. Tynte* (1864), 2 De G. J. & Sm. 127, 131, C. A.), though in such a case the court directs an inquiry as to what trees can be felled without impairing the beauty of the place as it stood at the time of the settlement (*Marker v. Marker*, *supra*; *Ashby v. Hincks* (1888), 58 L. T. 557). The protection of the court has also been extended to trees planted for the purpose of excluding unsightly objects (*Day v. Merry* (1810), 16 Ves. 375 a), and even to trees in a park and pleasure grounds which surrounded a mansion that had been pulled down under a power in the settlement (*Wellesley v. Wellesley* (1834), 6 Sim. 497); but no judgment was delivered in this case, and it does not appear whether the decision went on the ground that the mansion-house might be rebuilt, or that the trees in question were ornamental to villas that had been erected on the property. A tenant for life who wrongfully pulls down a mansion-house does not thereby acquire a right to cut ornamental timber (*Morris v. Morris* (1847), 15 Sim. 505; see *Leeds (Duke) v. Amherst (Lord)* (1846), 14 Sim. 357); but trees originally planted for the ornament of a mansion-house that has been pulled down by a settlor without any intention of rebuilding are not protected as ornamental timber between the parties claiming under him (*Micklethwait v. Micklethwait*, *supra*). Trees planted for profit are not ornamental timber (*Halliwell v. Phillips* (1858), 4 Jur. (N. S.) 607); in one case, however, the protection was extended to fruit trees in a garden as being ornamental to the house (*Anon.* (1705), Freem. (CH.) 278).

(c) *Ford v. Tynte*, *supra*, differing on this point from *Halliwell v. Phillips*, *supra*.

(d) *Bewick v. Whitfield* (1734), 3 P. Wms. 267; *Lushington v. Boldero* (1819), Madd. & G. 149.

SECT. 3.

Waste.

piece of ornamental planting, the cutting of a few trees to produce a uniform and consistent, instead of an unpleasant and disjointed, appearance would not be construed waste(e), and the cutting of decayed wood, which is beneficial to the ornamental timber that remains, may be directed by the court (f) or even done by the tenant for life (g).

o

SUB-SECT. 4.—*Permissive Waste.*

Liability for
permissive
waste.

1069. A tenant for life, whether legal or equitable, is not liable for permissive waste (h), that is, an omission whereby damage results to the premises, such as suffering houses to fall into decay (i). If, however, the settlor has imposed a condition that the tenant for life shall keep the premises in repair, there is a personal liability which can be enforced in a court of equity (k), even in respect of dilapidations existing at the time when the settlement came into force (l). Damages may be recovered in respect of such a liability from the estate of the tenant for life after his death, the proper measure of such damages being such sum as is reasonably necessary to put the

(e) *Mahon (Lord) v. Stanhope (Lord)* (1808), 3 Madd. 523, n.

(f) *Lushington v. Boldero* (1819), Madd. & G. 149; *Ford v. Tynte* (1864), 2 De G. J. & Sm. 127, C. A.

(g) *Baker v. Sebright* (1879), 13 Ch. D. 179. In such a case, however, the court, at the instance of the remainderman, may restrain the tenant for life from cutting and direct the cutting to be done under its supervision (*ibid.*).

(h) *Castlemain (Lord) v. Craven (Lord)* (1733), 22 Vin. Abr. 523, pl. 11; *Wood v. Gaynon* (1761), Amb. 395; *Powys v. Blagrove* (1854), 4 De G. M. & G. 448; *Barnes v. Dowling* (1881), 44 L. T. 809; *Re Hotchkys, Freke v. Calmady* (1886), 32 Ch. D. 408, C. A.; *Re Cartwright, Avis v. Newman* (1889), 41 Ch. D. 532; *Re Parry and Hopkin*, [1900] 1 Ch. 160. The principle applies equally in the case of land settled by the instrument creating the settlement and of land purchased under a direction contained in such instrument (*Re Freeman, Dimond v. Newburn*, [1898] 1 Ch. 28). In face of these cases, *Parteriche v. Powlet* (1742), 2 Atk. 383, cannot be relied on. See also *Gibson v. Wells* (1805), 1 Bos. & P. (N. R.) 290 (a tenancy at will); *Herne v. Bembow* (1813), 4 Taunt. 764 (lessee under a lease which contained no covenant to repair). As to the liability of lessees for years for permissive waste generally, see title LANDLORD AND TENANT, Vol. XVIII., p. 499.

(i) 2 Co. Inst. 145.

(k) *Caldwall v. Baylis* (1817), 2 Mer. 408; *Gregg v. Coates, Hodgson v. Coates* (1856), 23 Beav. 33; *Marsh v. Wells* (1824), 2 Sim. & St. 87; *Woodhouse v. Walker* (1880), 5 Q. B. D. 404; *Re Williams, Andrew v. Williams* (1885), 54 L. T. 105, C. A.; *Bulthyan v. Walford* (1886), 33 Ch. D. 624; affirmed (1887), 36 Ch. D. 269, C. A.; *Re Bradbrook, Lock v. Willis* (1887), 56 L. T. 106; *Dingle v. Coppen, Coppen v. Dingle*, [1899] 1 Ch. 726; see *Dashwood v. Magniac*, [1891] 3 Ch. 306, 335, C. A. A direction that trustees shall pay for repairs out of rents throws the cost of ordinary repairs on income (*Crowe v. Crisford* (1853), 17 Beav. 507; *Clarke v. Thornton* (1887), 35 Ch. D. 307; *Re Baring, Jeune v. Baring*, [1893] 1 Ch. 61; *Debnay v. Eckett* (1894), 43 W. R. 54; *Re Thomas, Weatherall v. Thomas*, [1900] 1 Ch. 319, 323), but not the cost of extraordinary repairs which would be equivalent to rebuilding (*Crowe v. Crisford, supra*; *Ovoke v. Cholmondeley* (1858), 4 Drew. 326); but where the tenant for life has power to direct the repairs, and the trustees' expenses in carrying out the repairs are charged on the estate, they are borne by capital (*Skinner v. Todd* (1881), 46 L. T. 131).

(l) *Re Bradbrook, Lock v. Willis, supra*; *Cooke v. Cholmondeley, supra*.

premises in the state of repair in which the tenant for life ought to have left them (*m*).

SECT. 3.
Waste.

1070. An equitable tenant for life of settled leaseholds is not liable to the remainderman for permissive waste in the absence of an express condition that he shall keep the settled leaseholds in repair (*n*); nevertheless he, and every successive owner of the lease, is bound as between himself and the estate of the settlor to perform the covenants in the lease, including the covenant to repair, and indemnify the estate against any breach thereof (*o*). This liability of the tenant for life is unaffected by the fact that he is entitled, not to the clear rack-rent of the property, but only to a small improved ground rent (*p*). He is not, however, bound to make good the settlor's deficiencies, and put premises into repair which were out of repair at the time when the settlement came into force (*q*).

Settled
leaseholds.

SECT. 4.—Right to Income.

1071. A tenant for life of settled property is entitled both to the ordinary income of the property, including the income of a fund set aside to provide for portions payable on his death (*r*), and to all casual profits (*s*) which accrue during the time of his tenancy for life, unless the settlement provides otherwise.

In general.

1072. On the same principle, the tenant for life of an estate on which there are mines opened, or contracted to be leased by the settlor (*t*), receives the royalties payable in respect of the minerals gotten, though they are really instalments of the purchase-money of part of the inheritance (*u*).

Mining
royalties.

Damages recovered from a lessee of settled land for breach of the covenants contained in the lease belong to the tenant for life (*v*),

Damages.

(*m*) *Woodhouse v. Walker* (1880), 5 Q. B. D. 404; *Bathyan v. Walford* (1886), 33 Ch. D. 624; *Re Williams, Andrew v. Williams* (1885), 54 L. T. 105, C. A.; *Re Bradbrook, Lock v. Willis* (1887), 56 L. T. 106.

(*n*) *Re Parry and Hopkin*, [1900] 1 Ch. 160.

(*o*) *Re Redding, Thompson v. Redding*, [1897] 1 Ch. 876; *Re Betty, Betty v. A.-G.*, [1899] 1 Ch. 821; *Kingham v. Kingham*, [1897] 1 I. R. 170; *Re Giers, Cooper v. Giers*, [1899] 2 Ch. 54; *Re Waldron and Bogue's Contract*, [1904] 1 I. R. 240. *Re Baring, Jeune v. Baring*, [1893] 1 Ch. 61; *Re Tomlinson, Tomlinson v. Andrew*, [1898] 1 Ch. 232, are overruled on this point.

(*p*) *Re Copland's Settlement, Johns v. Carden*, [1900] 1 Ch. 326.

(*q*) *Re Courtier, Coles v. Courtier, Courtier v. Coles* (1886), 34 Ch. D. 136, C. A., distinguishing *Re Fowler, Fowler v. Odell* (1881), 16 Ch. D. 723; *Brereton v. Day*, [1895] 1 I. R. 518; *Re Smith, Bull v. Smith* (1901), 84 L. T. 835; see *Pinfold v. Shillingford* (1877), 46 L. J. (CH.) 491; *Re Sutton, Sutton v. Sutton* (1912), 56 Sol. Jo. 650.

(*r*) *Wellesley v. Mornington (Earl)* (1858), 27 L. J. (CH.) 150.

(*s*) Such casual profits include fines on admissions to, or the enfranchisement of, copyholds (*Cowley (Earl) v. Wellesley* (1866), L. R. 1 Eq. 656; *Re Medows, Norie v. Bennett*, [1899] 1 Ch. 300), or fines payable by a lessee on the grant of a fresh lease under a covenant for perpetual renewal (*Taylor d. Atkyns v. Horde* (1757), 1 Burr. 60, 121; *Brigstocke v. Brigstocke* (1878), 8 Ch. D. 357, C. A.; compare *Milles v. Milles* (1802), 6 Ves. 761), or under a power to renew conferred by the settlement (*Simpson v. Bathurst, Shepherd v. Bathurst* (1869), 5 Ch. App. 193).

(*t*) *Re Kemeys-Tynte, Kemeys-Tynte v. Kemeys-Tynte*, [1892] 2 Ch. 211.

(*u*) *Brigstocke v. Brigstocke*, *supra*; see also p. 600, *ante*; and see pp. 656, 657, *post*.

(*v*) *Noble v. Cass* (1828), 2 Sim. 343.

SECT. 4.

Right to
Income.Compensa-
tion.Profits
arising on
accumula-
tions.Income of
stocks and
shares.Distribution
by company
of profits as
dividends or
capital.

even though the lease is granted under the statutory powers (w). Money paid to a legal tenant for life as the consideration for accepting the surrender of a lease also belongs to that life tenant (a). But compensation money paid in respect of the extinction of the licence of a public-house (b) is treated as capital.

Where interest is directed by a will to be accumulated beyond the legal period (c), the interest on the original sum and the accumulations after that period and until the time of payment must be invested as capital, and a tenant for life of residue is only entitled to the income arising therefrom (d).

1073. If stocks or shares of a public company (e) are settled, the tenant for life is entitled to all dividends declared out of current profits at whatever rate (f), and whether described as extraordinary or special dividends (g) or bonuses (h). The rights of the tenant for life to the entire dividend declared are not affected by the fact that the profits out of which the dividend is declared include money received by the company in respect of an old debt (i), or profits made in past years which have been put by under the name of a reserve fund (k).

1074. A company which has the power of increasing its capital (l)

(w) *Re Lacon's Settlement, Lacon v. Lacon*, [1911] 2 Ch. 17, C. A.; *Re Dealtry, Davenport v. Dealtry*, [1913] W. N. 138. It is doubtful whether *Mitchell v. Armstrong* (1901), 17 T. L. R. 495, was rightly decided (*Re Lacon's Settlement, Lacon v. Lacon, supra*, at p. 26, per KENNEDY, L.J.). But where damages for breach of covenant were recovered by the trustees they were treated as capital, the tenant for life being entitled only to "rents, dividends, interest, and other produce" (*Re Pyke, Birnstingl v. Birnstingl*, [1912] 1 Ch. 770). As to the statutory powers of leasing, see pp. 653 *et seq.*, 675 *et seq.*, *post*. As to the damages recoverable from a lessee for breach of covenants, see title LANDLORD AND TENANT, Vol. XVIII., pp. 500, 512, 513, 520, 556, 557, 581 *et seq.*

(a) *Re Hunloke's Settled Estates, Filzroy v. Hunloke*, [1902] 1 Ch. 941. As to fines on surrenders under the statutory powers, see p. 663, *post*.

(b) Under the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 20; see *Re Bladon, Dando v. Porter*, [1912] 1 Ch. 45, C. A.

(c) See pp. 683, 684, *post*; and see, generally, title PERPETUITIES, Vol. XXII., pp. 370 *et seq.*

(d) *Crawley v. Crawley* (1835), 7 Sim. 427; *O'Neill v. Lucas* (1838), 2 Keen, 313; *Re Pope, Sharp v. Marshall*, [1901] 1 Ch. 64; but see title PERPETUITIES, Vol. XXII., p. 382, note (w). If the invalid direction is contained in a settlement, the rents and income result to the settlor for the excess (*ibid.*).

(e) See *Re White, Theobald v. White*, [1913] 1 Ch. 231.

(f) *Price v. Anderson* (1847), 15 Sim. 473; *Barclay v. Wainwright* (1807), 14 Ves. 66.

(g) *Re Hopkins' Trusts* (1874), L. R. 18 Eq. 696.

(h) *Preston v. Melville* (1848), 16 Sim. 163; *Johnson v. Johnson* (1850), 15 Jur. 714; *Hebert v. Bateman* (1853), 1 W. R. 191; *Murray v. Glasco* (1854), 17 Jur. 816; *Plumbe v. Nield* (1860), 29 L. J. (CH.) 618; *Dale v. Hayes* (1870), 40 L. J. (CH.) 244.

(i) *Maclaren v. Stainton* (1861), 3 De G. F. & J. 202, C. A.; *Edmondson v. Crosthwaite* (1864), 34 Beav. 30. A bonus declared by a company in consideration of a release of certain preferential rights attached to shares, has been held to be capital, but the reason for this would seem to be that it was a payment subsequent to a testator's death in respect of a release given by him during his life; see *Bates v. Mackinley* (1862), 31 Beav. 280.

(k) *Re Alebury, Sugden v. Alebury* (1890), 45 Ch. D. 237; *Re Northage, Ellis v. Barfield* (1891), 60 L. J. (CH.) 488.

(l) This power is now possessed by all companies limited by shares, if authorised by their articles (Companies (Consolidation) Act, 1908

SECT. 4.
Right to
Income.Effect of
capitalisation.

can either distribute its profits as dividend or convert them into capital, and if the company validly exercises this power, such exercise of its power is binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all interested in the capital (*m*). Accordingly, where a company having these powers issued new shares, which represented a portion of their current earnings that had been applied to necessary works, such new shares were held to be capital (*n*); and where a company declared a bonus dividend out of accumulated profits, and at the same time made an issue of new shares for a corresponding amount among its shareholders in proportion to the existing interests, and applied the bonus dividend in paying the calls on such new shares, there was an effective appropriation by the company of the undivided profits dealt with as an increase of the capital stock in the concern (*o*).

It is a question of fact in each case whether a company has or has not capitalised its profits (*p*). Both the form and substance of the transaction must be looked at, and where a company has power to increase its capital and appropriate its profits to such increase, it cannot be considered as having converted any part of its profits into capital when it has made no such increase (*q*). It follows that in the case of such a company the mere carrying over of profits to a reserve fund (*r*), or the temporary devotion of them to capital purposes (*s*),

Capitalisa-
tion of profits
a question
of fact.

(8 Edw. 7, c. 69), s. 41 (1); see title COMPANIES, Vol. V., p. 95. In cases formerly where a company did not possess this power, but had accumulated profits and used them in fact for capital purposes, and afterwards distributed these profits among its proprietors, the profits so distributed were treated as accretions to capital, so that the tenant for life was only entitled to the income thereof (*Brander v. Brander* (1799), 4 Ves. 800; *Irving v. Houston* (1903), 4 Pat. App. 521, H. L.; *Paris v. Paris* (1804), 10 Ves. 185; *Clayton v. Gresham* (1804), 10 Ves. 288; *Witts v. Steere* (1807), 13 Ves. 363; *Ward v. Combe* (1836), 7 Sim. 634; *Re Hodgens, Ex parte Hodgens* (1847), 11 I. Eq. R. 99). The fact that the distribution of accumulated profits was by way of a cash bonus, and not of shares, was held to be too slight a circumstance to take the case out of this general rule (*Paris v. Paris, supra*). Where a company, which, having originally no power to increase its capital, was subsequently authorised by Act of Parliament to do so, apportioned the additional capital *eo nomine* among its shareholders, the accretion was considered capital (*Hooper v. Rossiter* (1824), 13 Price, 774).

(*m*) *Bouch v. Sproule* (1887), 12 App. Cas. 385. If the intention on the part of the company to capitalise is clear, the fact that the shareholders have an option to take cash or new shares does not affect the position as between the tenant for life and the remainderman (*Re Evans, Jones v. Evans*, [1913] 1 Ch. 23). If the option in such a case is vested in trustees, there is no right to elect between them and their *cestuis que trust*, and they must take the dividend in the capitalised form (*Re Evans, Jones v. Evans, supra*).

(*n*) *Re Barton's (Ezekiel) Trust* (1868), L. R. 5 Eq. 238.

(*o*) *Bouch v. Sproule, supra*; *Baring v. Ashburton* (1868), 16 W. R. 452.

(*p*) *Bouch v. Sproule, supra*; *Re Malam, Malam v. Hitchens*, [1894] 3 Ch. 578, 585.

(*q*) *Bouch v. Sproule, supra*, at p. 398.

(*r*) *Re Alsbury, Sugden v. Alsbury* (1890), 45 Ch. D. 237.

(*s*) *Bouch v. Sproule, supra*, at p. 401; *Re Paget (Lord Alfred), Listowel v. Paget* (1892), 9 T. L. R. 88; compare note (*l*), p. 608, *ante*.

SECT. 4.

**Right to
Income.**

does not suffice to convert them into capital. Payments off by the company of subscribed capital are capital (a), unless such payments are invalid by reason of failure on the part of the company to observe the necessary formalities, in which case they belong as income to the tenant for life (b).

**Option in
favour of
shareholder.**

If an option is given to the shareholder to take either a cash dividend or shares, the court determines from the scheme as a whole whether the profits dealt with are or are not capitalised (c). However, in the latter case the tenant for life is not entitled to the entire value of the shares allotted in respect of dividend, but only to so much of the proceeds of realisation of such shares as represent the dividend, and the balance ought to be applied as capital (d).

**Express
provision in
settlement.**

Of course, if the settlement contains an express declaration that bonuses shall be treated either as income or capital, the rights of the tenant for life are governed by such declaration (e).

**Distribution
of assets on
winding up.**

1075. The tenant for life is in ordinary cases only entitled to the income derived from dividends and bonuses declared by the company as a going concern, and assets distributed in a winding up on a company ceasing to exist are capital, even though such assets, or a portion of them, represent undivided profits which the company, while it existed, could have distributed as dividend or bonus (f).

**Options to
take shares.**

1076. Unless a settlement contains an express clause authorising the trustees to relinquish in favour of the tenant for life any preferential right that may accrue to them in respect of settled shares to take new shares in a company, they must exercise their option to take new shares on behalf of all their beneficiaries, and such new shares or any moneys received by sale of the option or the shares are capital (g). If the calls on such new shares are paid out of income, the tenant for life has a lien on them for the amount so paid (h).

**Directors'
fees.**

Where trustees were appointed directors of a company by reason

(a) *Re Paget* (Lord Alfred), *Listowel v. Paget* (1892), 9 T. L. R. 88.

(b) *Re Piercy, Whitwham v. Piercy*, [1907] 1 Ch. 289.

(c) *Bouch v. Sproule* (1887), 12 App. Cas. 385; *Re Piercy, Whitwham v. Piercy, supra*; *Blyth's Trustees v. Milne* (1905), 7 F. (Ct. of Sess.) 799; see *Re Evans, Jones v. Evans*, [1913] 1 Ch. 23; and see note (m), p. 609, *ante*.

(d) *Bouch v. Sproule, supra*, at p. 407; *Re Northage, Ellis v. Barfield* (1891), 60 L. J. (Ch.) 488; *Re Tindal* (1892), 9 T. L. R. 24; *Re Piercy, Whitwham v. Piercy, supra*; *Re Hume Nisbet's Settlement* (1911), 27 T. L. R. 461; see *Rowley v. Unwin* (1855), 2 K. & J. 138; and compare *Re Despard, Hancock v. Despard* (1901), 17 T. L. R. 478.

(e) *Re Mittam's Settlement Trusts* (1858), 4 Jur. (N. S.) 1077; compare *Plunkett v. Mansfield* (1845), 2 Jo. & Lat. 344. The court may decide as a question of construction that bonuses paid out of current profits are not within a proviso in the settlement for the capitalisation of bonuses (*Hollis v. Allan* (1866), 14 W. R. 980; *Re Baker, Euddock v. Baker* (1891), 8 T. L. R. 7).

(f) *Re Armitage, Armitage v. Garnett*, [1893] 3 Ch. 337, C. A.; *Nicholson v. Nicholson* (1861), 30 L. J. (Ch.) 617.

(g) *Rowley v. Unwin, supra*; *Re Bromley, Sanders v. Bromley* (1886), 55 L. T. 145; *Re Malam, Malam v. Hitchens*, [1894] 3 Ch. 578, 586, 587; *Re Curtis, Hawes v. Curtis* (1885), 1 T. L. R. 332.

(h) *Rowley v. Unwin, supra*. If money is advanced by the tenant for life, at the request of the trustees, for payment of calls or shares, he has

of their holding of settled shares, fees received by them were held to be capital (i).

1077. If a share in a partnership business is settled, or if settled funds are properly employed in a partnership business, the question what is income and what is capital must be determined by the articles of partnership, and all that is divided between the partners as profit goes to the tenant for life (k). What is properly retained as capital in the business is treated as capital, and belongs to the remainderman, only the interest thereon being payable to the tenant for life (l). Where a tenant for life is entitled to the profits arising from a business carried on by the trustees, they may be justified in deducting a reasonable and proper annual sum for depreciation (m).

SECT. 4.
Right to
Income.

Share in
partnership.

1078. In the case of property settled by deed the tenant for life is entitled to the entire income of the property settled, though it is of a wasting nature, such as leaseholds (n).

Wasting
property
settled by
deed.

In the case, however, of a residuary gift by will of property of a wasting nature to several persons in succession, there is a presumption that the testator intended the property to be enjoyed in accordance with his gift, and effect can only be given to this intention by converting the wasting property into securities of a permanent nature for the benefit of all persons interested (o).

Residuary
bequest.

This rule applies to unauthorised securities retained by trustees pending conversion, whether they are of a wasting nature or not, and the tenant for life is only entitled to the income of them as notionally converted at the testator's death (p).

Notional
conversion.

If the trustees of a settlement made by a deed make an unauthorised investment, but make good to the trust fund the entire

Income on
unauthorised
inve
made good.

a lien on the shares for the repayment of the amount advanced with interest (*Todd v. Moorhouse* (1874), L. R. 19 Eq. 69).

(i) *Re Francis, Barrett v. Fisher* (1905), 74 L. J. (CH.) 198: the trustees do not appear in this case to have claimed the fees for themselves, but it was laid down that they were clearly accountable for such fees to the trust estate. This case was not cited in the case of *Re Dover Coalfield Extension, Ltd.*, [1908] 1 Ch. 65, C. A., and cannot be taken to be overruled by that decision. The argument that the trustees could not have earned the fees unless they had been qualified to act by virtue of their trust shares was met in the case of *Re Dover Coalfield Extension, Ltd.*, *supra*, by the answer that they became directors at the express request of their *cestui que trust* (*ibid.*, at p. 70), which would not apply to an ordinary case of a trustee of settled shares.

(k) *Stroud v. Gwyer* (1860), 28 Beav. 130; *Browne v. Collins* (1871), L. R. 12 Eq. 586; *Gow v. Forster* (1884), 26 Ch. D. 672.

(l) *Stroud v. Gwyer*, *supra*; *Straker v. Wilson* (1871), 6 Ch. App. 503.

(m) *Re Crabtree, Thomas v. Crabtree* (1912), 106 L. T. 49.

(n) *Milford v. Peile* (1854), 17 Beav. 602; *Hope v. Hope* (1855), 1 Jur. (N. S.) 770; *Re Van Straubenzee, Boustead v. Cooper*, [1901] 2 Ch. 779.

(o) *Howe v. Dartmouth* (Earl), *Howe v. Aylesbury* (Countess) (1802), 7 Ves. 137 a; and see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 282, 283; WILLS.

(p) *Re Chaytor, Chaytor v. Horn*, [1905] 1 Ch. 233; and as to the respective rights of the tenant for life and remainderman in residuary estate settled on trusts for conversion, see, generally, titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 282 *et seq.*; WILLS.

SECT. 4.
Right to
Income.

capital, the remaindermen have no claim against the tenant for life for any interest which has been received by him from the unauthorised investment in excess of what he would have received from an authorised investment (q).

SECT. 5.—Apportionment.

In general.

1079. Unless the settlement (r) expressly stipulates that no apportionment shall take place (s), all rents, annuities, dividends, and other periodical payments in the nature of income are considered as accruing from day to day, and on the death of the tenant for life are apportionable accordingly (t) between his personal representatives and the remainderman (u).

What profits
are appor-
tionable.

1080. Apportionment by virtue of the statute takes place in respect of all rents (a), which expression includes rent-service, rentcharge, and rent-seck, and also tithes, and all periodical payments or renderings in lieu of or in the nature of rent or tithe (b), annuities including salaries or pensions (b), dividends on stock (c), and all payments made by the name of dividend, bonus or otherwise out of the revenue of trading or other public companies (d), whether such payments are usually made or declared at any fixed times or otherwise (e).

(q) *Stroud v. Gwyer* (1860), 28 Beav. 130; *Re Appleby, Walker v. Lever, Walker v. Nisbet*, [1903] 1 Ch. 565, 566, C. A.; *Slade v. Chaine*, [1908] 1 Ch. 522, C. A. *Re Hill, Hill v. Hill* (1881), 50 L. J. (CH.) 551, may be distinguished on the ground that it related to accumulations of profits which were treated as accretions to capital (*Slade v. Chaine, supra*, at pp. 528 *et seq.*); but if it is in conflict with the foregoing cases it must be taken to be overruled. As to cases where a loss results from an unauthorised investment, see pp. 622, 623, *post*.

(r) It seems that the express stipulation must be found in the will or other instrument of gift (*Re Oppenheimer. Oppenheimer v. Boatman*, [1907] 1 Ch. 399).

(s) Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 7. There must either be an express direction against apportionment or terms of gift so clear as necessarily to exclude apportionment; an inference to be collected from the general terms of the will is not sufficient (*Tyrrell v. Clark* (1854), 2 Drew. 86: decided on similar language in the Apportionment Act, 1834 (4 & 5 Will. 4, c. 22)). For examples of "express stipulations," see *Re Cleveland's (Duke) Estate, Wolmer (Viscount) v. Forester*, [1894] 1 Ch. 164, C. A.; *Re Lysaght, Lysaght v. Lysaght*, [1898] 1 Ch. 115, C. A.; *Re Meredith, Stone v. Meredith* (1898), 67 L. J. (CH.) 409; *Macpherson's Trustees v. Macpherson*, [1907] S. C. 1067.

(t) Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 2. This is so whether the instrument came into operation before or after the commencement of the Act (*Capron v. Capron* (1874), L. R. 17 Eq. 288; *Re Cline's Estate* (1874), L. R. 18 Eq. 213; *Hasluck v. Pedley* (1874), L. R. 19 Eq. 271; *Patching v. Barnett* (1880), 43 L. T. 50; *Lawrence v. Lawrence* (1884), 26 Ch. D. 795). As to the earlier law, see title LANDLORD AND TENANT, Vol. XVIII., p. 482, note (l).

(u) *Re Cline's Estate, supra*; *Pollock v. Pollock* (1874), L. R. 18 Eq. 329.

(a) *Roseingrave v. Burke* (1873), 7 L. R. Eq. 186; *Capron v. Capron, supra*.

(b) Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 5.

(c) *Pollock v. Pollock, supra*.

(d) See *Re White, Theobald v. White*, [1913] 1 Ch. 231.

(e) Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 5; *Re Griffith, Carr v. Griffith* (1879), 12 Ch. D. 655; *Re Lysaght, Lysaght v. Lysaght, supra*.

Profits arising from a private trading partnership (*f*) or a newspaper carried on by trustees (*g*) are not apportionable; there is no apportionment in respect of any sum duly or properly paid or accruing due before the happening of the event which is said to require the apportionment (*h*); and annual sums made payable on policies of assurance of any description are not apportionable (*i*).

SECT. 5.
Apportionment.

Profits not apportionable.

1081. As a general rule, on a sale of investments, whether for purposes of reinvestment or distribution, the court declines to make any apportionment between the tenant for life and the remainderman of the proceeds of sale on account of income accrued but not payable at the time of sale, inasmuch as to do otherwise would be to impose a heavy burden on testators' estates (*j*). This rule is not affected by the Apportionment Act, 1870 (*k*), and it is applied in cases where the tenant for life has died between the last payment of income and the sale (*l*). Apportionment has, however, been allowed in special circumstances, as, for instance, where the sale has been by order of the court for the benefit of the estate, or to facilitate distribution among the beneficiaries (*m*). If a purchase of stock carries with it the right to receive dividends which have been earned and declared but not paid, there is no question of apportionment, and the tenant for life is not entitled to be paid by the trustees the amount of such dividends (*n*).

Sale of investments.

Purchase of investments.

1082. An apportioned part of any continuing rent, annuity, dividend, or other payment is payable or recoverable when the entire portion of which such apportioned part forms part becomes due or payable, and not before, and in the case of a rent, annuity, or other payment determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable, if the same had not so determined, and not before (*o*).

Recovery of apportioned part.

1083. The personal representatives of the tenant for life have the same remedies for recovering apportioned parts as for the entire portions, except that entire or continuing rents are to be recovered by the person who, if the rent had not been apportionable, would have been entitled to such entire or continuing rent, and the

Remedies for recovering apportioned rents.

(*f*) *Jones v. Ogle* (1872), 8 Ch. App. 192.

(*g*) *Re Cox's Trusts* (1878), 9 Ch. D. 159.

(*h*) *Trevelion v. Anderton* (1897), 66 L. J. (Q. B.) 489, C. A.; *Ellis v. Rowbotham*, [1900] 1 Q. B. 740, 744, C. A.

(*i*) Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 6.

(*j*) *Scholefield v. Redfern* (1863), 2 Drow. & Sm. 173; *Freman v. Whitebread* (1865), L. R. 1 Eq. 266.

(*k*) 33 & 34 Vict. c. 35.

(*l*) *Bulkeley v. Stephens*, [1896] 2 Ch. 241.

(*m*) *Bulkeley v. Stephens* (1863), 3 New Rep. 105; *Bulkeley v. Stephens*, [1896] 2 Ch. 241; see *Londesborough (Lord) v. Somerville* (1854), 19 Beav. 295.

(*n*) *Re Peel's (Sir Robert) Settled Estates*, [1910] 1 Ch. 389.

(*o*) Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 3. As to recovery of rents and annuities, see titles LANDLORD AND TENANT, Vol. XVIII., pp. 485 *et seq.*; RENTCHARGES AND ANNUITIES, Vol. XXIV., pp. 520 *et seq.*

SECT. 5.
Apportionment.

apportioned part is recoverable from such person by the executors or other person entitled to the same by suit at law or in equity (*p*).

SECT. 6.—Insurance.

**Liability of
tenant for
life.**

1084. In the absence of special contract or obligation (*q*), a tenant for life is not bound to insure the settled premises (*r*). Accordingly, where policies have been effected and kept up by or on behalf of a tenant in tail, who is under no obligation to insure and, being an infant, cannot be credited with any intention of making the policy moneys a present to the settled estate, the policy moneys belong absolutely to the infant tenant in tail (*s*). In the case of a tenant for life without impeachment of waste, the absence of liability to insure carries with it a right to receive money forthcoming by reason of the insurance which he is under no liability to effect (*a*), and this is so both in the case of an insurance of buildings and of chattels

(*p*) Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 4.

(*q*) As to the obligation on the tenant for life to insure buildings comprised in an improvement executed under the statutory provisions, see Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 28; title LAND IMPROVEMENT, Vol. XVIII., p. 293. If he is under an obligation to insure or trustees have power to insure, the insurance is for the benefit of the persons successively entitled, and does not belong to any one of them (*Re Bladon, Dando v. Porter*, [1911] 2 Ch. 350, *per* NEVILLE, J., at p. 354). A tenant for life of settled leaseholds must bear the obligation of the covenants in the lease which have to be performed by the lessee for the benefit of the lessor, including insurance if there is a covenant to insure (*Re Betty, Betty v. A.-G.*, [1899] 1 Ch. 821; *Re Gjers, Cooper v. Gjers*, [1899] 2 Ch. 54), and the expenses of such insurance are payable out of income (*Re Redding, Thompson v. Redding*, [1897] 1 Ch. 876); but see *Kingham v. Kingham*, [1897] 1 I. R. 170. A tenant for life is not bound to keep furniture insured (*Re Betty, Betty v. A.-G.*, *supra*).

(*r*) *Re Bennell, Jones v. Bennett*, [1896] 1 Ch. 778, 787, C. A.; *Re McEacharn, Gambles v. McEacharn*, [1911] W. N. 23.

(*s*) *Seymour v. Vernon* (1852), 16 Jur. 189; *Warwicker v. Bretnall* (1882), 23 Ch. D. 188, distinguishing *Rook v. Worth* (1750), 1 Ves. Sen. 460, *Norris v. Harrison* (1817), 2 Madd. 268, and *Parry v. Ashley* (1829), 3 Sim. 97.

(*a*) *Gausson v. Whatman* (1905). 93 L. T. 101. A contract of insurance being a contract of indemnity, as between the contracting parties, the insured is only entitled to recover the amount of his loss, and, accordingly, a tenant for life who has insured for the full value of a house may only be able to recover the full amount of the policy in an action between himself and the insurance company by proving that his intention is to cover not merely his own limited interest, but the interest of all others who are interested in the property (*Castellain v. Preston* (1883), 11 Q. B. D. 380, C. A.). It does not, however, follow that if the insurance company pays the entire sum over to such a limited owner without raising any question as to the extent of his interest, he thereby becomes a trustee of the sum for all persons interested in the property. *Gausson v. Whatman*, *supra*, has decided the contrary, and the decision seems supported by the analogy of a person effecting for his own benefit a policy on a life in which he has no insurable interest, in which case it has been held that the fact that the insurance company might have had a good defence to an action on the policy conferred no rights on the representatives of the person on whose life the policy was effected (*Worthington v. Curtis* (1875), 1 Ch. D. 419, C. A.; followed in *A.-G. v. Murray*, [1904] 1 K. B. 165, C. A.). A condition in a settlement that a tenant for life shall keep the settled property in good and tenantable repair creates an obligation upon him to rebuild premises destroyed by fire (*Re Skingley* (1851), 3 Mac. & G. 221; *Flegg v. Coates, Hodgson v. Coates* (1856), 23 Beav. 33).

settled to devolve with land (*b*). The remaindermen have, however, a statutory right to require insurance moneys on buildings to be applied in replacing the buildings insured (*c*), and if they exercise this right the tenant for life is not entitled to a charge for the amount so applied (*d*).

SECT. 6.
Insurance.

SECT. 7.—Adjustment of Burdens between Capital and Income.

SUB-SECT. 1.—Outgoings.

1085. In the absence of an express direction by a settlor to the contrary, it is presumed that the settled property is intended to descend intact. Income must, therefore, bear all ordinary outgoings of a recurrent nature, such as rates and taxes (*e*), rents reserved by the lease under which settled leaseholds are held (*f*), and fee-farm rents and quit-rents to which the settled property is subject. The tenant for life must also bear the costs of legal proceedings for his sole benefit in respect of his life interest (*g*).

Outgoings
payable out
of income.

(*b*) *Re Quicke's Trusts*, *Poltimore v. Quicke*, [1908] 1 Ch. 887; *Re Bludon, Dando v. Porter*, [1911] 2 Ch. 350, *per* NEVILLE, J., at p. 354.

(*c*) Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3, c. 78), s. 83. This Act is not confined to places within the weekly bills of mortality (*Re Barker, Ex parte Gorely* (1864), 4 De G. J. & Sm. 477; *Re Quicke's Trusts*, *Poltimore v. Quicke*, *supra*; *Sinnott v. Bowden*, [1912] 2 Ch. 414; compare *Westminster Fire Office v. Glasgow Provident Investment Society* (1888), 13 App. Cas. 699, 716); and see title INSURANCE, Vol. XVII., p. 542, notes (*c*), (*d*).

(*d*) *Re Quicke's Trusts*, *Poltimore v. Quicke*, *supra*.

(*e*) *Kingham v. Kingham*, [1897] 1 I. R. 170; *Re Redding, Thompson v. Redding*, [1897] 1 Ch. 876. Where the real value of property could only be ascertained and its real benefit enjoyed by means of a sale, the tenant for life was held entitled to the income of the proceeds of sale without contributing to the charges accrued since the life interest came into possession; see *Lonsdale (Earl) v. Bergholtdt (Countess)* (1857), 3 K. & J. 185. The deductions from rent which the tenants of a licensed house are entitled to make under the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24) (see title INTOXICATING LIQUORS, Vol. XVIII., pp. 74, 75), in respect of charges imposed by that Act are annual outgoings, and not charges to be paid out of capital (*Re Smith, Smith v. Dodsworth*, [1906] 1 Ch. 799 (decided on the Licensing Act, 1904 (4 Edw. 7, c. 23); and see title INTOXICATING LIQUORS, Vol. XVIII., p. 75).

(*f*) *Kingham v. Kingham*, *supra*; *Re Redding, Thompson v. Redding*, *supra*; *Re Betty, Betty v. A.-G.*, [1899] 1 Ch. 821; *Re Gjers, Cooper v. Gjers*, [1899] 2 Ch. 54. As to the liability of a tenant for life of settled leaseholds for repairs, see p. 607, *ante*, and, for insurance, see p. 614, *ante*.

(*g*) *E.g.*, costs of originating summons to be let into possession of the settled estates (*Re Bagot's Settlement, Bagot v. Killoe*, [1894] 1 Ch. 177), including the costs of the remainderman, if served by direction of the court (*Re Hunt, Pollard v. Geake*, [1900] W. N. 65), but not of a remainderman attending without being a party to the proceedings or formally served (*Re Newen, Newen v. Barnes*, [1894] 2 Ch. 297, 309); costs of applications by the tenant for life of a fund paid into court under the Trustee Relief Acts, 1847 (10 & 11 Vict. c. 96) and 1849 (12 & 13 Vict. c. 74), now repealed and replaced by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 42 (see title TRUSTS AND TRUSTEES) (*Ingram's Trust* (1854), 2 W. R. 679; *Re — (a Lunatic, not so found by Inquisition)* (1860), 8 W. R. 333; *Re Marner's Trusts* (1866), L. R. 3 Eq. 432; *Re Whilton's Trusts* (1869), L. R. 8 Eq. 352; *Re Smith's Trusts* (1870), L. R. 9 Eq. 374; *Re Evans' Trusts* (1872), 7 Ch. App. 609; *Re T —* (1880), 15 Ch. D. 78), including the costs of the trustees, if it

SECT. 7.
Adjust-
ment of
Burdens
between
Capital and
Income.

On the other hand, the *corpus* of a trust estate must be resorted to for all costs, charges, and expenses properly incurred for the benefit of the whole estate (*h*), including the costs of legal proceedings for the administration and protection thereof (*i*), even though such proceedings are instituted by the tenant for life primarily for his own benefit (*k*), and the cost of appointing new trustees (*l*).

is necessary for the trustees to appear (*Re Evans' Trusts* (1872), 7 Ch. App. 609); the costs of an application in an administration action for payment of income (*Eady v. Watson* (1864), 12 W. R. 682; but see *Scrivener v. Smith* (1869), L. R. 8 Eq. 310; *Longuet v. Hockley* (1870), 22 L. T. 198); the costs of an application to the court to change investments in order to increase income (*Equitable Reversionary Interest Society v. Fuller* (1861), 1 John. & H. 379, 383; *Re Tennant* (1889), 60 L. T. 488); costs of rendering an income account unnecessarily demanded by a tenant for life in an administration action (*Croggan v. Allen* (1882), 22 Ch. D. 101); the costs of a reference to inquire whether a tenant or life was capable of managing her own affairs, her income being reduced in the event of her being declared incapable (*Winthrop v. Winthrop* (1846), 15 L. J. (CH.) 403); the expenses of a receiver of the rents (*Bainbridge v. Blair* (1835), 4 L. J. (CH.) 207; *Shore v. Shore* (1859), 4 Drew. 501).

(*h*) Thus, the costs of carrying into execution the trust of a will (*Bainbridge v. Blair*, *supra*), and the expenses of a yearly audit and stocktaking, where capital is left in a business (*Re Bennett, Jones v. Bennett*, [1896] 1 Ch. 778, C. A.) are payable out of *corpus*.

(*i*) *E.g.*, costs of paying a trust fund into court (*Ingram's Trust* (1854), 2 W. R. 679; *Re Staples' Settlement* (1849), 13 Jur. 273; *Re Whilton's Trusts* (1869), L. R. 8 Eq. 352); costs of actions by the trustees for the protection of the estate (*Stott v. Milne* (1884), 25 Ch. D. 710, C. A.; *Re Ormrod's Settled Estate*, [1892] 2 Ch. 318; *Re Blake (a Lunatic)* (1895), 72 L. T. 280, C. A.; as to costs of proceedings for the protection of settled land, see, further, pp. 649, 650, *post*). But expenses incurred by trustees in compelling lessees of settled land to perform their covenants to repair have been directed to be raised by mortgage of the settled land, so that the tenant for life and the remainderman should bear them in fair proportion (*Re McClure's Trusts, Carr v. Commercial Union Insurance Co.* (1906), 76 L. J. (CH.) 52).

(*k*) *E.g.*, questions as to the proper investment of trust funds (*Hume v. Richardson* (1862), 8 Jur. (N. S.) 686; *Beauclerk v. Ashburnham* (1845), 8 Beav. 322); the costs of a redemption action brought by the tenant for life (*Colyer v. Colyer, Pawley v. Colyer* (1863), 3 De G. J. & Sm. 676, C. A.), and costs incurred by him in settling foreclosure actions brought by the mortgagees (*More v. More* (1889), 37 W. R. 414; see *Selby v. Selby* (1838), 2 Jur. 106); costs of proceedings taken by the tenant for life for the protection of the settled estate (*Re De la Warr's (Earl) Estates* (1881), 16 Ch. D. 587); and see pp. 649, 650, *post*. But where the sole question has been one of apportionment between the tenant for life and the remainderman, the costs have been apportioned also (*Reeves v. Creswick* (1839), 3 Y. & C. (EX.) 715; *Re Chesterfield's (Earl) Trusts* (1883), 24 Ch. D. 643, 654). As to the costs of a tenant for life on a compulsory purchase under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 118.

(*l*) *Re Fulham, a Lunatic* (1850), 15 Jur. 69; *Ex parte Davies* (1852), 16 Jur. 882; *Brougham (Lord) v. Poulett (Lord William)* (1855), 19 Beav. 119, 135; *Re Fellows' Settlement* (1856), 2 Jur. (N. S.) 62; *Carter v. Sebright* (1859), 26 Beav. 374, 377; *Harvey v. Oliver*, [1887] W. N. 149. Where the settlor has appointed a single trustee, the costs of appointing an additional trustee are payable out of *corpus* (*Grant v. Grant* (1865), 34 Beav. 623; *Re Ratcliff*, [1898] 2 Ch. 352; but see *Re Brackenbury's Trusts* (1870), L. R. 10 Eq. 45; *Finlay v. Howard* (1842), 2 Dr. & War. 490); and where trustees rightly retired in consequence of the acts of the tenant for life, the costs were directed to be paid out of income (*Coventry v. Coventry* (1837), 1 Keen, 758); and see title TRUSTS AND TRUSTEES.

Costs which ought to be borne by capital may be retained out of income by the trustees until they can be raised out of capital (*m*), but the tenant for life is entitled to have such costs defrayed by an immediate sale (*a*).

Fines, fees, and expenses on the admission of new trustees to copyholds must be borne by the tenant for life and those in remainder in proportion to their respective interests (*b*).

SECT. 7.
Adjustment of Burdens between Capital and Income.

Capital outgoings.

SUB-SECT. 2.—*Duty of Tenant for Life to Keep Down Interest.*

1086. Apart from any question arising on the special terms of the instrument creating the settlement, a tenant for life is under no obligation to discharge any portion of the principal of paramount incumbrances (*c*), but he is bound as between himself and the remaindermen (*d*) to keep down the interest accruing during his lifetime to the extent of and out of the rents and profits received by him (*e*). If the rents are at any time insufficient to keep down the interest, subsequent rents arising during the lifetime of the tenant for life are applicable to liquidate arrears accruing during his own life tenancy (*f*), and, if part of the property is sold, principal, interest and costs due on the mortgage being then paid off out of the proceeds, the rents of the unsold portion subsequently received by the tenant for life remain liable as between himself and the remainderman to recoup amounts paid out of capital in satisfaction of arrears of interest (*g*).

Liability for incumbrances and interest thereon.

Arrears of interest.

The obligation to keep down interest applies though there is an ultimate limitation to the tenant for life in fee (*h*), or though he has an absolute power of appointment, by reason of which he might make the estate his own (*i*). A purchaser of the estate of the tenant

Extent of obligation.

(*m*) *Stott v. Milne* (1884), 25 Ch. D. 710, C. A.; and see title TRUSTS AND TRUSTEES.

(*a*) *Burkett v. Spray* (1829), 1 Russ. & M. 113.

(*b*) *Carter v. Sebright* (1859), 26 Beav. 374; *Re Bullock's Settled Estates, Lofthouse v. Haggard* (1904), 91 L. T. 651.

(*c*) *Penrhyn (Lord) v. Hughes* (1799), 5 Ves. 99, 107; *Kekewich v. Marker* (1851), 3 Mac. & G. 311, 328.

(*d*) The obligation does not exist as between the tenant for life and the incumbrancers (*Re Morley, Morley v. Saunders* (1860), L. R. 8 Eq. 594); and see title MORTGAGE, Vol. XXI., p. 230.

(*e*) *Revel v. Watkinson* (1748), 1 Ves. Sen. 93; *Amesbury v. Brown* (1750), 1 Ves. Sen. 477, 480; *Peterborough (Earl) v. Mordaunt* (1760), 1 Eden, 474; *Faulkner v. Daniel* (1843), 3 Hare, 199, 207; see *Syer v. Gladstone* (1885), 30 Ch. D. 614, as explained in *Frewen v. Law Life Assurance Society*, [1896] 2 Ch. 511, 517; and see title MORTGAGE, Vol. XXI., pp. 229, 230.

(*f*) *Revel v. Watkinson*, *supra*; *Tracy v. Hereford (Viscountess Dowager)* (1786), 2 Bro. C. C. 128; see title MORTGAGE, Vol. XXI., p. 229, note (*h*); and see p. 619, *post*.

(*g*) *Honywood v. Honywood*, [1902] 1 Ch. 347.

(*h*) *Burgess v. Mawbey* (1823), Turn. & R. 187.

(*i*) *Whitbread v. Smith* (1854), 3 De G. M. & G. 727, 741, C. A. The rule applies to the case of an owner in fee with an executory devise over (*Butcher v. Simmonds* (1876), 35 L. T. 304), or of an infant tenant in tail (*Sergeason v. Sealey* (1742), 2 Atk. 412; *Burgess v. Mawbey*, *supra*), but not to the case of an adult tenant in tail because he is in fact the owner of the estate, and has the remainderman at his mercy (*Burgess v. Mawbey*, *supra*, at p. 175; *Amesbury v. Brown*, *supra*). But if the tenant in tail, having kept down

SECT. 7.
Adjust-
ment of
Burdens
between
Capital and
Income.

Debts and
 legacies
 charged on
 the estate.
 Nature of
 obligation.

for life, although himself the mortgagee, is bound to discharge his obligations (*k*).

If real estate is charged by will with payment of debts, and subject thereto is settled, every tenant for life must keep down all the interest upon all the debts bearing interest which are ascertained to be a charge upon such estate (*l*) from the day of the testator's death (*m*), and also pay all interest payable on any legacies charged on the estate (*n*).

The liability of the tenant for life is not personal, but is a charge on his estate, and if he fails to keep down interest, future rents and profits payable during his tenancy for life are liable to recoup to the remainderman the full amount of his default (*o*), and he is not entitled to have any portion of the settled estates sold for the purposes of paying off interest and arrears (*p*). He may, however, have an incumbrance paid off by sale if the rents are insufficient to keep down the interest (*q*).

Rights of
 remainder-

1087. The remainderman is entitled to be recouped arrears of interest out of the assets of a deceased tenant for life to the extent of the rents received during the life-tenancy (*r*), subject to any set-off that there may be in respect of capital charges paid by the tenant for life (*a*). He is not entitled, however, to have arrears of interest which have accrued during a previous life-tenancy discharged by a subsequent tenant for life out of the rents and profits.

interest during his life, dies without barring the entail, his personal representative has no charge on the reversion for the interest (*Anesbury v. Brown* (1760), 1 Ves. Sen. 477).

(*k*) *Penrhyn (Lord) v. Hughes* (1799), 5 Ves. 99; *Raffety v. King* (1836), 1 Keen, 601.

(*l*) *Wastell v. Leslie, Carter v. Leslie* (1844), 13 L. J. (CH.) 205; *Faulkner v. Daniel* (1843), 3 Hare, 199; *Marshall v. Crowther* (1874), 2 Ch. D. 199.

(*m*) *Barnes v. Bond* (1863), 32 Beav. 653; *Marshall v. Crowther, supra*, following *Allhusen v. Whittell* (1867), L. R. 4 Eq. 295, and not following *Greasley v. Chesterfield (Earl)* (1851), 13 Beav. 288; and see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 281, 282.

(*n*) *Milltown (Earl) v. Trench* (1837), 4 Cl. & Fin. 276, H. L.; *Coote v. Milltown (Lord)* (1844), 1 Jo. & Lat. 501; *Faulkner v. Daniel, supra*.

(*o*) *Waring v. Coventry* (1834), 2 My. & K. 406; *Fitzmaurice v. Murphy* (1859), 8 I. Ch. R. 363; *Makings v. Makings* (1860), 1 De G. F. & J. 355; *Kilworth (Lord) v. Mountcashell (Earl)* (1864), 15 I. Ch. R. 565. The remedy of the remainderman is to apply to the court for the appointment of a receiver, and have the rents appropriated for the purpose of paying the accruing interest (*Kensington (Baron) v. Bouverie* (1859), 7 H. L. Cas. 557, 575; *Hill v. Browne* (1844), Drury temp. Sug. 426, 434; *Coote v. O'Reilly* (1844), 1 Jo. & Lat. 455, 461; *Kirwan v. Kennedy* (1869), 3 I. R. Eq. 472, 481); see title RECEIVERS, Vol. XXIV., p. 352.

(*p*) *Hawkins v. Hawkins* (1836), 6 L. J. (CH.) 69; *Shore v. Shore* (1859), 4 Drew. 501.

(*q*) *Penrhyn (Lord) v. Hughes, supra*; *Cooke v. Cholmondeley* (1857), 4 Drew. 244.

(*r*) *Baldwin v. Baldwin* (1856), 6 I. Ch. R. 156; *Kirwan v. Kennedy, supra*. The remainderman has not, however, a specific lien on rents collected or to be collected by a personal representative after the death of the tenant for life (*Dillon v. Dillon* (1853), 4 I. Ch. R. 102).

(*a*) *Howlin v. Sheppard* (1872), 6 I. R. Eq. 497; *Re Whyte* (1857), 7 I. Ch. R. 61, n.

Such arrears are primarily a charge on the inheritance (*b*), and if not the subsequent tenant for life are repayable to him out of capital (*c*).

1088. If several estates are included in the same settlement, the tenant for life is bound out of the whole rents and profits to keep down the interest on charges on all the estates (*d*), and if a charge in respect of which arrears have arisen is paid off by means of a sale of one of the estates, he remains liable to make good the arrears out of subsequent rents received by him from any of the estates (*e*).

SECT. 7.
Adjustment of Burdens between Capital and Income.

Several estates in one settlement.

SUB-SECT. 3.—Annuities.

1089. On a gift of real estate charged with annuities, the tenant for life is bound to keep down the annuities (*f*); and, if he fails to do this, and the estate is sold to pay the arrears, the remainderman is entitled to have the capital recouped out of interest on the surplus of the purchase-money accruing during the life tenancy (*g*). But arrears unpaid at the death of a tenant for life become a charge upon and must be raised out of *corpus*, and the succeeding tenant for life is only bound to keep down interest thereon (*h*).

Annuities.

If the annuity charged on the settled estate is a debt of the settlor, the tenant for life and the remainderman must contribute to the annuity proportionately (*i*).

Annuity created by settlor.

SUB-SECT. 4.—Discharge of Incumbrances by Tenant for Life.

1090. A tenant for life in possession of an estate subject to a charge bearing interest, who pays the interest, although the rents and profits are insufficient to enable him to do so, may make himself an incumbrancer for the excess of his payments beyond the amount of the rents and profits; but, if he pays the interest during his life without any intimation that the rents and profits are insufficient, or that he has any intention of charging the *corpus* of the estate with any deficiency, his legal representatives cannot after his death set up any such charge (*k*).

Discharge of interest

(*b*) *Caulfield v. Maguire* (1845), 2 Jo. & Lat. 141; *Sharshaw v. Gibbs* (1854), Kay, 333; *Kennedy v. Daly* (1858), 7 I. Ch. R. 445.

(*c*) *Kirwan v. Kennedy* (1870), 4 I. R. Eq. 499.

(*d*) *Tracy v. Hereford (Viscountess Dowager)* (1786), 2 Bro. C. C. 128; *Frewen v. Law Life Assurance Society*, [1896] 2 Ch. 511; *Honywood v. Honwood*, [1902] 1 Ch. 347; and see *Re Hotchkys, Freke v. Calmady* (1886), 32 Ch. D. 408, 418, 419, C. A.

(*e*) *Honywood v. Honwood*, *supra*.

(*f*) *Re Grant, Walker v. Martineau* (1883), 52 L. J. (CH.) 552.

(*g*) *Coote v. O'Reilly* (1844), 1 Jo. & Lat. 455.

(*h*) *Playfair v. Cooper, Prince v. Cooper* (1853), 17 Beav. 187.

(*i*) As to the rules for ascertaining the respective liabilities of the tenant for life and the remainderman, see title RENTCHARGES AND ANNUITIES, Vol. XXIV., pp. 505, 506; and, as to whether an annuity is payable out of the *corpus* or income of property charged, see *ibid.*, pp. 491 *et seq.*

(*k*) *Kensington (Baron) v. Bouverie* (1859), 7 H. L. Cas. 557; *Dixon v. Peacock* (1855), 3 Drew. 288; see title MORTGAGE, Vol. XXI., p. 229, note (*h*); and see p. 617, *ante*. As to payment off of charges by a tenant in tail and by a remainderman, see title MORTGAGE, Vol. XXI., pp. 319, 320.

SECT. 7.

Adjust-
ment of
Burdens
between
Capital and
Income.Discharge of
capital.Evidence of
intention to
discharge
capital
debt for
life tenant's
own benefit.Burden of
proof.

A tenant for life who pays off a capital charge on the inheritance is *primâ facie* entitled to that charge for his own benefit (*l*); and the presumption applies equally in favour of the tenant for life if the charge is paid off by the trustees out of rents and profits (*m*). If successive tenants for life pay off a mortgage by instalments, the money must be repaid to them rateably in proportion to the payments made by them, and not divided among them in order of priority (*n*).

1091. A tenant for life is under no obligation to prove his intention to pay off the charge for his own benefit (*o*). The simple payment of the charge by him is sufficient to establish his *primâ facie* right to have the charge raised out of the estate; he is under no obligation or duty to make any declaration, or to do any act demonstrating his intention (*p*). In every case, what the court has to ascertain is the intention of the party paying off the charge. In the absence of evidence the intention must be gathered from what it was his interest to do, but any evidence to the contrary must be regarded (*q*), and the smallest demonstration that he meant to discharge the estate is sufficient (*r*). Such a demonstration may be made by acts as well as by words of the tenant for life, which, being against interest, are legitimate evidence even after the event (*s*). The burden of proving an intention to exonerate the estate, however, lies on the remainderman (*a*), and evidence drawn from recitals in a deed, or the form of reconveyance, may be in its turn rebutted by a long series of acts consistent only with an intention to keep the charge alive (*b*), or by the personal evidence of the tenant for life (*c*).

^l (*l*) *Shrewsbury (Countess) v. Shrewsbury (Earl)* (1790), 1 Ves. 227; *Faulkner v. Daniel* (1843), 3 Hare, 199, 217; *Burrell v. Egremont (Earl)* (1844), 7 Beav. 205, 226; *Morley v. Morley* (1855), 5 De G. M. & G. 610; *Howlin v. Sheppard* (1872), 6 I. R. Eq. 497; and see titles EQUIT, Vol. XIII., pp. 147, 148; MORTGAGE, Vol. XXI., pp. 320, 321.

^m (*m*) *Re Harvey, Harvey v. Hobday*, [1896] 1 Ch. 137, C. A.

ⁿ (*n*) *Re Nepean's Settled Estate*, [1900] 1 I. R. 298.

^o (*o*) *Lindsay v. Wicklow (Earl)* (1873), 7 I. R. Eq. 192.

^p (*p*) *Redington v. Redington* (1809), 1 Ball & B. 131; *Burrell v. Egremont (Earl)*, *supra*; *Kensington (Baron) v. Bouverie* (1859), 7 II. L. Cas. 557, 595; *Lindsay v. Wicklow (Earl)*, *supra*; *Re Harvey, Harvey v. Hobday*, *supra*.

^q (*q*) *Pitt v. Pitt* (1856), 22 Beav. 294. For a case where there was a covenant to assign to the trustees of the settlement the benefit of charges paid off, see *Cochrane v. St. Olair* (1855), 1 Jur. (N. S.) 302.

^r (*r*) *Jones v. Morgan* (1783), 1 Bro. C. C. 206, 218; *Kensington (Baron) v. Bouverie*, *supra*; and compare title EQUIT, Vol. XIII., p. 147.

^s (*s*) *Kensington (Baron) v. Bouverie*, *supra*, at p. 574; *Conolly v. Barter*, [1904] 1 I. R. 130, 138, C. A.; and compare title EVIDENCE, Vol. XIII., pp. 463, 464.

^a (*a*) *Re Harvey, Harvey v. Hobday*, *supra*.

^b (*b*) *Lindsay v. Wicklow (Earl)*, *supra*.

^c (*c*) *Gifford (Lord) v. Fitzhardinge (Lord)*, [1899] 2 Ch. 32. On the other hand, an assignment of a charge to a trustee for the benefit of the tenant for life has been held not to keep the charge alive in the face of evidence contained in his will that he regarded it as extinguished (*Re Lloyd's Estate*, [1903] 1 I. R. 144). For a case where an intention to keep a charge alive was evidenced by the will, see *Lysaght v. Lysaght* (1851), 4 Ir. Jur. 110.

The fact that the tenant for life who pays off the charge and the remainderman stand in the relationship of parent and child is material if there is anything else to rebut the presumption that the tenant for life paid the charge off for his own benefit, but is not by itself sufficient to rebut it (*d*).

1092. A tenant for life who extinguishes a charge on the estate in a mistaken belief as to his own rights, is entitled on discovering his error to keep the charge alive against the inheritance (*e*), and a vague intention of not requiring repayment, if he should find that he could conveniently do without it, does not convert the payment into a gift for the benefit of the inheritance (*f*).

SECT. 7.
Adjustment of Burdens between Capital and Income.

Mistake.

SECT. 8.—*Adjustment of Losses between Tenant for Life and Remainderman.*

1093. A tenant for life under an ordinary settlement of personal property is entitled to the whole income arising from authorised investments, notwithstanding any shrinkage or decrease of the capital value, but he is not entitled to share in any augmentation of the capital value (*g*); and so, in the case of the settled property producing a diminished or no income, the loss must be borne by the tenant for life, and he has no claim to have it, or any portion of it, made good out of capital (*h*). Thus, a tenant for life has no claim against capital in respect of loss of income by the reduction of dividends on Government stock (*i*), or the non-payment of interest on railway bonds where the covenant is to pay out of net earnings available, and no earnings are available, though the bonds are cumulative (*k*). Any loss arising from the misappropriation by a trustee of the rents of settled property must be borne by the tenant for life (*l*).

Authorised investment : when loss borne by tenant for life ;

If, however, the authorised investment is a security, such as a mortgage, not only for principal but also for interest, then, notwithstanding any payment of interest to the tenant for life, he has a right as against the remainderman to have arrears of interest charged upon the security, and the proceeds of the insufficient security must be apportioned in the proportions which

when loss apportioned.

(*d*) *Re Harvey, Harvey v. Hobday*, [1896] 1 Ch. 137, C. A.; and see title GIFTS, Vol. XV., p. 415.

(*e*) *Burrell v. Egremont (Earl)* (1844), 7 Beav. 205; *Conolly v. Barter*, [1904] 1 I. R. 130, C. A. Apart from mistake, an intention to discharge the incumbrance cannot afterwards be changed; see title MORTGAGE, Vol. XXI., p. 323; *Lindsay v. Wicklow (Earl)* (1873), 7 I. R. Eq. 192, 209; but see *Lysaght v. Lysaght* (1851), 4 Ir. Jur. 110; and on the question of merger generally, see titles EQUIT, Vol. XIII., pp. 146 *et seq.*; MORTGAGE, Vol. XXI., pp. 318 *et seq.*; REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 332 *et seq.* As to mistake generally, see title MISTAKE, Vol. XXI., pp. 1 *et seq.*

(*f*) *Cuddon v. Cuddon* (1876), 4 Ch. D. 583.

(*g*) *Verner v. General and Commercial Investment Trust*, [1894] 2 Ch. 239, 258, 270, C. A.

(*h*) *Shore v. Shore* (1859), 4 Drew. 501, 509; *Yates v. Yates* (1860), 28 Beav. 637.

(*i*) *Bague v. Dumergue* (1853), 10 Hare, 462.

(*k*) *Re Taylor's Trusts, Matheson v. Taylor*, [1905] 1 Ch. 734.

(*l*) *Solley v. Wood* (1861), 29 Beav. 482.

SECT. 8.
Adjust-
ment of
Losses
between
Tenant for
Life and
Remainder-
man.

the amount due for capital and the amount due to the tenant for life for arrears of interest bear to one another (*m*). This right to apportionment is not defeated by a provision that no property not actually producing income shall be treated as producing income (*n*). In cases where the mortgagees enter into possession of the mortgaged property, the rents thereof, pending realisation, ought to be applied in the first place in payment of arrears of interest, and subject thereto in payment to the tenant for life of sums not exceeding the interest on the mortgages, any excess being applied as capital (*o*). Interest on arrears of interest is not allowed (*p*), but where a mortgage contained a proviso for reduction of interest on punctual payment the arrears were calculated on the full rate of interest (*q*).

Loss on
unauthorised
investment.

1094. A loss arising on the ultimate realisation of a security covering both principal and interest, the security not being an authorised investment, but one which cannot be immediately realised, must be shared between the tenant for life and the remainderman in the same way as they would have shared it if the loss had occurred when they first became entitled in possession to the fund, the principle being that neither shall gain an advantage over the other (*r*). In such cases a calculation is made of what principal sum, if invested at the date when the conversion should have taken place, would amount with interest to the sum actually recovered. Interest on this principal sum, or, in other words, the difference between such principal sum and the amount actually recovered, goes to the tenant for life and the rest is treated as principal (*s*).

(*m*) *Re Moore, Moore v. Johnson* (1885), 54 L. J. (CH.) 432; *Re Barker, Barker v. Barker*, [1897] W. N. 154; *Lyon v. Mitchell*, [1899] W. N. 27; *Re Alston, Alston v. Houston*, [1901] 2 Ch. 584; *Stewart v. Kinsale*, [1902] 1 I. R. 496; *Re Atkinson, Barbers' Co. v. Grose-Smith*, [1904] 2 Ch. 160, C. A., overruling *Re Foster, Lloyd v. Carr* (1890), 45 Ch. D. 629, and *Re Phillimore, Phillimore v. Herbert* [1903] 1 Ch. 942.

(*n*) *Re Hubbuck, Hart v. Stone*, [1896] 1 Ch. 754, C. A.; *Re Lewis, Davies v. Harrison*, [1907] 2 Ch. 296.

(*o*) *Re Broadwood's Settlements, Broadwood v. Broadwood*, [1908] 1 Ch. 115; *Re Coaks, Coaks v. Bayley*, [1911] 1 Ch. 171; see *Re Anckettill's Estate, Ex parte Scottish Provident Institution* (1891), 27 L. R. Ir. 331 (where a receiver had been appointed); and compare *Re Godden, Teague v. Fox*, [1893] 1 Ch. 292.

(*p*) *Re Moore, Moore v. Johnson, supra*.

(*q*) *Re Atkinson, Barbers' Co. v. Grose-Smith, supra*.

(*r*) *Cox v. Cox* (1869), L. R. 8 Eq. 343.

(*s*) *Turner v. Newport* (1846), 2 Ph. 14; *Cox v. Cox, supra*. In both these cases the rate of interest was calculated at 4 per cent.; compare *Re Owen, Slater v. Owen*, [1912] 1 Ch. 519; but see *Re Bird, Re Evans, Dodd v. Evans*, [1901] 1 Ch. 916; *Re Cleveland's (Duke) Estate, Hay v. Wolmer*, [1895] 2 Ch. 542; and compare *Rowlls v. Bebb, Re Rowlls, Wallers v. Treasury Solicitor*, [1900] 2 Ch. 107, C. A. Where the sale of a leasehold circus forming part of a testator's residuary estate was postponed for the benefit of the estate, the annual profit, if any, or loss thereon was apportioned between income and capital by calculating what sum, accumulating at compound interest at 4 per cent., with yearly rests from the day appointed for conversion, would, together with such interest and accumulations, after deducting income tax, have been equivalent to the amount of such profit or loss, and crediting to or charging against capital the sum so calculated, and crediting to or

The same principle has been applied to a case of a trustee wrongfully selling out an authorised investment in Consols and investing the proceeds in an unauthorised equitable mortgage. The total amount of dividends on the Consols that the tenant for life would have received if the wrongful investment had not been made and the value of the Consols at the death of the tenant for life, which was the proper time of distribution of the fund, were ascertained, and the loss was divided between the estate of the tenant for life and the remainderman in the proportion which the total dividends that the tenant for life would have received on the Consols bore to the value of the Consols at the death, the executor giving credit for interest actually received, but not being liable to refund any overpayment, as the tenant for life was in no way responsible for or cognisant of the breach of trust (a). If the tenant for life in such a case was responsible for the breach of trust, the remainderman would have the right to have the income received refunded to capital (b).

SECT. 8.
Adjustment of
Losses
between
Tenant for
Life and
Remainder-
man.

Conversion of
authorised
investment
into an
unauthorised
security.

1095. Where a business is assigned to trustees in trust for successive tenants for life, losses incurred by a receiver in carrying on the business may be ordered to be made good out of subsequent profits (c), but a direction to defray losses out of the estate throws them on capital (d).

Settlement
of business.

charging against income the rest of such profit or loss; see *Re Hengler, Frowde v. Hengler*, [1893] 1 Ch. 586. This case, however, proceeded on the admission that the principle of *Re Chesterfield's (Earl) Trusts* (1883), 24 Ch. D. 643 (see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 284), applied. There does not seem to be any other case in which this principle has been applied in the apportionment of a loss, and it is difficult to see why the rents of an unsaleable leasehold were not borne by income; see *Lonsdale (Earl) v. Berchtoldt (Countess)* (1857), 3 K. & J. 185; *Allen v. Embleton* (1858), 4 Drew. 226; *Re Owen, Slater v. Owen*, [1912] 1 Ch. 519 *ἀσφάλματον*.

(a) *Re Bird, Re Evans, Dodd v. Evans*, [1901] 1 Ch. 916, which is difficult to reconcile with *Re Grabowski's Settlement* (1868), L. R. 6 Eq. 12, except that in the latter case the dividends actually received by the tenant for life were in excess of anything that could have been recovered on an apportionment.

(b) *Raby v. Ridehalgh* (1855), 7 De G. M. & G. 104, C. A.

(c) *Upton v. Brown* (1884), 26 Ch. D. 588; but where a share in a partnership was settled, the practice of the partnership was followed, and accordingly losses were written off against capital; see *Gow v. Forster* (1884), 26 Ch. D. 672.

(d) *Re Millichamp, Goodale, and Bullock* (1885), 52 L. T. 758; *Re Clapham, Rutter v. Clapham* (1886), 2 T. L. R. 424 (where it was held that the losses and profits on the working of several steamboats, part of the estate, should be set off against each other, and that the widow should take the net income).

Part IX.—Statutory Powers in Relation to Settled Property.

SECT. 1.

Under the Settled Land Acts.

"Settlement."

SECT. 1.—*Under the Settled Land Acts.*

SUB-SECT. 1.—*Definitions.*

(i.) *Settlement.*

1096. For the purposes of the Settled Land Acts (*e*) (sometimes referred to in this part of this title as "the Acts"), a "settlement" (*f*) is any deed, will, agreement for a settlement or other agreement, covenant to surrender, copy of court roll, Act of Parliament, public or private (*g*), or other instrument, or any number of instruments (*h*), under or by virtue of which instrument or instruments any land (*i*), or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession (*k*).

(ii.) *Settled Land.*

"Settled land."

1097. "Settled land" is land (*l*), and any estate or interest therein

(*e*) In this title the Settled Land Act, 1882 (45 & 46 Vict. c. 38), Settled Land Act, 1884 (47 & 48 Vict. c. 18), Settled Land Acts (Amendment) Act, 1887 (50 & 51 Vict. c. 30), Settled Land Act, 1889 (52 & 53 Vict. c. 36), and Settled Land Act, 1890 (53 & 54 Vict. c. 69), are referred to as the "Settled Land Acts."

(*f*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (1). This definition of settlement is incorporated into the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 22 (1); see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 184, note (*p*). As to settlement by way of trust for sale, see p. 625, *post*.

(*g*) *Vine v. Raleigh*, [1896] 1 Ch. 37. An Act, however, which neither incorporates nor affects the limitations of a settlement, but merely confers powers of management upon the trustees thereof, is not part of the settlement (*Talbot v. Scarisbrick*, [1908] 1 Ch. 812).

(*h*) As to compound settlements, see pp. 670 *et seq.*, *post*.

(*i*) A deed settling land upon trust for sale, with a direction to apply the sale money or the income thereof for the benefit of some person or persons for life with remainders over, is a settlement within the Settled Land Act, 1882 (45 & 46 Vict. c. 38) (*ibid.*, s. 63); and a settlement of pure personalty, where a power is given to invest in land, comes within the Acts as soon as land is purchased (*Re Childs' Settlement*, [1907] 2 Ch. 348).

(*k*) The words "stands . . . limited . . . by way of succession" have no technical force, and include the case of a jointure and portions for younger children limited to arise on or after the death of a tenant for life, and the terms of years limited to trustees to secure them (*Re Mundy and Roper's Contract*, [1899] 1 Ch. 275, C. A.), even in cases where the tenant for life is also entitled, subject to the jointure and portions, to the remainder in fee (*Re Phillimore's Estate, Phillimore v. Milnes*, [1904] 2 Ch. 460; *Re Marshall's Settlement, Marshall v. Marshall*, [1905] 2 Ch. 325). They do not, however, include an instrument by which land stands limited to, or in trust for, one and the same person for various estates and interests by way of succession (*Re Pocock and Pranker's Contract*, [1896] 1 Ch. 302), or by which land is limited to A. B. and his successors, vicars of X. (*Ex parte Castle Bytham (Vicar), Ex parte Midland Rail. Co.*, [1895] 1 Ch. 348; *Re Bath and Wells (Bishop)*, [1899] 2 Ch. 138), nor do they include the case of an owner in fee simple whose estate is subject to the charge of an annuity (*Re Collie's Estate*, [1911] 1 I. R. 267).

(*l*) This includes incorporeal hereditaments and an undivided share in land (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (10), (*i*); see

which is the subject of a settlement (*m*), the question whether any land is "settled land" being determined by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect (*n*). The fact that part of an estate is settled land does not make the whole estate settled land (*o*).

1098. Land, or any estate or interest in land, which by virtue of any instrument or instruments is subject to a trust or direction for sale (*p*), and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely or subject to a trust for accumulation of income for payment of debts, or for other purpose, is deemed to be settled land (*q*).

The instrument, or instruments, under which the trust arises is or are deemed to be the settlement (*q*).

SECT. 1.
Under the
Settled
Land Acts.

Land settled
by way of
trust for sale.

Settlement
by way of
trust for sale.

(iii.) *Tenant for Life.*

1099. The tenant for life of settled land is the person who is for the time being beneficially entitled under a settlement to possession (*r*) of settled land for his life (*s*). There is only one tenant for

Tenant for
life.

Cooper v. Belsey, [1899] 1 Ch. 639, C. A., overruling *Re Collinge's Settled Estates* (1887), 36 Ch. D. 516). The "settled land" may consist entirely of ground rents (*Re Wilkinson, Lloyd v. Steel* (1901), 85 L. T. 43).

(*m*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (3). An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor, or descending to the testator's heir, is an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement (*ibid.*, s. 2 (2)), so that, where a reversion in fee is left in a settlor, a tenant for life, or a person having the powers of a tenant for life, under the Acts can sell and make a good title to the fee simple (*Re Hunter and Hewlett's Contract*, [1907] 1 Ch. 46; compare *Re Bond, Panes v. A.-G.*, [1901] 1 Ch. 15).

(*n*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (4). As to the origin of this provision, see *Re Ailesbury (Marquis) and Iveagh (Lord)*, [1893] 2 Ch. 345, 354. In *Re Bective Estate* (1891), 27 L. R. Ir. 364, the opinion was expressed that land which was originally settled land continued to be so notwithstanding that there was no tenant for life or person having the powers of a tenant for life.

(*o*) *Re Bective Estate, supra*.

(*p*) The trust or direction for sale need not be express (*Re M'Curdy's Settled Estate* (1891), 27 L. R. Ir. 395), but it must not be postponed so that it may never arise (*Re Horne's Settled Estate* (1888), 39 Ch. D. 84, C. A.; *Re Goodall's Settlement, Fane v. Goodall*, [1909] 1 Ch. 440). A trust, however, to sell as and when the trustees think fit is within the provision (*Re Crips, Crips v. Tod* (1906), 95 L. T. 865), and so is a trust for sale with the consent of the tenant for life (*Re Wagstaff's Settled Estates*, [1909] 2 Ch. 201; see *Re Childs' Settlement*, [1907] 2 Ch. 348; *Re Lever's Settlements*, [1904] 1 I. R. 492; *Re Tuthill*, [1907] 1 I. R. 305).

(*q*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 63. As to land purchased under a power contained in a settlement by way of trust for sale, see Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 10; and see title TRUSTS AND TRUSTEES.

(*r*) "Possession" includes receipt of income (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (10) (*i.*)).

(*s*) *Ibid.*, s. 2 (5). A person who is entitled to reside in a house for life is a tenant for life within this provision, even though extensive powers of management are given to trustees (*Re Lilanover's (Baroness) Will, Herbert v. Freshfield*, [1902] 2 Ch. 679; affirmed, [1903] 2 Ch. 16, C. A.).

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Under the
Settled
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Tenant for
life consti-
tuted by two
or more
persons.

life for the purposes of the Settled Land Acts (*t*), but such tenant for life may be constituted by two or more persons entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests (*u*). Such persons must, however, be both beneficially entitled to possession and entitled for their lives, so that a tenant for life under the Settled Land Acts (*t*) is not constituted by the several objects of a discretionary trust for distribution of the rents and profits during the life of one of them (*a*).

If there is a tenant for life within the foregoing definitions, he is deemed to be such notwithstanding that under the settlement, or otherwise, the settled land, or his estate or interest therein, is charged or incumbered (*b*).

(iv.) *Persons Deemed to be or Having Powers of Tenant for Life.*

Under settle-
ment by way
of trust for
sale.

1100. If the settlement is by way of trust for sale (*c*), the person, or persons if two or more are entitled concurrently, for the time being beneficially entitled to the income of the land till sale, whether absolutely or subject to any trust for accumulation of income for payment of debts, or for any other purpose, is deemed to be the tenant for life thereof (*d*). To ascertain whether there is a tenant for life the court looks only at the provisions of the instrument creating the trust for sale, and if under that instrument there is no person entitled to the income of the land till sale or the income of the proceeds of sale, there is no tenant for life (*e*). If the instrument does not dispose of the income of the land till sale, but makes a tenant for life of the proceeds of sale, such person, being by implication entitled to the income of the land till sale (*f*), is deemed to be tenant for life (*g*).

Persons
having cer-
tain specified
estates in
possession.

1101. Certain persons, who are not tenants for life within the statutory definition (*h*), but have the specified beneficial (*i*) estates

(*t*) See note (*e*), p. 624, *ante*.

(*u*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (6). If, however, undivided shares are separately settled, the several persons who are tenants for life of the undivided shares do not together constitute a tenant for life of the entirety (*Re Osborne and Bright's, Ltd.*, [1902] 1 Ch. 335). As to such concurrent estates, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 199 *et seq.*

(*a*) *Re Atkinson, Atkinson v. Bruce* (1886), 31 Ch. D. 577. *Semble*, that annuitants do not constitute a tenant for life within the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (6), even though the annuities exhaust the whole income (*Re Bennet, Bennet v. Bennet*, [1903] 2 Ch. 136; compare *Re Bective Estate* (1891), 27 L. R. Ir. 364).

(*b*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (7).

(*c*) As to settlements by way of trust for sale, see p. 625, *ante*.

(*d*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 63. If an estate is given upon trust for sale and to maintain infants out of the income and accumulate the residue for their benefit, they are tenants for life under this provision (*Re Powell, Re Allaway, Allaway v. Oakley*, [1884] W. N. 67; but see *Re Horne's Settled Estate* (1888), 39 Ch. D. 84, C. A.).

(*e*) *Re Earle and Webster's Contract* (1883), 24 Ch. D. 144.

(*f*) *Casamajor v. Strode* (1809), 19 Ves. 390, n.; and see title WILLS.

(*g*) *I.e.*, under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 63 (*Re Searle, Searle v. Baker*, [1900] 2 Ch. 829; *Re Darnley, Clifton (Baroness) v. Darnley* (1906), 95 L. T. 706).

(*h*) See p. 625, *ante*.

(*i*) *Re Jemmett and Guest's Contract*, [1907] 1 Ch. 629. Trustees having an estate *pur autre vie* cannot exercise the statutory powers (*ibid.*). It is

or interests in possession, as distinguished from reversion or remainder (*j*), can exercise the statutory powers as if each of them was a tenant for life as defined by statute (*k*), and the statutory provisions referring to a tenant for life, and to a settlement and to settled land, extend to each of such persons and to the instrument under which his estate or interest arises and to the land therein comprised (*l*), any reference to the death of a tenant for life being deemed to refer to the determination by death or otherwise of the estate or interest (*m*).

These persons are:—

(1) A tenant in tail, including a tenant in tail restrained by Act of Parliament (*n*) from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of the statutory powers shall bind the Crown, unless the lands in respect whereof such restraint is imposed were purchased with money provided by Parliament in consideration of public services (*o*);

(2) A tenant in fee simple, with an executory limitation, gift or disposition over, on failure of his issue or in any other event (*p*);

(3) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise of the statutory powers shall bind the Crown (*q*);

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Persons
having
powers of
tenant for
life.

apprehended that these powers only last so long as the specified estate lasts, *e.g.*, that those vested in a tenant in tail or in a tenant in fee with an executory limitation over are extinguished when such person becomes absolute owner in fee.

(*j*) *Re Morgan* (1883), 24 Ch. D. 114; *Re Strangways, Hickley v. Strangways* (1886), 34 Ch. D. 423, C. A.; *Re Llanover (Baroness), Herbert v. Ram*, [1907] 1 Ch. 635. A term of years, however, whatever its length be, if it is merely a security for charges, does not prevent the person entitled to the income subject to the term from being in possession within the meaning of this provision (*Re Jones* (1884), 26 Ch. D. 736, C. A.; *Re Clitheroe Estate* (1885), 31 Ch. D. 135, C. A.; compare *Re Richardson, Richardson v. Richardson*, [1900] 2 Ch. 778; *Re Money Kyrle's Settlement, Money Kyrle v. Money Kyrle*, [1900] 2 Ch. 839).

(*k*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58 (1); see p. 625, *ante*.

(*l*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58 (2).

(*m*) *Ibid.*, s. 58 (3).

(*n*) See title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 261.

(*o*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58 (1) (i.); see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 261, note (*j*). The powers of sale and exchange hereby conferred on a tenant for life, restrained by Act of Parliament from alienating lands, do not make him a person capable of alienating the same within the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (5) (*Re Bolton Estates Act*, 1863, [1904] 2 Ch. 289); and see title ESTATE AND OTHER DEATH DUTIES, Vol. XII., pp. 209, 220, 230.

(*p*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58 (1) (ii.); see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 165, 168. This includes the case of a person to whom land is devised on condition of residence in a house and maintenance of a home there for a named person of unsound mind (*Re Richardson, Richardson v. Richardson*, [1904] 2 Ch. 777). Where there is a class gift to children contingently on their attaining twenty-one, members of the class who have attained twenty-one have the powers of a tenant for life over the shares which have not for the time being vested indefeasibly (*Re Walmsley's Settled Estates* (1911), 105 L. T. 332).

(*q*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58 (1) (iii.). As to base fees, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 262 *et seq.*

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Land Acts.

Persons
having
powers of
tenant for
life.

(4) A tenant for years determinable on life, not holding merely under a lease at a rent (*r*) ;

(5) A tenant for the life of another, not holding merely under a lease at a rent (*s*) ;

(6) A tenant for his own or any other life (*t*), or for years determinable on life (*a*), whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose (*b*) ;

(*r*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58 (1) (iv.). A person entitled to receive, if she shall so long live, the rents payable by a tenant for years under an ordinary lease at a rent during the continuance of that tenant's term is not a tenant for years determinable on life within *ibid.*, s. 58 (1) (iv.) or under *ibid.*, s. 58 (1) (vi.). (*Re Hazle's Settled Estates* (1885), 29 Ch. D. 78, C. A.); and see the text, *infra*.

(*s*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58 (1) (v.); see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 178, 179. The next of kin of a testator, who become entitled *pur autre vie* to receive the rents and profits of real estate purchased under a power in the will by virtue of the avoidance by the Accumulations Act, 1800 (39 & 40 Geo. 3, c. 98), of a direction to accumulate, have collectively the powers of a tenant for life under this provision (*Vine v. Raleigh*, [1896] 1 Ch. 37). It was held in this case that the person having the statutory powers was constituted by the surviving next of kin and the legal personal representatives of deceased next of kin, but this view was not followed, so far as the legal personal representatives were concerned, in *Re Jemmett and Guest's Contract*, [1907] 1 Ch. 629, where it was held that only persons beneficially entitled come within the purview of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58. The assignee of the whole estate of a tenant for life under a settlement is a tenant for the life of another, not holding under a lease at a rent, but probably he would be held by reason of the provisions of *ibid.*, s. 50 (see pp. 636, 637, *post*), not to be a person having the statutory powers.

(*t*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58 (1) (vi.). A person entitled during his own or another's life to receive surplus rents from trustees who are in possession of the estates is not within this provision (*Re Llanover (Baroness)*, *Herbert v. Ram*, [1907] 1 Ch. 635; *Re Jones* (1884), 26 Ch. D. 736, C. A.); but residuary legatees were held to be within it where there was a trust to pay an annuity to the testator's widow during widowhood and accumulate the residue of the rents during her life, even before twenty-one years had elapsed from the testator's death (*Re Drinkwater's Settled Estates* (1905), 49 Sol. Jo. 237). A person entitled to occupy a house during pleasure has during such occupation the powers of a tenant for life under this provision (*Re Paget's Settled Estates* (1885), 30 Ch. D. 161; *Re Eastman's Settled Estates*, [1898] W. N. 170; *Re Carne's Settled Estates*, [1899] 1 Ch. 324; *Re Llanover's (Baroness) Will*, *Herbert v. Freshfield*, [1902] 2 Ch. 679; affirmed, [1903] 2 Ch. 16, C. A.), unless he has precluded himself for the time being from occupying personally, *e.g.*, by concurring in a lease of the house (*Re Edwards' Settlement*, [1897] 2 Ch. 412); there must, however, be a direction to permit a specified person to reside in a specified house (*Re Bond's Estate*, *Burrell v. Bond* (1904), 48 Sol. Jo. 192).

(*a*) It should be noted that the words "not holding merely under a lease at a rent" are not inserted here.

(*b*) This includes the case of a widow to whom land was devised during widowhood for the maintenance of herself and her children (*Re Pollock*, *Pollock v. Pollock*, [1906] 1 Ch. 146), and also the case of a person whose estate was suspended in the event, which happened, of a claim being enforced against the testator's estate (*Williams v. Jenkins*, [1893] 1 Ch. 700).

(7) A tenant in tail after possibility of issue extinct (c);

(8) A tenant by the curtesy (d), whose estate is to be deemed an estate arising under a settlement made by his wife (e);

(9) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life (f), whether subject to expenses of management or not (g), or until sale of the land, or until forfeiture (h) of his interest therein on bankruptcy or other event (i).

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Under the
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Land Acts

Persons
having
powers of
tenant for
life.

Infants.

Powers of
tenant for
life.

1102. If a person seised of or entitled in possession to land in his own right (k) is an infant, the land is settled land, and the infant is deemed to be the tenant for life thereof (l).

If a tenant for life, or a person having the powers of a tenant for

The words "other purpose" do not mean only a purpose *ejusdem generis* with the payment of debts, so where a testator made his son tenant for life subject to a trust for accumulation till he attained twenty-seven, the son, on attaining his majority, was held to be a person having the powers of a tenant for life within this provision (*Re Llewellyn, Llewellyn v. Llewellyn*, [1911] 1 Ch. 451, following *Annesley v. Woodhouse*, [1898] 1 I. R. 69, and *Re Martyn, Coode v. Marilyn* (1900), 69 L. J. (CH.) 733, and distinguishing *Re Strangways, Hickley v. Strangways* (1886), 34 Ch. D. 423, C. A.).

(c) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58 (1) (vii.); see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 174, 175.

(d) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58 (1) (viii.); see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 183 *et seq.*

(e) Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 8.

(f) An interest arising under an intestacy does not come within these words (*Re Llanover (Baroness), Herbert v. Ram*, [1907] 1 Ch. 635). If, however, there is a direction to pay the income to a person for life, the instrument need not create a succession within the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (1) (*Re Pocock and Pranker's Contract*, [1896] 1 Ch. 302); see p. 624, *ante*. If there is a trust or direction to pay the income to several persons, they have together the powers of a tenant for life (*Re Bennet, Bennet v. Bennet*, [1903] 2 Ch. 136). A terminable life interest is within the provision (*Re Sumner's Settled Estates*, [1911] 1 Ch. 315, not following *Re Llanover (Baroness), Herbert v. Ram*, *supra*, on this point).

(g) As to what may be included in expenses of management, see *Re Bentley, Wade v. Wilson* (1885), 54 L. J. (CH.) 782.

(h) Forfeiture is a loss of the right to possess, and it includes cesser, or determination on bankruptcy, alienation, remarriage, or any other event (*Re Sumner's Settled Estates, supra*).

(i) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 58 (1) (ix.). The fact that the whole income is exhausted by charges does not prevent the person who would be entitled to it, if there were any, from having the powers of a tenant for life under this provision (*Re Jones* (1884), 26 Ch. D. 736, C. A.; *Re Cookes' Settled Estates, Cookes v. Cookes*, [1885] W. N. 177). A person entitled in remainder after a valid trust for accumulation has not the powers of a tenant for life, his estate not being in possession (*Re Strangways, Hickley v. Strangways, supra*); *secus*, if the term is in the nature of an incumbrance which may be redeemed at any moment (*Re Clitheroe Estate* (1885), 31 Ch. D. 135, C. A.).

(k) The estate must not be contingent (*Re Horne's Settled Estate* (1888), 39 Ch. D. 84, C. A.); but an infant who has a vested equitable estate in land, liable to be divested on death under the age of twenty-one, is within this provision (*Re James* (1884), 51 L. T. 596). The shares of infants under the Statute of Distribution (22 & 23 Car. 2, c. 10) in lands forming part of a partnership estate, which lands have not been converted, but are retained *in specie*, are within these words (*Re Wells* (1883), 48 L. T. 859).

(l) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 59; see title INFANTS AND CHILDREN, Vol. XVII., p. 94.

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life, is an infant, or if an infant would, if he were of full age, be a tenant for life or have the powers of a tenant for life (*m*), the powers of a tenant for life may be exercised on behalf of the infant by the trustees of the settlement (*n*), and if there are none, then by such person (*o*) and in such manner as the court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance orders (*p*).

Married
women.

1103. Where a married woman who, if she had not been a married woman, would have been a tenant for life or had the powers of a tenant for life, is entitled for her separate use, or is entitled by virtue of any statute, passed or to be passed, for her separate property, or as a *feme sole*, then she, without her husband, has the powers of a tenant for life (*q*). If she is otherwise entitled, she and her husband together have the powers of a tenant for life (*r*).

Extension of
statutory
provisions.

All provisions referring to a tenant for life and a settlement and settled land extend to the married woman without her husband, or to her and her husband together as the case may require, and to the instrument under which her estate or interest arises and to the land therein comprised (*s*).

Powers of
married
woman.

The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to these provisions (*t*), and a restraint on anticipation does not prevent the exercise of any of her statutory powers (*a*).

(*m*) This includes the case of an infant entitled to an estate tail contingently on attaining twenty-one (*Re Brabazon's Estate*, [1909] 1 I. R. 209).

(*n*) As to who are trustees of the settlement, see pp. 631, 632, *post*. The words include trustees appointed by the court for the purposes of the Acts under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 38 (*Re Dudley's (Countess) Contract* (1887), 35 Ch. D. 338). Where the infant was domiciled in Australia, the court, on proof that a sale was for the infant's benefit, appointed trustees, who were resident in Australia, to carry out the sale and receive the purchase-money (*Re Simpson, Re Whitchurch*, [1897] 1 Ch. 256, C. A.).

(*o*) The court has declined to appoint a person who was a co-owner of the property, but has appointed an independent person and directed the infant's share of the proceeds of sale to be paid into court (*Re Greenville Estate* (1883), 11 L. R. Ir. 138).

(*p*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 60; see, further, title INFANTS AND CHILDREN, Vol. XVII., pp. 94, 95. As to infant married women, see note (*q*), *infra*.

(*q*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 61 (2). *Ibid.*, ss. 1—60, do not apply in the case of a married woman (*ibid.*, s. 61 (1)): the case of an infant married woman, therefore, seems not to be included. A married woman absolutely entitled, subject to a restraint on anticipation, is not a tenant for life by reason of the estate by the curtesy given to her husband by the common law (*Bates v. Kesterton*, [1896] 1 Ch. 159); but a married woman entitled for life for her separate use, without power of anticipation, with a general power of appointment by will and a gift over, in default of appointment, to herself in fee has the powers of a tenant for life (*Re Pocock and Pranker's Contract*, [1896] 1 Ch. 302). As to the rights of a married woman over property generally, see title HUSBAND AND WIFE, Vol. XVI., pp. 321 *et seq.*, 376 *et seq.*; and, as to restraint on anticipation, see *ibid.*, pp. 359 *et seq.*

(*r*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 61 (3).

(*s*) *Ibid.*, s. 61 (4).

(*t*) *Ibid.*, s. 61 (5).

(*a*) *Ibid.*, s. 61 (6); and see title HUSBAND AND WIFE, Vol. XVI., p. 367. As to restraint on anticipation generally, see *ibid.*, pp. 359 *et seq.*

1104. Where a tenant for life, or a person having the powers of a tenant for life, is a lunatic (*b*), the powers of a tenant for life may be exercised in his behalf by the committee or *quasi*-committee of his estate under an order of the judge in lunacy (*c*), which may be made on the application by summons, unless the judge otherwise directs (*d*), of any person interested in the settled land or of the committee of the estate (*e*).

SECT. I.
Under the
Settled
Land Acts.
Lunatics.

(v.) *Trustees for the Purposes of the Settled Land Acts.*

1105. The persons who are for the time being under a settlement trustees with power of sale, or with power of consent to or approval of the exercise of a power of sale, of settled land (*f*), or of any other land comprised in the settlement and subject to the same limitations (*g*), or, if there are no such persons, the persons, if any, who are by the settlement (*h*) declared to be trustees thereof for the purposes of the Settled Land Acts (*i*), are for the purposes of the Acts (*i*) trustees of the settlement (*j*). Trustees having a future power of or trust for

Trustees for
the purposes
of the Settled
Land Acts.

(*b*) It was originally held that there was no jurisdiction to authorise the exercise of the statutory powers except where the lunatic had been so found by inquisition and a committee appointed (*Re Baggs*, [1894] 2 Ch. 416, n.; *Re S. S. B. (a Person of Unsound Mind not so found by Inquisition)*, [1906] 1 Ch. 712, C. A.; *Re De Moleyns' and Harris's Contract*, [1908] 1 Ch. 110; but see *Re X. (a Person through Mental Infirmary incapable of Managing his Affairs)*, [1894] 2 Ch. 415, C. A.; *Re Salt*, [1896] 1 Ch. 117, C. A.). Now, however, the powers of management of committees with respect to property have been extended to *quasi*-committees (Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1).

(*c*) See Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 108; title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 412, 413.

(*d*) Rules in Lunacy, 1892, r. 20; see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 444.

(*e*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 62; see, further, title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 444 *et seq.* As to the committee entering into covenants for title, see *ibid.*, p. 456; and see title SALE OF LAND, p. 427, *ante*.

(*f*) Trustees of a term with power to raise money by mortgage or any other means have not a power of sale of the settled land (*Re Carne's Settled Estates*, [1899] 1 Ch. 324).

(*g*) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 16. "Comprised in" means "at any time comprised in," and, therefore, includes land not originally subject to the trusts of the settlement, but subsequently purchased by the trustees out of personalty (*Re Moore, Moore v. Bigg*, [1906] 1 Ch. 789).

(*h*) If a compound settlement (see pp. 670, 671, *post*) consisting of an original settlement and a resettlement is created by a tenant for life and a tenant in tail male, who are together owners with absolute dominion over the settled estates, they are competent to appoint trustees of the compound settlement for the purposes of the Settled Land Acts (*Re Spearman Settled Estates*, [1906] 2 Ch. 502), but not if they are not in complete control of the property, *e.g.*, by reason of a jointure and portions subsisting under the original settlement, which have priority over the resettlement (*Re Spencer's Settled Estates*, [1903] 1 Ch. 75).

(*i*) See note (*e*), p. 624, *ante*.

(*j*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (8); and see p. 661, *post*. Trustees for the purposes of the Acts are trustees of the settlement, not of the lands subject thereto: consequently, trustees appointed to be trustees for the purposes of the Acts by the court in Ireland of a settlement which then comprised only land in Ireland did not cease to be trustees of the settlement for the purposes of the Acts by reason of the sale of all the land

- SECT. 1.** sale, or power of consent to the exercise of a future power of sale, are included (*k*), and it is immaterial that the power or trust is to take effect only after the death of one of the trustees (*l*), or that one or both the trustees are themselves tenants for life (*m*).
- Under the Settled Land Acts.** The fact that the trust or power is only exercisable with the consent of the tenant for life does not make any difference (*n*).
- Nature of power of sale.** The power of sale must be general and not limited, that is, it must be a power exercisable at any time and for any purpose, and not a power exercisable in a contingency and for a particular purpose (*o*).
- Effect of power to vary investments.** If realty is settled by reference to the trusts of personality, a power to vary investments makes the trustees of the personality trustees with a power of sale of the settled realty (*p*), and a power to vary or transfer securities has been held to imply a power to sell ground rents which were an investment authorised by the settlement (*q*).
- Application of statutory provisions.** **1106.** The statutory provisions as to the trustees of a settlement apply to the surviving or continuing trustees of the settlement for the time being (*r*), except that capital money arising under the Act (*s*) must not be paid to fewer than two persons as trustees of a settlement, unless the settlement authorises the receipt of capital trust money of the settlement by one trustee (*t*).
-
- in Ireland, and the purchase out of capital money of land in England; see *Re Arran (Earl) and Knowlesden and Creer's Contract*, [1912] 2 Ch. 141.
- (*k*) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 16. Prior to this provision a trustee having a power of sale to arise *in futuro* was not a trustee for the purposes of the Settled Lands Acts (*Wheehwright v. Walker* (1883), 23 Ch. D. 752).
- (*l*) *Re Jackson's Settled Estate*, [1902] 1 Ch. 258.
- (*m*) *Ibid.*; *Re Davies and Kent's Contract*, [1910] 2 Ch. 35, C. A.
- (*n*) *Constable v. Constable* (1886), 32 Ch. D. 233. In *Re Johnstone's Settlement* (1886), 17 L. R. Ir. 172, it was held that trustees having a power of sale which could only be exercised with the consent of a person other than the tenant for life, which consent could not be obtained, were not trustees for the purposes of the Acts, and they were appointed such. This case was, however, decided before *Constable v. Constable*, *supra*, and it seems doubtful whether it would now be followed, at any rate in England.
- (*o*) *Re Coull's Settled Estates*, [1905] 1 Ch. 712; see *Re Morgan*, (1883), 24 Ch. D. 114.
- (*p*) *Re Garnett Orme and Hargreaves' Contract* (1883), 25 Ch. D. 595.
- (*q*) *Re Tapp and London and India Docks Co.'s Contract* (1905), 74 L. J. (Ch.) 523.
- (*r*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 39 (2).
- (*s*) As to capital money arising under the Act, see pp. 633 *et seq.*, *post*.
- (*t*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 39 (1). A power in the settlement to the trustees or trustee to act and to receive or give receipts for capital money has been held to enable a sole surviving trustee to give receipts for capital money arising under the Act (*Re Garnett Orme and Hargreaves' Contract*, *supra*). In all cases where the donee of the power of appointing new trustees can either appoint under the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10, or under the combined effect of that provision and the Public Trustee Act, 1908 (6 Edw. 7, c. 5), s. 5 (see title TRUSTS AND TRUSTEES), in the event of the Public Trustee being appointed sole trustee of the settlement, either by the donee of the power or by the court, the settlement must be read as

(vi.) *The Court.*

1107. The court means the High Court of Justice (a).

As regards land in the County Palatine of Lancaster, the powers of the court may be exercised by the Court of Chancery of the County Palatine (b).

As regards land not exceeding in capital value £500, or in annual rateable value £30, and as regards capital money or personal chattels not exceeding in value £500, the powers of the court may be exercised by any county court within the district whereof is situate any part of the land which is to be dealt with in the court, or from which the capital money to be dealt with in the court arises, or in connexion with which the personal chattels to be dealt with in the court are settled (c).

1108. Applications to the court must be by summons, unless a petition is directed by the judge (d).

The court has an absolute discretion in directing how the costs of any party to the application are to be borne (e).

(vii.) *Capital Money Arising under the Act.*

1109. Capital money arising under the Act means (f) capital

authorising the payment of capital moneys to a sole trustee (*Re Leslie's Hassop Estates*, [1911] 1 Ch. 611).

(a) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (10) (ix.). Matters within the jurisdiction of the court under the Settled Land Acts are assigned to the Chancery Division (*ibid.*, s. 46 (1)); and see title COURTS, Vol. IX., pp. 52, 61.

(b) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 46 (8); see title COURTS, Vol. IX., pp. 120 *et seq.*

(c) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 46 (10); see title COUNTY COURTS, Vol. VIII., pp. 684, 685.

(d) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 46 (3); Settled Land Act Rules, 1882 (Stat. R. & O. Rev., Vol. XII., Supreme Court, p. 743), r. 2. The costs of a petition were allowed in *Re Bethlehem and Bridewell Hospitals* (1885), 30 Ch. D. 541; *Re Arnold*, [1887] W. N. 122; *Re De Grey's (Earl) Entailed Estate*, [1887] W. N. 241. But an applicant who applies by petition without the direction of the judge does it at his own risk as regards costs. The Settled Land Act Rules, 1882, r. 2, applies to an application for payment out of court of capital money arising under the Act (see note (f), *infra*), even though the sum exceeds £1,000, but if a sum which is derived from a different source and exceeds £1,000 is in court, a petition should be presented for its payment out, though the money is applicable as capital money arising under the Act (see note (f), *infra*) and it is proposed so to apply it (*Re Torry Hill Estate, Pemberton v. Pemberton*, [1909] 1 Ch. 468). As to the procedure, see title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 131, 191, 192.

(e) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 46 (6). Costs have been allowed where the application was unsuccessful (*Re Horne's Settled Estate* (1888), 39 Ch. D. 84, C. A.), and, on the other hand, the costs of a successful application have been ordered to be paid by the tenant for life (*Re Bagot's Settlement, Bagot v. Kittoe*, [1894] 1 Ch. 177). Where trustees are the applicants the ordinary rule as to their costs is followed. Where trustees concurred in an application as to improvements without appearing separately, the court declined to allow their costs out of the estate; see *Re Broadwater Estate* (1885), 33 W. R. 738, C. A. Where trustees acted reasonably in taking different views, they were allowed separate costs; see *Re Ailesbury's (Marquis) Settled Estates*, [1892] 1 Ch. 506, 548, C. A.

(f) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (9). For purposes of convenience capital money arising under the Settled Land Acts, or any of them (see note (e), p. 624, *ante*), is also thus referred to in this title.

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The court.

Jurisdiction of county court.

Practice and procedure.

Costs.

Origin.

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Under the
Settled
Land Acts.

Money held
by trustees.

money arising under the Settled Land Acts (*g*), and receivable for the trusts and purposes of the settlement, and may arise in the following ways :—

(1) By reason of the exercise of the statutory powers (*h*).

(2) Where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement (*i*), then in addition to such powers of dealing therewith as the trustees may have independently of statute, they may, at the option of the tenant for life (*j*), invest or apply the same as capital money arising under the Act (*k*).

Money liable
to be laid out
in purchase
of land.

Money liable to be laid out in the purchase of land to be made subject to the settlement includes money bequeathed to trustees on trust to be laid out in land in strict settlement (*l*), the proceeds of sale of settled land directed by an order of court to be invested in Consols pending the purchase of other hereditaments to be settled in the same manner as the land that was sold (*m*), money the investment of which in land is deferred (*n*), a sinking fund to replace a sum raised by mortgage for the purposes of improvements on settled estates (*o*), and money subject to some disposition under which it may be, although it is not bound to be, laid out in the purchase of land (*p*), or of some particular parcel of land (*q*), or of freehold ground rents (*r*).

Money in
court.

(3) Where under any statute (*s*) money is in court and is liable to be laid out in the purchase of land to be made subject to a settlement (*t*), then, in addition to any mode of dealing therewith authorised by the statute under which the money is in court, that

(*g*) See note (*e*), p. 624, *ante*.

(*h*) See, e.g., pp. 651 (sale of investments), note (*q*), 654 (grant of lease subject to fine), 656 (sale of land under option in building lease), 657 (lease of mines), 659 (sale of timber: sale of heirlooms), 662 (sums raised by mortgage), 664 (variation or rescission of contracts), *post*.

(*i*) See the text, *infra*. As to the proceeds of investments sold, see p. 651, *post*.

(*j*) *Re Gee, Pearson Gee v. Pearson* (1895), 64 L. J. (CH.) 606. If there is no tenant for life to exercise the option, the application may be directed by the court (*Re Tessyman's Settled Estate* (1897), 77 L. T. 484).

(*k*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 33.

(*l*) *Re Mackenzie's Trusts* (1883), 23 Ch. D. 750.

(*m*) *Re Tennant* (1889), 40 Ch. D. 594; this case and *Re Mackenzie's Trusts*, *supra*, proceeded on the ground that, if the investment had been made, the land purchased could have been sold and the proceeds invested under the Settled Land Acts. Both these decisions were approved in *Re Mundy's Settled Estates*, [1891] 1 Ch. 399, C. A.

(*n*) *Re Maberly, Maberly v. Maberly* (1886), 33 Ch. D. 455; but see *Burke v. Gore* (1884), 13 L. R. Ir. 367.

(*o*) *Re Sudbury and Poynton Estates, Vernon v. Vernon*, [1893] 3 Ch. 74; see title LAND IMPROVEMENT, Vol. XVIII., pp. 289 *et seq*.

(*p*) *Re Soltau's Trusts*, [1898] 2 Ch. 629.

(*q*) *Re Hill, Hill v. Pilcher*, [1896] 1 Ch. 962.

(*r*) *Re Thomas, Weatherall v. Thomas*, [1900] 1 Ch. 319, 323.

(*s*) That is, under any Act incorporating or applying, wholly or in part, the Lands Clauses Consolidation Acts, 1845 (8 & 9 Vict. c. 18), 1860 (23 & 24 Vict. c. 106), and 1869 (32 & 33 Vict. c. 18), or the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), or under any other Act, public, local, personal or private (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 32).

(*t*) This includes the purchase-money on a compulsory purchase of land belonging to a charity absolutely (*Re Byron's Charity* (1883), 23 Ch. D. 171; *Re Bethlehem and Bridewell Hospitals* (1885), 30 Ch. D. 641), of

money may be invested or applied as capital money arising under the Act, on the like terms, if any, respecting costs (a) and other things, as nearly as circumstances admit, and, notwithstanding anything in the Settled Land Acts (b), according to the same procedure as if the modes of investment or application authorised by the Settled Land Acts (b) were authorised by the statute under which the money is in court (c). Such money may be paid out to the trustees of the settlement at the request of the tenant for life (d). Reason must be shown for supposing that the payment will be to the advantage of the settlement. There is no jurisdiction to impose as a condition of such payment out that the trustees shall give notice to the remainderman of all proposed investments or other applications of the money, although it may be right that they should give such notice (e).

SMOY. I.
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Land Acts.

SUB-SECT. 2.—*Characteristics of Statutory Powers.*

(i.) *Fiduciary.*

1110. In exercising the statutory powers (f) a tenant for life must regard the interests of all parties entitled under the settlement, and is deemed in relation to such exercise to be in the position and to have the duties and liabilities of a trustee for those parties (g). It follows that a purchaser who knows that the tenant for life is exercising a statutory power improperly, and is aware that what the tenant for life is doing would amount to a breach of trust, has a right to decline to complete (h).

The tenant
for life a
trustee.

It is no objection to a proposed transaction that it will benefit the

glebe land (*Ex parte Castle Bytham (Vicar), Ex parte Midland Rail. Co.*, [1895] 1 Ch. 348), and of land belonging to a municipal corporation (*Ex parte City of London Corporation. Ex parte West Ham Corporation* (1901), 17 T. L. R. 232).

(a) As to costs where land is compulsorily acquired, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 124 *et seq.*

(b) See note (e), p. 624, *ante*.

(c) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 32. An order made on petition cannot be varied on summons (*Re Sanders* (1894), 70 L. T. 755).

(d) *Re Wright's Trusts* (1883), 24 Ch. D. 662; *Re Harrop's Trusts* (1883), 24 Ch. D. 717; *Re Rulland's (Duke) Settlement* (1883), 49 L. T. 196; *Re Wootton's Estate*, [1890] W. N. 158; *Re Rathmines Drainage Act* (1885), 15 L. R. Ir. 576; *Re Belfast Improvement Acts, Ex parte Reid*, [1898] 1 I. R. 1.

(e) *Re Bolton Estates Act*, 1863 (1885), 52 L. T. 728.

(f) *I.e.*, all powers conferred by the Settled Land Acts (see note (e), p. 624, *ante*) on a tenant for life or person having the powers of a tenant for life; see pp. 625 *et seq.*, *ante*. As to the particular powers, see pp. 642 *et seq.*, *post*.

(g) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 53. The tenant for life, is however, a trustee for the parties interested under the settlement only according to their rights as created by the settlement: the statutory provision does not create in favour of the remaindermen a trust to apply any moneys in a manner in which the settlor has not directed that they shall be applied (*Re Lacon's Settlement, Lacon v. Lacon*, [1911] 2 Ch. 17, C. A.).

(h) *Hatten v. Russell* (1888), 38 Ch. D. 334, 345; and see title SALE OF LAND, pp. 325, 403, *ante*. As to the fiduciary position of trustees, see title TRUSTS AND TRUSTEES.

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Under the
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Land Acts.

Interests of
all bene-
ficiaries must
be con-
sidered.

Rights of
trustees not
conferred.

Statutory
powers
inalienable.

tenant for life personally, and may be to the detriment of the remaindermen (*i*), especially where the evidence adduced on behalf of the remaindermen is speculative evidence of a future increase of the value of the settled property, for it is the right of the tenant for life to derive any benefit he can from his estate (*k*). But he must not act unjustly towards those whose interests he is bound to protect (*l*), including the tenants on the estate (*m*) and existing incumbrancers (*n*). Moreover, the exercise by the tenant for life of his powers must be *bond fide* for the benefit of the estate as a whole, and not for the purpose of obtaining a benefit for himself or some person connected with him, such as his wife, at the expense of the remaindermen (*o*); and he is not justified in forwarding his private views to their detriment (*p*). It necessarily follows that, if a bribe is given to induce the tenant for life to exercise his powers, the transaction can be set aside by the remaindermen, whether they are damaged or not (*q*).

The statute, however, although it imposes on the tenant for life the duties of a trustee, does not confer on him the rights of a trustee as to, for instance, his costs (*r*).

(ii.) *Inalienable.*

1111. A tenant for life may make any arrangement that he pleases for disposing of his beneficial interest (*s*), but a contract by him not to exercise his statutory powers is void (*t*). The statutory powers are incapable of assignment (*a*), or release, and do not pass to an assignee of the tenant for life, but remain exercisable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement (*b*), even

(*i*) *Re Stamford's (Lord) Estate* (1887), 56 L. T. 484; *Re Hare, Leicester-Penrhyn v. Leicester-Penrhyn* (1908), 43 L. J. 659.

(*k*) *Thomas v. Williams* (1883), 24 Ch. D. 558.

(*l*) *Re Richardson, Richardson v. Richardson*, [1900] 2 Ch. 778.

(*m*) *Re Marlborough's (Duke) Settlement, Marlborough (Duke) v. Marjoribanks* (1885), 30 Ch. D. 127; affirmed (1886), 32 Ch. D. 1, C. A.; *Bruce (Lord Henry) v. Ailesbury (Marquis)*, [1892] A. C. 356; *Re Stafford's (Lord) Settlement and Will, Gerard v. Stafford*, [1904] 2 Ch. 72.

(*n*) *Hampden v. Buckinghamshire (Earl)*, [1893] 2 Ch. 531, C. A.

(*o*) *Sutherland (Dowager Duchess) v. Sutherland (Duke)*, [1893] 3 Ch. 169; *Middlemas v. Stevens*, [1901] 1 Ch. 574; *Re Hunt's Settled Estates, Bulleel v. Lawdeshayne*, [1905] 2 Ch. 418; [1906] 2 Ch. 11, C. A.; *Re Wharnccliffe's Trusts, Wharnccliffe v. Stuart-Wortley* (1904), 116 L. T. Jo. 240, C. A.

(*p*) *Re Somers (Earl), Cocks v. Somerset (Lady H.)* (1895), 11 T. L. R. 567; but see *Re Egmont's (Earl) Settled Estates, Lefroy v. Egmont (Earl)*, [1906] 2 Ch. 151.

(*q*) *Chandler v. Bradley*, [1897] 1 Ch. 315.

(*r*) *Sebright v. Thornton*, [1885] W. N. 176; *Re Llewellyn, Llewellyn v. Williams* (1887), 37 Ch. D. 317.

(*s*) *Re Trenchard, Trenchard v. Trenchard*, [1902] 1 Ch. 378.

(*t*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 50 (2).

(*a*) The assignment may have been made either before or after the coming into operation of the Act (31st December, 1882), and for the purposes of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 50, "assignment" includes assignment by way of mortgage, and any partial or qualified assignment and any charge or incumbrance; while "assignee" has a meaning corresponding with that of assignment (*ibid.*, s. 50 (4)).

(*b*) *Ibid.*, s. 50 (1).

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though the effect of the assignment may be partially (c) or wholly (d) to merge the life estate, provided that the settlement still subsists (e), but, if the effect of the merger of a first life estate is to accelerate and bring into possession a second life estate, the person entitled thereto becomes tenant for life with all the statutory powers (f).

The rights, however, of an assignee for value (g) are not to be affected without his consent (h), except that, unless the assignee is actually in possession, his consent is not requisite for the making of leases by the tenant for life, provided that such leases are in conformity with the statutory requirements (i).

(iii.) *Prohibitions against Exercise of Powers Void.*

1112. Notwithstanding anything in a settlement, the exercise by a tenant for life of his statutory powers cannot occasion a forfeiture (k). If in a settlement, whether made before or after, or partly before and partly after, the commencement of the Settled Land Acts (l), a provision is inserted purporting or attempting, by way of direction, declaration or otherwise, to forbid a tenant for life to exercise any statutory power, or attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or of other real or any personal property (m), or by the imposition of any condition (n), or by forfeiture, or in any other manner whatever, to

Prohibitions
against
exercise of
powers void.

(c) *Re Barlow's Contract*, [1903] 1 Ch. 382.

(d) *Re Mundy and Roper's Contract*, [1899] 1 Ch. 275, C. A.; *Re Wimborne (Lord) and Browne's Contract*, [1904] 1 Ch. 537; see *Lonsdale (Earl) v. Lowther*, [1900] 2 Ch. 687. As to the effect of alienation on powers conferred by a settlement, see *Lonsdale (Earl) v. Lowther*, *supra*; title POWERS, Vol. XXIII., p. 65.

(e) See *Re Mundy and Roper's Contract*, *supra*, at p. 296; *Re Barlow's Contract*, *supra*.

(f) *Re Bruen's Estate*, [1911] 1 I. R. 76.

(g) An assignment or charge by a tenant for life in consideration of marriage or by way of family arrangement, not being a security for repayment of money advanced, does not vest in any person any right as assignee for value (Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 4; *Re Du Cane and Nettlefold's Contract*, [1898] 2 Ch. 96; *Re Mundy and Roper's Contract*, *supra*).

(h) The consent of a mortgagee of a tenant for life need not be given by his concurrence in the conveyance on sale (*Re Dickinson and Kelsall's Contract*, [1908] 1 Ch. 213): it is sufficient if it be given in writing, which writing may be the contract for purchase, if the mortgagee himself is the purchaser (*Re Kingsley and Holder's Contract* (1903), 115 L. T. Jo. 201). A tenant for life who has assigned his life estate and agreed to exercise his statutory powers when requested to do so by his assignee, is entitled to obtain proper advice on being requested to exercise the powers, but not to initiate a scheme (*Re Hope, Tarleton v. Hope* (1911), 28 T. L. R. 93).

(i) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 50 (3); see *Re Sebright's Settled Estates* (1886), 33 Ch. D. 429, C. A.; see pp. 653 *et seq.*, *post*.

(k) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 52.

(l) *Re Smith, Grose-Smith v. Bridger*, [1899] 1 Ch. 331. As to the Settled Land Acts, see note (e), p. 624, *ante*.

(m) *Re Ames, Ames v. Ames*, [1893] 2 Ch. 479; *Re Smith, Grose-Smith v. Bridger*, *supra*; *Re Eastman's Settled Estates*, [1898] W. N. 170; *Re Fitzgerald, Brereton v. Day*, [1902] 1 I. R. 162.

(n) As to whether a direction that a beneficiary shall provide a home for a named person is a condition, see *Re Richardson, Richardson v. Richardson*, [1904] 2 Ch. 777; and see note (p), p. 627, *ante*.

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prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him in a position inconsistent with his exercising any statutory power, that provision, so far as it tends to have such operation, is deemed to be void (o), and an estate or interest limited to continue so long only as a person abstains from exercising any power takes effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same (p).

Effect of gift
over on non-
compliance
with
condition.

It follows that a gift over on failure to comply with a condition as to residence in a particular house may be defeated by the exercise of the statutory powers (q), and it is immaterial that the gift over is of property settled by a person other than the original settlor by an instrument other than the original settlement (r). Such a condition, however, is void only so far as it is a fetter on the exercise of the statutory powers (s), and a testator can oblige a tenant for life to reside in a mansion until it shall be disposed of by exercise of the statutory powers, and his failure to comply with this condition causes him to forfeit his interest (a).

SUB-SECT. 3.—*Preliminary Conditions to Exercise of the Powers.*

(i.) *Notice.*

Notices.

1113. A tenant for life, when intending to make a sale, exchange, partition, lease, mortgage, or charge, must give notice (b), which may be notice of a general intention (c), of his intention in that behalf

(o) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 51 (1). A provision that the tenant for life of a leasehold house while in occupation thereof shall be free from all outgoingss does not tend to induce the tenant for life to refrain from exercising the statutory power of sale, notwithstanding that on a sale the equivalent of this benefit would be lost (*Re Simpson, Clarke v. Simpson*, [1913] W. N. 25).

(p) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 51 (?); and see *Re Freme, Samuel v. Freme* (1912), 56 Sol. Jo. 362.

(q) *Re Paget's Settled Estates* (1885), 30 Ch. D. 161; *Re Dalrymple, Bircham v. Springfield* (1901), 49 W. R. 627; *Re Adair*, [1909] 1 I. R. 311; *Re Griffiths, Heasley v. Griffiths* (1910), 130 L. T. Jo. 106; and see note (t), p. 696, *post*.

(r) *Re Smith, Grose-Smith v. Bridger*, [1899] 1 Ch. 331.

(s) *Re Trenchard, Trenchard v. Trenchard*, [1902] 1 Ch. 378.

(a) *Re Haynes, Kemp v. Haynes* (1887), 37 Ch. D. 306; *Re Edwards' Settlement*, [1897] 2 Ch. 412; and, as to conditions as to residence generally, see p. 696, *post*.

(b) The notice must be given by registered letters addressed to the trustees, severally, and to the solicitor for the trustees, if any such solicitor is known to the tenant for life (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 45 (1)). A distinction is drawn between the making of the sale, exchange, partition, lease, mortgage or charge, and the making of the contract, and if the notice is given before either one of these two things it is good (*Marlborough (Duke) v. Sartoris* (1886), 32 Ch. D. 616, 621), and it is no objection that the notice given did not expire till after the contract became binding between the parties (*ibid.*). As to the giving of notice by the committee of a lunatic tenant for life, see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., p. 444.

(c) Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 5, which altered the law as laid down in *Re Ray's Settled Estates* (1884), 25 Ch. D. 464. At the

to each of the trustees of the settlement (*d*), unless the intention is to grant a lease for a term not exceeding twenty-one years at the best rent that can be reasonably obtained without fine and whereby the lessee is not exempted from punishment for waste. Such a lease may be made without notice, and notwithstanding that there are no trustees of the settlement for the purposes of the Settled Land Acts (*e*).

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The notice is not a mere formality, as if the tenant for life attempted to commit a fraud, for example, by proposing to sell the property for something very much below its real value, it would be the duty of the trustees to come to the court and ask for an injunction (*f*). Consequently, if there are no trustees for the purposes of the Settled Land Acts (*g*), a tenant for life may be restrained from exercising any of the powers mentioned until trustees have been appointed (*h*), and, if the sanction of the court is required to such exercise, an application for leave will be ordered to stand over till trustees have been appointed (*i*).

Notice not
a mere
formality.

1114. A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any notice to the trustees (*k*). Default in giving notice to the trustees is not a defect in the title of the tenant for life (*l*), nor is the non-existence of trustees, unless the transaction involves the payment of capital money, which must be paid either to the trustees or into court at the option of the tenant for life (*m*), and, since he can only exercise his option if there are trustees, the person paying the capital money is thus bound to ascertain that there were trustees to whom it might be paid (*n*). But a person dealing with the tenant for life, if he knows that there are no trustees, is probably justified in refusing to complete, even though no capital money has to be received by them (*o*); and a purchaser who knows that there are no trustees in existence cannot be compelled to pay his purchase-money into court, though he would get a good title if he did so in ignorance of the non-existence of the trustees (*p*). An agreement

Position of
persons
dealing with
tenant for
life.

date of notice given the number of trustees must not be less than two, unless a contrary intention is expressed in the settlement (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 45 (2)). As to when a single trustee is sufficient, see note (*t*), p. 632, *ante*.

(*d*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 45 (1).

(*e*) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 7 (i.), (ii.). As to the Settled Land Acts, see note (*e*), p. 624, *ante*.

(*f*) *Wheelwright v. Walker* (1883), 23 Ch. D. 752, 762; *Re Monson's (Lord) Settled Estates*, [1898] 1 Ch. 427, 432.

(*g*) See note (*e*), p. 624, *ante*.

(*h*) *Wheelwright v. Walker*, *supra*; *Re Bentley*, *Wade v. Wilson* (1885), 54 L. J. (CH.) 782; and see titles INFANTS AND CHILDREN, Vol. XVII., p. 95; INJUNCTION, Vol. XVII., p. 267, note (*a*).

(*i*) *Re Taylor* (1883), 52 L. J. (CH.) 728, C. A.

(*k*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 45 (3); *Marlborough (Duke) v. Sartoris* (1886), 32 Ch. D. 616, 623; *Hatten v. Russell* (1888), 38 Ch. D. 334.

(*l*) *Hatten v. Russell*, *supra*.

(*m*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 22; see p. 642, *post*.

(*n*) *Mogridge v. Clapp*, [1892] 3 Ch. 382, C. A.

(*o*) *Ibid.*, at p. 400.

(*p*) *Re Fisher and Crazebrook's Contract*, [1898] 2 Ch. 660.

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Effect of
 receipt in
 writing of
 trustees.

for a lease when the intending lessee knows that there are no trustees in existence is not binding on the remaindermen (*q*).

The receipt in writing of the trustees of a settlement (*r*), or, where one trustee is empowered to act (*s*), of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities paid or transferred to the trustees, trustee, representatives or representative, as the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of the Settled Land Acts (*t*), or that no more than is wanted is raised (*u*).

(ii.) *Leave of the Court.*

When leave
 of court
 required.

Settlement by
 way of trust
 for sale.

1115. The leave of the court (*a*) is required to the exercise of the statutory powers in the following cases:—

(1) If the settlement is by way of trust for sale (*b*), the statutory powers (*c*) must not be exercised without leave of the court (*d*), which may by order give leave to exercise all or any of the powers, and the order must name the person or persons to whom leave is given (*e*), who thereupon become the proper person or persons to exercise the statutory powers, and may exercise them accordingly (*f*). Such order may be rescinded or varied (*g*), but, so long as it is in force, neither

(*q*) *Hughes v. Fanagan* (1891), 30 L. R. Ir. 111, C. A.

(*r*) This includes trustees appointed by the court to be trustees of the settlement for the purposes of the Acts (*Cookes v. Cookes* (1887), 34 Ch. D. 498).

(*s*) As to cases where one trustee is empowered to act, see note (*t*), p. 632, *ante*; and see title SALE OF LAND, p. 438, *ante*.

(*t*) See note (*e*), p. 624, *ante*.

(*u*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 40.

(*a*) As to the court, see p. 633, *ante*.

(*b*) As to settlements by way of trust for sale, see p. 625, *ante*.

(*c*) *I.e.*, the powers conferred by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 63; see p. 626, *ante*.

(*d*) Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 7 (*i*). The effect of this provision is that the person deemed to be tenant for life is not entitled as a matter of course to an order (*Re Tuthill*, [1907] 1 I. R. 305), but if the court thinks that he is the proper person to exercise the power, the trustees are displaced (*Re Harding's Estate*, [1891] 1 Ch. 60; *Re Bagot's Settlement*, *Bagot v. Kittoe*, [1894] 1 Ch. 177). The court, in the exercise of its jurisdiction under this provision, has declined to sanction a lease when part of the consideration for the lease was that the lessee should expend a specific sum on repairs such as a landlord is usually expected to do (*Re Daniell's Settled Estates*, [1894] 3 Ch. 503, C. A.), though consent is not refused merely because a tenant for life will obtain a personal advantage by the exercise of the power (*Re Iever's Settlements*, [1904] 1 I. R. 492, where a sale resulted in the bonus payable under the Irish Land Act, 1903, (3 Edw. 7, c. 37), s. 48, becoming the absolute property of the tenant for life; but see *Re Tuthill*, *supra*). Transactions that took place before the passing (3rd July, 1884) of the Settled Land Act, 1884 (47 & 48 Vict. c. 18), are not affected thereby (*ibid.*, s. 7 (*x*)).

(*e*) *Ibid.*, s. 7 (*ii*).

(*f*) *Ibid.*, s. 7 (*ix*).

(*g*) *Ibid.*, s. 7 (*iii*).

the trustees of the settlement, nor any person other than a person having leave, may execute any trust or power created by the settlement for any purpose for which leave is by the order given to exercise a statutory power (h). The order may be registered as a *lis pendens* against the trustees of the settlement (i), but until registration any person dealing with the trustees, or any other person acting under the trusts or powers of the settlement, is not affected by the order (k).

An application for an order may be made by the tenant for life, or by the persons who together constitute the tenant for life, and an application to vary or rescind an order, or to make any new or further order, may be made also by the trustees of the settlement, or by any person beneficially interested under the settlement (l).

(2) If it is desired to vary a building or mining lease in accordance with local customs (m).

(3) On a sale or purchase of chattels settled to devolve with land (n).

(iii.) *Leave of the Court or Consent of the Trustees.*

1116. The consent of the trustees of the settlement (o) or of the court is required—

(1) To the cutting and sale of timber by the tenant for life (p).

(2) To the sale, lease (q) or exchange of the principal mansion-house (r), if any, on any settled land, and the pleasure grounds and park (s) and lands, if any, usually occupied therewith (t).

(h) Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 7 (iv.).

(i) *Ibid.*, s. 7 (v.); and, as to such registration, see titles JUDGMENTS AND ORDERS, Vol. XVIII., p. 221; SALE OF LAND, pp. 358, 359, *ante*.

(k) Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 7 (vi.).

(l) *Ibid.*, s. 7 (vii.), (viii.).

(m) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 10; and see p. 657, *post*.

(n) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 37 (3); and see p. 659, *post*.

(o) As to who are the trustees of the settlement, see pp. 631, 632, *ante*.

(p) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 35; and see pp. 658, 659, *post*.

(q) "Lease" includes the lease of an easement over the park or grounds (*Sutherland (Dowager Duchess) v. Sutherland (Duke)*, [1893] 3 Ch. 169, 194; *Pease v. Courtney*, [1904] 2 Ch. 503, 510).

(r) A house usually occupied as a farm-house, or a house the site of which and the pleasure grounds and park and lands, if any, usually occupied therewith, do not together exceed twenty-five acres in extent, is not to be deemed a principal mansion-house (Settled Land Act, 1890 (53 & 54 Vict. c. 36), s. 10 (3)). If two estates are settled by the same settlement, with a mansion-house on each, there may be two principal mansion-houses on the settled land (*Gilbey v. Rush*, [1906] 1 Ch. 11), but it is competent for the court at any time to say whether or not a particular house is the principal mansion-house, and the court, having regard to the state of facts existing at the date of the application to it, may come to the conclusion that a house, though formerly a principal mansion-house, has ceased to be such (*Re Wythes' Settled Estates*, [1908] 1 Ch. 593).

(s) The word "park" is not used in the sense of an ancient legal park, but according to its ordinary meaning in common parlance (*Pease v. Courtney*, [1904] 2 Ch. 503). The park need not be usually occupied with the principal mansion-house, the words "usually occupied therewith" applying merely to the words "lands, if any," immediately preceding them (*ibid.*; but see *Bruce (Lord Henry) v. Ailesbury (Marquis)*, [1892] A. C. 356, 360).

(t) Settled Land Act, 1890 (53 & 54 Vict. c. 36), s. 10 (2), repealing and replacing the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 15.

SECT. 1.
Under the
Settled
Land Acts.

Application
for order.

Variations of
building or
mining leases.
Sale or
purchase of
settled
chattels.

Consent of
trustees or
court.

Cutting of
timber,
Mansion-
house.

SECT. 1.

Under the Settled Land Acts.**Consent of trustees.**

1117. The consent of the trustees must be the consent of both trustees (*u*), given at the time and with reference to the particular transaction proposed, but it need not be in writing, and it is immaterial whether it is expressed orally or otherwise to the parties. Provided that it is given to the actual transaction proposed, it makes no difference that it was given in the belief that the house affected was not the principal mansion-house (*a*).

Discretion of the court.

1118. The court in sanctioning a sale is bound to consider the interests of the persons entitled under the settlement, but in the Settled Land Acts (*b*) the paramount object of the legislature is the well-being of the settled land, and the public interests, in the sense of the interests of those who live upon the soil, ought to outweigh all considerations of sentimental interest in the family (*c*). The facts that the estate is not an old family estate and that the settlor has directed a sale on the death of the tenant for life may make the court readier to consent to a sale (*d*), but, on the other hand, the consent is not refused merely because the settlor in creating the settlement has annexed a qualification that the mansion-house shall not be sold (*e*), or a condition as to residence (*f*). If, however, the tenant for life has mortgaged his life interest to its full value, the court declines to make an order to sanction a sale without the consent of the mortgagees being obtained thereto, and without full information as to the proposed sale (*g*).

Condition as to residence.**Exercise of statutory power of leasing.**

1119. The same principles apply to the exercise of the statutory power of leasing, the consent of the court being required to any exercise of such power, and a condition as to residence is inoperative to prevent such exercise (*h*).

SUB-SECT. 4.—*Powers in Respect of Application of Capital Money and Land Acquired.*

(i.) *Power of Tenant for Life to Direct Application.*

Application at option of tenant for life.

1120. Capital money arising under the Act (*i*) must be paid either to the trustees of the settlement (*j*) or into court (*k*), at the option of the tenant for life (*l*). This option can only be exercised if there are trustees for the purposes of the Settled Land Acts (*b*) in

(*u*) As to the case of there being only one trustee, see note (*t*), p. 632, *ante*.

(*a*) *Gilbey v. Rush*, [1906] 1 Ch. 11.

(*b*) See note (*e*), p. 624, *ante*.

(*c*) *Re Ailesbury's (Marquis) Settled Estates*, [1892] 1 Ch. 506, C. A.; *sub nom. Bruce (Lord Henry) v. Ailesbury (Marquis)*, [1892] A. C. 356.

(*d*) *Re Wortham's Settled Estates* (1896), 75 L. T. 293.

(*e*) *Re Brown's Will* (1884), 27 Ch. D. 179 (where the court declined to grant leave without a direction as to what was to be done with chattels settled to devolve with the house).

(*f*) *Re Paget's Settled Estates* (1885), 30 Ch. D. 161; see p. 638, *ante*.

(*g*) *Re Sebright's Settled Estates* (1886), 33 Ch. D. 429, C. A.

(*h*) *Re Thompson's Will* (1888), 21 L. R. Ir. 109.

(*i*) See p. 633, *ante*.

(*j*) See also title SALE OF LAND, p. 438, *ante*.

(*k*) A person directed to pay into court may apply by summons for leave to pay into court (Settled Land Act Rules, 1882, r. 10); for form of summons, see *ibid.*, Appendix, Forms ix., x., xi.

(*l*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 22 (1). A purchaser

existence at the time of payment (*m*). Consequently a purchaser cannot be compelled to pay into court if there are no trustees in existence at the time of completion of the contract, though he might get a good title if he paid into court in ignorance of the fact that there were no trustees (*n*).

SECT. 1.
Under the
Settled
Land Acts.

1121. The investment or other application by the trustees must be made according to the direction of the tenant for life (*o*). The trustees are bound to see that the proposed application is for an authorised object, and they are entitled to be satisfied that the direction is given on proper professional advice (*p*), but, so long as the tenant for life really and honestly exercises his discretion, he cannot be controlled by the trustees or by the court (*q*). The court may, however, interfere to prevent a tenant for life, who in these matters is in the same position as a trustee, from investing on a security which is not suitable, even although it is within the words of the power (*r*).

Application
by, and duty
of, trustees.

In default of any direction by the tenant for life, the investment or other application must be made according to the discretion of the trustees, subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement (*s*).

Discretion of
trustees.

All investments must be in the names or under the control of the trustees (*s*).

Investment.

If the capital money is paid into court, the investment, or other application under the direction of the court, must be made on the application of the tenant for life or of the trustees (*t*). The money

Application
under direc-
tion of court.

is not justified in paying purchase-money by the direction of the tenant for life not to the trustees but to an incumbrancer in order to pay off an incumbrance which is prior to the settlement, even where the purchase-money is insufficient to discharge the incumbrance (*Re Norton and Las Casas' Contract*, [1909] 2 Ch. 59). For form of exercise of option, see *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 213, 214.

(*m*) *Hatten v. Russell* (1888), 38 Ch. D. 334; *Mogridge v. Clapp*, [1892] 3 Ch. 382, C. A.; *Re Fisher and Grazebrook's Contract*, [1898] 2 Ch. 660.

(*n*) *Re Fisher and Grazebrook's Contract*, *supra*; compare *Hughes v. Fanagan* (1891), 30 L. R. Ir. 111, C. A.; and see p. 639, *ante*.

(*o*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 22 (2). In giving such direction, as in exercising any of the statutory powers, the tenant for life is acting as a trustee (*Re Peel's (Sir Robert) Settled Estates*, [1910] 1 Ch. 389); see p. 635, *ante*.

(*p*) *Re Coleridge's (Lord) Settlement*, [1895] 2 Ch. 704; *Re Hotham, Hotham v. Doughty*, [1902] 2 Ch. 575, C. A. If the order of the Court of Appeal in the latter case is to be taken as laying down a principle of law, it seems to follow that the tenant for life can consult his own brokers as to proposed investments, and that the trustees, on being satisfied that he has been properly advised, can safely pay the money to his brokers for investment, and are not entitled to employ their own brokers, contrary to *Re Cleveland's (Duke) Settled Estates*, [1902] 2 Ch. 350, which followed *Re Hotham, Hotham v. Doughty*, [1901] 2 Ch. 790, subsequently varied by the Court of Appeal, *supra*.

(*q*) *Re Coleridge's (Lord) Settlement*, *supra*.

(*r*) *Re Hunt's Settled Estates*, *Bulleel v. Lawdeshayne*, [1905] 2 Ch. 418; [1906] 2 Ch. 11, C. A.

(*s*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 22 (2).

(*t*) *Ibid.*, s. 22 (3).

- SMO. 1.** may be paid out to the trustees of the settlement for the purposes of the Settled Land Acts (*u*), although the tenant for life has in the first instance exercised his option to have it paid into court (*a*); but there is no jurisdiction to order capital money to be paid to trustees residing abroad, even though all the beneficiaries are resident in a foreign country (*b*).
- Under the Settled Land Acts.**
- Change of investment.** An investment, or other application, of capital money cannot, during the life of the tenant for life, be altered without his consent (*c*).
- Purchase-money for leasehold or reversionary interests.** **1122.** If capital money arising under the Act (*d*) is purchase-money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate, or interest, the trustees of the settlement, or the court, and, in the case of the court, on the application of any party interested in that money, may require and cause it to be laid out, invested, accumulated and paid in such manner as in the judgment of the trustees or of the court will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest or reversion in respect whereof the money was paid or as near thereto as may be (*e*).
- (ii.) *Modes of Application.*
- Application.** **1123.** Capital money arising under the Act (*d*) may, subject to payment of claims properly payable thereout and to the application thereof for any special authorised purpose for which it was raised (*f*), be applied for the following purposes:—
- Payment for improvement.** (1) In payment for any authorised improvement (*g*) in accordance
- (*u*) See note (*e*), p. 624, *ante*.
- (*a*) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 14; and, as to such option, see p. 642, *ante*. This could not be done under the earlier Acts (*Cookes v. Cookes* (1887), 34 Ch. D. 498). It seems that such payment out is not made against the wish of the tenant for life.
- (*b*) *Re Lloyd, Edwards v. Lloyd* (1886), 54 L. T. 643.
- (*c*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 22 (4).
- (*d*) See p. 633, *ante*.
- (*e*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 34. The words in this provision which direct apportionment follow those of the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 37, which are identical with the corresponding words of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 74, the cases on which form a precedent for the interpretation of the present enactment (*Cottrell v. Cottrell* (1885), 28 Ch. D. 628); and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 123. On a sale of settled leaseholds by the court where there is no trust or power of sale, the same method of distribution is adopted as in a case of compulsory purchase (*Re Lingard, Lingard v. Squirrell*, [1908] W. N. 107).
- (*f*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21. For the raising of capital money for specially authorised purposes, see Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 15; Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 11; pp. 661, 662, *post*.
- (*g*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21 (iii.). For a list of authorised improvements, see Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 25; Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13; title LAND IMPROVEMENT, Vol. XVIII., pp. 283 *et seq.*; and see, generally, *ibid.*, pp. 280 *et seq.*

with a scheme approved by the trustees or an order of the court (h).

(2) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land or other the whole estate the subject of the settlement (i), or of land tax, rentcharge in lieu of tithe, Crown rent, chief rent, or quit-rent charged on or payable out of the settled land (k). A mortgage of a long term is a mortgage affecting the inheritance (l). A mortgage of part of the land may be discharged out of capital money arising from another part (m), even when the two parts are settled by different instruments (n), or in the actual event devolve on different persons (o); and capital money arising from the proceeds of sale of chattels settled to devolve with land may be applied in discharge of incumbrances affecting the inheritance of the land, by reference to the limitations of which, though by another instrument, the chattels are settled, notwithstanding that different persons may become entitled to the proceeds of the chattels and to the land (p).

SECT. 1.
Under the
Settled
Land Acts.
Discharge of
incumbrances.

(h) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 26; Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 15.

(i) Arrears of a jointure rentcharge are an incumbrance affecting the inheritance (*Re Manchester's (Duke) Settlement*, [1910] 1 Ch. 106). As to whether future payments of a jointure or pin money may be redeemed out of capital moneys, see *ibid.*, at p. 115; *Re Knatchbull's Settled Estate* (1884), 27 Ch. D. 349, 353; *Re Frewen, Frewen v. James* (1888), 38 Ch. D. 383.

(k) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21 (ii.). As to redemption of land tax, see title LAND TAX, Vol. XVIII., p. 327; and see, generally, *ibid.*, pp. 321 *et seq.*; as to redemption of rentcharge in lieu of tithe, see title ECCLESIASTICAL LAW, Vol. XI., p. 750; and, as to redemption of rentcharges generally, see title RENTCHARGES AND ANNUITIES, Vol. XXIV., pp. 512, 513.

(l) *Re Frewen, Frewen v. James, supra*, where NORTH, J., held that a mortgage of a long term was an incumbrance affecting the inheritance on two grounds: (1) that if the mortgagee foreclosed he would have the power of acquiring the fee as being possessed of a long term not subject to any equity of redemption, and if he did acquire the fee it could not be said that his incumbrance was one which did not affect the inheritance; (2) that the tenant for life had the power of selling the entire fee free from incumbrances. With regard to the second reason, the mortgage having been to secure a sum of money actually raised by way of portions under a power in that behalf contained in the settlement, the tenant for life seems not to have had the power to sell the land discharged from it (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 20 (2) (ii.); *Re Keck and Hart's Contract*, [1898] 1 Ch. 617, 624). The first reason seems to apply only to a term which, as originally created, was for not less than 300 years, as otherwise it could not be enlarged into a fee simple; see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., p. 268. But inasmuch as a mortgage of a term, however short, seems to be an incumbrance on the settled land which could be discharged by a mortgage of the fee (see Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 11; p. 661, *post*), it is possible that the court would allow such a mortgage to be discharged out of capital money, on the principle that what may be done in two steps may be done in one.

(m) *Re Chaytor's Settled Estate Act* (1884), 25 Ch. D. 651; *Re Navan and Kingscourt Rail. Co., Ex parte Dyas* (1888), 21 L. R. Ir. 369.

(n) *Re Stafford's (Lord) Settlement and Will, Gerard v. Stafford*, [1904] 2 Ch. 72.

(o) *Re Freme, Freme v. Logan*, [1894] 1 Ch. 1, C. A.; and see pp. 669, 674, *post*.

(p) *Re Marlborough's (Duke) Settlement, Marlborough (Duke) v. Marjoribanks* (1886), 32 Ch. D. 1, C. A.; *Re Stafford's (Lord) Settlement and Will*,

SECT. 1.
Under the
Settled
Land Acts.

Charges on
land.

Direction by
tenant for
life.

Further
application.

Investment.

Payment
to persons
absolutely
entitled.

So much of a charge on land (*g*) for expenses incurred by a local authority in sewerage, paving, and flagging new streets as represents capital, although payable by instalments, may be paid out of capital money (*r*), but not a terminable rentcharge of which the tenant for life is bound to pay the instalments (*s*), unless it has been created in pursuance of an Act of Parliament with the object of paying off any money advanced for the purpose of defraying the expenses of an authorised improvement (*t*).

The tenant for life may direct the application of capital money arising under the Act (*a*) in discharge of incumbrances, notwithstanding that his interest is subject to a term created by the settlement for that purpose, provided that his direction is *bonâ fide* and in the interest of all parties (*b*). A purchaser is not, however, justified in paying his purchase-money, at the request of the tenant for life, to an incumbrancer who has priority over the settlement (*c*).

1124. Capital money arising under the Act (*a*) may also be applied :—

(1) In investment on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law authorised to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock, of any railway company in Great Britain or Ireland incorporated by special Act of Parliament and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities (*d*).

(2) In payment to any person absolutely entitled or empowered to give an absolute discharge (*e*).

Gerard v. Stafford, [1904] 2 Ch. 72. Capital money arising from land has been applied in discharging estate and succession duties on heirlooms (*Re Egmont's (Earl) Settled Estates*, *Lefroy v. Egmont*, [1912] 1 Ch. 251).

(*g*) See titles HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 215 *et seq.*; SEWERS AND DRAINS, pp. 738, 739, *post*.

(*r*) *Re Legh's Settled Estate*, [1902] 2 Ch. 274; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 226. The question whether a liability to repair *ratione tenuræ* is an incumbrance affecting the inheritance of the settled land was raised but not decided in *Re Sturmford and Warrington (Earl)*, *Payne v. Grey*, [1911] 1 Ch. 648; it has now been decided that it is not (*Re Hodgson's Settled Estate*, *Altamont v. Porsyth*, [1912] 1 Ch. 784).

(*s*) *Re Knatchbull's Settled Estate* (1885), 29 Ch. D. 588, C. A.

(*t*) Settled Land Acts (Amendment) Act, 1887 (50 & 51 Vict. c. 30), s. 1; and see title LAND IMPROVEMENT, Vol. XVIII., p. 292.

(*a*) See p. 633, *ante*.

(*b*) *Re Richardson*, *Richardson v. Richardson*, [1900] 2 Ch. 778.

(*c*) *Re Norton and Las Casas' Contract*, [1909] 2 Ch. 59; see note (*l*), p. 642, *ante*.

(*d*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21 (*i*). As to what investments are now permitted by law to trustees, see Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 1—7; title TRUSTS AND TRUSTEES.

(*e*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21 (*ix*). The words "any person . . . empowered to give an absolute discharge" allow of payment out to trustees for the purposes of the Acts (*Re Smith, Ex parte London and North Western Rail. Co. and Midland Rail. Co.* (1888), 40 Ch. D. 386, C. A.), who, if necessary, are appointed for the purpose of receiving the money (*Re Wright's Trustees* (1883), 24 Ch. D. 662; *Re Harrop's Trusts* (1883), 24 Ch. D. 717; *Re Wootton's Estate*, [1890] W. N. 159). The power to order payment out to trustees is, however, discretionary on the part of the court (*Re Smith, Ex parte London and North*

(8) In payment of costs, charges and expenses of and incidental to the exercise of any of the powers or the execution of any of the provisions of the Settled Land Acts (*f*).

(4) In payment for equality of exchange or partition of settled land (*g*).

(5) In purchase of the seigniori of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land (*h*).

(6) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life (*i*).

(7) In purchase of land in fee simple or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land (*k*). Ground rents may be purchased (*l*), but not an equity of redemption (*m*). Capital money arising from settled land in England cannot be applied in the purchase of land out of England, unless such purchase is expressly authorised by the settlement (*n*).

(8) In any other mode in which money produced by the exercise of a power of sale under the settlement is applicable thereunder (*o*).

(9) Certain other methods of applying capital money have also been sanctioned by statute. Thus capital money may be applied in payment for or in discharge of a charge created in respect of

SECT. 1.
Under the
Settled
Land Acts.

Costs.

Equality of exchange or partition.

Purchase of seigniori.

Purchase of reversion.

Purchase of freehold and leasehold land.

Modes authorised by settlement.

Other statutory methods.

Western Rail. Co. and Midland Rail. Co. (1888), 40 Ch. D. 386, C. A.; see Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 14; and see p. 644, *ante*.

(*f*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21 (*x*); and, as to what are such costs, charges and expenses, see pp. 648 *et seq.*, *post*. As to the Settled Land Acts, see note (*e*), p. 624, *ante*.

(*g*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21 (*iv*). As to equality of exchange or partition, see p. 657, *post*.

(*h*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21 (*v*).

(*i*) *Ibid.*, s. 21 (*vi*). There is no statutory power to adjust the rights as between the tenant for life and the remaindermen on the purchase of a reversion.

(*k*) *Ibid.* s. 21 (*vii*). If, however, the capital money arises from land subject to a trust for sale (see p. 625, *ante*) it cannot be invested in land unless such investment is authorised by the settlement (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 63 (2) (*ii*)).

(*l*) *Re Peyton's Settlement Trust* (1869), L. R. 7 Eq. 463; but see *Ex parte Gartside* (1837), 6 L. J. (CH.) 266.

(*m*) *Re Radnor's (Earl) Settled Estates*, [1898] W. N. 174.

(*n*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 23. As to expenditure of capital money on improvements on land out of England but settled by an English settlement, see *Re Gurney's Marriage Settlement, Sullivan v. Gurney*, [1907] 2 Ch. 496, following an unreported decision, *Re Strousberg* (1886) (see 32 Sol. Jo. 625); and see *Re Dunraven's (Earl) Settled Estates*, [1907] 2 Ch. 417.

(*o*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21 (*xi*). A testator may add to the methods of applying capital, but he cannot limit the discretion given to the tenant for life by the Settled Land Acts, though it may be controlled by the court if its exercise, though *bonâ fide*, would work injustice to any parties concerned (*Re Richardson, Richardson v. Richardson*, [1900] 2 Ch. 778); and see p. 636, *ante*.

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agricultural improvements (a), or in the provision of dwellings for the working classes (b), or in paying estate duty in respect of property comprised in the settlement (c).

(iii.) *Expenses Incurred in the Execution of the Acts.*

Costs
incurred by
tenant for
life.

1125. The tenant for life is entitled to be paid out of capital money arising under the Act (d) the costs incurred but not recovered by him of an unsuccessful action by the remaindermen to prevent his exercising his statutory power of sale (e), and also the costs of a wholly or partially unsuccessful attempt to sell (f). If the tenant for life consists of several persons, each is entitled to employ his own solicitor in completing a sale, and to have his separate costs out of the purchase-money (g). An estate agent's commission for procuring a building lease for a long term is payable out of capital money (h), but commission on a short letting is an income charge, which cannot be thrown on capital (i); and an intention to deal with portions of an estate does not enable a tenant for life to obtain out of capital money payment of the costs of making an elaborate survey of the whole estate (k). The costs of obtaining the consent of the mortgagees of the life estate to a sale, although costs incidental to the exercise of the statutory power, ought not as a rule to be directed by the court to be paid out of capital money (l); and the tenant for life must bear the cost of obtaining vacant possession of settled land for the purpose of executing an authorised improvement (m).

Costs of
application
to court.

1126. The court may, if it thinks fit, in its discretion order the costs of any application to it under the Settled Land Acts (n) to be paid out of the settled property (o). When the court directs that any costs be paid out of settled property, the same are, subject to the direction of the court, to be raised and paid out of capital money

(a) Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 20; see title LAND IMPROVEMENT, Vol. XVIII., p. 288.

(b) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 7; see title LAND IMPROVEMENT, Vol. XVIII., p. 286.

(c) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9 (7); see title ESTATE AND OTHER DEATH DUTIES, Vol. XIII., p. 223. Capital money arising from other parts of the estate may be applied in paying succession duty in respect of heirlooms (*Re Egmont's (Earl) Settled Estates*, *Lefroy v. Egmont*, [1912] 1 Ch. 251).

(d) See p. 623, *ante*.

(e) *Re Llewellyn*, *Llewellyn v. Williams* (1887), 37 Ch. D. 317.

(f) *Re Smith's Settled Estates*, [1891] 3 Ch. 65. As to the form of order for payment of costs of sale, see *Re Rudd*, [1887] W. N. 251. The trustees need not tax the tenant for life's costs, but are entitled to an opportunity of considering the bills and whether they shall require them to be taxed (*Re Peel's (Sir Robert) Settled Estates*, [1910] 1 Ch. 389).

(g) *Smith v. Lancaster*, [1894] 3 Ch. 439, C. A.

(h) *Re Maryon Wilson's Settled Estates*, [1901] 1 Ch. 934.

(i) *Re Leveson-Gower's Settled Estates*, [1905] 2 Ch. 95.

(k) *Re Eyton's Settled Estate*, [1888] W. N. 254.

(l) *Cardigan v. Curzon-Howe* (1889), 41 Ch. D. 375, C. A.; *Sebright v. Thornton*, [1885] W. N. 176. This is so whether the money is in court or held by the trustees (*Re Peel's (Sir Robert) Settled Estates*, *supra*).

(m) *Re De La Warr's (Earl) Gooden Beach Settled Estate*, [1913] 1 Ch. 142, C. A.

(n) See note (e), p. 624, *ante*.

(o) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 46 (6).

arising under the Act (*p*) or other money liable to be laid out in the purchase of land to be made subject to the settlement, or out of investments representing such money, or out of income of any such money or investments, or out of accumulations of income of land, money, or investments, or by means of sale or mortgage of the settled land, or part thereof, or partly in one of those modes, partly in another or others, or in any such other mode as the court thinks fit (*q*).

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1127. Increment value duty or reversion duty (*r*) which becomes payable on a sale or lease under the statutory powers, is presumably costs, charges and expenses incidental to the exercise of the statutory powers, and therefore payable out of capital (*s*).

Duties on
land values.

1128. If the tenant for life, or any person having the powers of a tenant for life, or the trustee, is the person who is liable to pay any sums on account of either increment value duty or reversion duty (*r*), he is entitled to charge by deed upon the land or interest in land any amount paid by him or which he may then be or may become liable to pay in respect of those duties, and the amount of any expenditure which he may have reasonably incurred in connexion with the valuation (*t*), and the benefit of such charge may be transferred like a mortgage (*u*). But no deed executed for this purpose takes effect until notice has been given to the trustees of the settlement for the purposes of the Settled Land Acts (*a*).

Charges for
payments in
respect of
duties on
land values.

1129. The court (*b*) may, if it thinks fit, approve of any action,

Costs of
protection of
settled land.

(*p*) See p. 633, *ante*.

(*q*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 47.

(*r*) See title REVENUE, Vol. XXIV., pp. 557 *et seq.*, 571 *et seq.* Undeveloped land duty is payable out of income; see *ibid.*, pp. 575 *et seq.*

(*s*) Increment duty on a sale is clearly so payable; see *Re Smith-Bosanquet's Settled Estates* (1912), 107 L. T. 191; so also is increment value duty, in respect of leased or worked minerals, and payable annually under the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 22; see *ibid.*, s. 39 (1). Mineral rights duty is primarily payable out of income, but, if the duty assessed is represented in part by annual increment value duty paid in the same year in respect of minerals, to this extent the mineral rights duty appears to be payable out of capital (*ibid.*, s. 22 (6)); and see title REVENUE, Vol. XXIV., pp. 569, 581). It is doubtful whether reversion duty can strictly be said to be costs, charges, or expenses incidental to the exercise of the statutory powers; but a charge by the tenant for life for reversion duty would be an incumbrance redeemable out of capital, and probably the court would allow that to be done in one step which could be done in two (see note (*l*), p. 645, *ante*).

(*t*) As to the valuation, see title REVENUE, Vol. XXIV., pp. 559 *et seq.*, 571 *et seq.* Probably this includes the costs of the opposition by the tenant for life to an unfair valuation. The question, however, whether a valuation ought to be made for this purpose is one of discretion, and if honestly exercised the court does not interfere with it (*Re Knollys' Trusts*, *Saunders v. Haslam*, [1912] 2 Ch. 357, C. A.).

(*u*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 39 (1).

(*a*) *Ibid.*, s. 39 (2). As to the case where the tenant for life is an infant or a lunatic, see *ibid.*, s. 39 (3). As to the Settled Land Acts, see note (*e*), p. 624, *ante*; and, as to the trustees, see pp. 631, 632, *ante*.

(*b*) The Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 36, does not apply to opposition to a Bill by the committee on behalf of a lunatic, the power to present a petition to Parliament not being one conferred by the Settled Land Acts on a tenant for life (*Re Blake* (1895), 72 L. T. 280); but see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX.,

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defence, petition to Parliament, parliamentary opposition or other proceeding taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land (c) being or alleged to be subject to a settlement, and may direct that any costs, charges or expenses incurred or to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement (d). The tenant for life is not bound to obtain the sanction of the court before commencing proceedings (e), but, if he does so, it is at the risk of having payment of his costs out of capital refused (f).

Expense of
opposing Bill
in Parliament.

The court has also power under its general jurisdiction to order that moneys, forming part of the settled estate and subject to a trust to be laid out in the purchase of land, may be applied in repaying to the tenant for life the expenditure incurred in opposing a Bill before Parliament (g), or in an action to establish rights (h).

(iv.) *Devolution of Capital Money.*

Devolution of
capital money.

1130. Capital money arising under the Act (i), while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, are, for all purposes of disposition, transmission and devolution, considered as land, and are held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts as the land wherefrom the money arises would, if not disposed of, have been held and gone under the settlement (k), and the income of the securities is paid or applied as the income of the land would, if not disposed of, have been payable or applicable under the settlement (l). An appointee under a will of land does not, however, become entitled to fines or premiums paid to the appointor in consideration of the granting of building leases by him (m).

Personalty
uninvested
in land.

A declaration that personalty is to be held as capital money

p. 449; and see p. 650, *post*. As to the Court in Lunacy, see title *Courts*, Vol. IX., p. 94.

(c) Proceedings successfully prosecuted before the House of Lords to establish a claim to an earldom, whereby further litigation was avoided for the recovery of settled estates, were held to be proceedings taken for the protection of the settled land (*Re Aylesford's (Earl) Settled Estates* (1886), 32 Ch. D. 162). Costs have also been allowed of a petition by the lord of a manor to the ecclesiastical courts for a new faculty, whereby under a compromise the lord was granted certain rights of seating and burial, and of erecting memorial tablets in the south aisle of his parish church (*Re Mosley's Settled Estates* (1912), 56 Sol. Jo. 325).

(d) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 36, replacing the repealed Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 17.

(e) Under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 17, an application had to be made to the court before any proceedings were taken or costs incurred (*Re De La Warr's (Earl) Estates* (1881), 16 Ch. D. 587); but see *Re Willan's Settled Estates* (1882), 45 L. T. 745.

(f) *Re Yorke, Barlow v. Yorke*, [1911] 1 Ch. 370.

(g) *Re Ormrod's Settled Estate*, [1892] 2 Ch. 318; and *Stanford v. Roberts* (1882), 52 L. J. (Ch.) 50.

(h) *Hamilton v. Tighe*, [1898] 1 I. R. 123.

(i) See p. 633, *ante*.

(k) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 22 (5).

(l) *Ibid.*, s. 22 (6).

(m) *Re Mosses, Beddington v. Beddington*, [1902] 1 Ch. 100, C. A., affirmed, *sub nom. Beddington v. Baumann*, [1903] A. C. 13.

arising under the Act (n) does not convert it into realty, if it is never invested in land under the Settled Land Acts (a) or otherwise (b).

Securities on which an investment of capital money is made may be converted into money, which in turn is capital money arising under the Act (c).

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(v.) *Settlement of Land Acquired.*

1131. Freehold land acquired by purchase, or in exchange, or on partition, must be conveyed to the uses, on the trusts and subject to the powers and provisions, which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances admit, but not so as to increase or multiply charges or powers of charging (d).

Freeholds.

1132. Copyhold, customary, or leasehold land must be conveyed to and vested in the trustees of the settlement on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers and provisions to, on and subject to which freehold land is to be conveyed as aforesaid; so nevertheless that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under the age of twenty-one years, but shall on the death of that person under that age go as freehold land conveyed as aforesaid would go (e).

Copyholds
and
leaseholds.

1133. Land acquired by purchase, or in exchange, or on partition, may be made a substituted security for any charge in respect of money actually raised, and remaining unpaid, from which the settled land, or any part thereof, or any undivided share therein, has

Substituted
security.

(n) See p. 633, *ante*.

(a) See note (e), p. 624, *ante*.

(b) *Re Walker, Macintosh-Walker v. Walker*, [1908] 2 Ch. 705.

(c) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 22 (7); see pp. 633 *et seq.* *ante*.

(d) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 24 (1), (2). It is a general rule of construction that the court does not impute an intention to multiply charges, or trusts in the nature of charges, upon a trust estate in the absence of anything in the particular document to be construed to show such an intention (*Trew v. Perpetual Trustee Co.*, [1895] A. C. 264, P. C.; see p. 709, *post*). The provisions relating to land extend and apply as far as may be to mines and minerals, and to easements, rights and privileges over and in relation to land (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 24 (7)). If property vested in trustees by way of security for capital money advanced on mortgage becomes, by virtue of the Statutes of Limitation (see title LIMITATION OF ACTIONS, Vol. XIX., pp. 33 *et seq.*) or an order for foreclosure or otherwise, discharged from the right of redemption (see title MORTGAGE, Vol. XXI., pp. 156, 293 *et seq.*), the trustees, if the tenant for life or any person having the powers of a tenant for life so require, instead of selling the land forming the whole or any part of such property, must make such conveyance or execute such declaration of trust as may be required for giving effect to the directions contained in the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 24 (Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 9 (1), (4)).

(e) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 24 (3). As to settlements of leaseholds upon trusts to correspond with freeholds, see pp. 703 *et seq.*, *post*; title PERSONAL PROPERTY, Vol. XXII., p. 414.

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theretofore been released on the occasion and in order to the completion of a sale, exchange or partition (*f*). But where a charge (*g*) does not affect the whole of the settled land, then the land acquired may not be subjected thereto, unless such land is acquired either by purchase with money arising from the sale of land which was before the sale subject to the charge, or by an exchange or partition of land which, or an undivided share wherein, was before the exchange or partition subject to the charge (*h*).

Conveyance
of substituted
security.

On land being so acquired, any person who, by the direction of the tenant for life, so conveys the land as to subject it to any charge is not concerned to inquire whether or not it is proper that the land should be subjected to the charge (*i*).

SUB-SECT. 5.—Power of Sale.

Power of sale.

1134. The tenant for life may sell the settled land (*k*), or any part thereof (*l*), or any easement, right, or privilege of any kind over or in relation to such land (*m*). This power is absolute, and may be exercised free from any restrictions on a power of sale given to the trustees by the settlement, or by a private Act of Parliament (*n*).

Price.

1135. Every sale must be made for the best price that can reasonably be obtained (*o*), and it is a breach of duty for the tenant for life to delegate his authority and enter into an agreement to sell for a price to be fixed by someone else, as, for example, by an arbitrator (*p*). If, however, the sale is under powers conferred by Act of Parliament for certain public purposes, for example the

(*f*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 24 (4); compare *ibid.*, s. 5; and see p. 662, *post*.

(*g*) The word "charge" is not limited to charges existing in priority to the settlement (*Re Stamford's (Lord) Settled Estates* (1889), 43 Ch. D. 84, 94).

(*h*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 24 (5). Land purchased with money arising from the sale of heirlooms settled to devolve with land subject to a charge does not become subject to the charge affecting the settled land (*Re Marlborough (Duke) and Queen Anne's Bounty (Governors)*, [1897] 1 Ch. 712).

(*i*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 24 (6).

(*k*) As to the meaning of "settled land," see pp. 624, 625, *ante*.

(*l*) The tenant for life is empowered to sell the subsoil without the surface (*Re Pearson's Will* (1900), 83 L. T. 626). For a separate sale of minerals, see p. 662, *post*.

(*m*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 3 (i.). Nothing in the Settled Land Act, 1882 (45 & 46 Vict. c. 38), gives any person entitled in remainder any power of any sort or description to interfere with the right of the tenant for life to sell (*Wheelwright v. Walker* (1883), 23 Ch. D. 752).

(*n*) *Re Chaytor's Settled Estate Act* (1884), 25 Ch. D. 651.

(*o*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 4; and see *Wheelwright v. Walker* (1883), 48 L. T. 867 (where a purchaser of the reversion from a remainderman obtained an injunction to prevent the tenant for life from selling at a less price than he himself was willing to give). The ordinary power of sale in a settlement does not authorise a sale in consideration of a rentcharge (see title **POWERS**, Vol. XXIII., p. 73), and a sale can only be made under the statutory power for such consideration on a grant for building purposes; see p. 656, *post*. As to options to purchase, see *ibid*.

(*p*) *Re Wilton's (Earl) Settled Estates*, [1907] 1 Ch. 50.

erection of houses for the working classes (*q*), or for small holdings (*r*), the consideration may be such as can be reasonably obtained for the purpose, irrespective of the fact that a higher consideration might have been obtained if the land had been sold for a different purpose.

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1136. A sale may be made in one lot or in several lots, and either by auction or by private contract (*s*). The tenant for life may fix reserve biddings, and buy in at an auction (*t*). The sale may be made subject to any stipulations respecting title, or evidence of title, or other things (*a*). Any restriction or reservation with respect to building or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law permits, by covenant, condition, or otherwise, on the tenant for life and the settled land, or any part thereof, or on the other party and any land sold to him (*b*).

Mode of sale.

Conditions.

SUB-SECT. 6.—Power of Leasing.

1137. A tenant for life may lease the settled land (*c*), or any part thereof (*d*), or any easement, right, or privilege of any kind over or in relation to the same (*e*), for any purpose whatever, whether

General
power.

(*q*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 7 (1); see title LAND IMPROVEMENT, Vol. XVIII., p. 286. The power applies only to buildings of a rateable value not exceeding £100 per annum (Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 18).

(*r*) Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 40 (4); see, generally, title SMALL HOLDINGS AND SMALL DWELLINGS.

(*s*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 4 (3). If the sale is by lots, the tenant for life is vendor in relation to each of the contracts into which he eventually enters, and there is no objection in principle to his solicitors giving him notice before the sale that on all sales under a certain amount they will not act under the scale, but will make detailed charges (*Re Peel's (Sir Robert) Settled Estates*, [1910] 1 Ch. 389). As to sale of land, generally, see title SALE OF LAND, pp. 285 *et seq.*, *ante*.

(*t*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 4 (4).

(*a*) *Ibid.*, s. 4 (5). As to sales by persons in a fiduciary position, see titles POWERS, Vol. XXIII., p. 73; TRUSTS AND TRUSTEES.

(*b*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 4 (6). If on a sale restrictive covenants are imposed under this provision on the land sold for the benefit of the unsold settled estate, the tenant for life has no power to give the purchaser an option at any future time to obtain a release of the covenants (*Palmer v. Grand Junction Waterworks Co.* (1902), 86 L. T. 352).

(*c*) As to the meaning of "settled land," see pp. 624, 625, *ante*; and, as to leases of the mansion-house, see p. 641, *ante*. As to leases, generally, see title LANDLORD AND TENANT, Vol. XVIII., pp. 331 *et seq.*

(*d*) This authorises a lease of the surface of the settled land, reserving the mines and minerals (*Re Gladstone, Gladstone v. Gladstone*, [1900] 2 Ch. 101, C. A., overruling *Re Newell and Nevill's Contract*, [1900] 1 Ch. 90; *Re Rutland's (Duke) Settled Estates, Rutland (Duke) v. Bristol (Marquis)*, [1900] 2 Ch. 206); see p. 662, *post*.

(*e*) It seems to have been the view of LINDLEY, M.R. (*Re Gladstone, Gladstone v. Gladstone*, *supra*, at p. 105), that the power to lease does not authorise a lease of part of the land with sporting rights over the rest, *sed quærens*. A right to lessees of mines during the continuance of their lease so to work the mines as to let down or damage the surface of the

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Length of
term.

Extent of
power.

involving waste or not (*f*), for a term not exceeding in the case of a building lease (*g*) ninety-nine years, in the case of a mining lease (*h*) sixty years, and in the case of any other lease, twenty-one years (*i*).

1138. The leasing power of a tenant for life extends to the making of (1) a lease for giving effect to a contract entered into by any of his predecessors in title for making a lease, which, if made by the predecessor, would have been binding on the successors in title (*k*); (2) a lease for giving effect to a covenant for renewal, performance whereof could be enforced against the owner for the time being of the settled land (*l*); and (3) a lease for confirming, as far as may be, a previous lease being void or voidable; but every lease, as and when confirmed, must be such a lease as might at the date of the original lease have been lawfully granted under the statutory powers or otherwise, as the case may require (*m*).

Statutory
requirements
of all leases.

1139. Every lease must be by deed, and must be made to take effect in possession not later than twelve months after its date (*n*), unless it is one for a term that does not extend beyond three years at the best rent that can be reasonably obtained without fine, and that does not exempt the lessee from punishment for waste, in which case it may be made by writing under hand only (*o*).

Rent.

Every lease must reserve the best rent that can reasonably be obtained (*p*), regard being had to any fine taken (*q*), and to any

land is the lease of an easement, right, or privilege over the settled land (*Sitwell v. Londesborough (Earl)*, [1905] 1 Ch. 460).

(*f*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 6. For forms of such leases, see *Encyclopædia of Forms and Precedents*, Vol. XII., pp. 131, 254, 641.

(*g*) See pp. 655, 656, *post*.

(*h*) See pp. 656, 657, *post*.

(*i*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 6 (i.), (ii.), (iii.).

(*k*) *Ibid.*, s. 12 (i.). Under this provision a tenant for life can grant a lease with such terms and having exactly the same effect as if it had been granted by the settlor, a valid contract having been made by the settlor (owner in fee) (*Re Kemeys-Tynte, Kemeys-Tynte v. Kemeys-Tynte*, [1892] 2 Ch. 211).

(*l*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 12 (ii.).

(*m*) *Ibid.*, s. 12 (iii.).

(*n*) *Ibid.*, s. 7 (1). A lease containing a covenant for renewal is not within this provision; compare *Re Farnell's Settled Estates* (1886), 33 Ch. D. 599.

(*o*) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 7 (iii.).

(*p*) Leases made for the purposes of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 74 (1), or the Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 40 (4), may be made for such rent as can reasonably be obtained for the purpose; see pp. 652, 653, *ante*. If money is paid to the tenant for life to induce him to grant a lease, the rent reserved by the lease so granted cannot be considered as the best rent, although there is no evidence that a better rent could have been obtained (*Chandler v. Bradley*, [1897] 1 Ch. 315; *Re Handman and Wilcox's Contract*, [1902] 1 Ch. 599, C. A.).

(*q*) A fine received on any grant of a lease under the statutory powers is capital money arising under the Act (see p. 633, *ante*) (Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 4). But fines arising on the renewal of a lease where the tenant can compel a renewal are casual profits to which the tenant for life is entitled; see *Brigstocke v. Brigstocke* (1878), 8 Ch. D.

money laid out, or to be laid out, for the benefit of the settled land (r), and generally to the circumstances of the case (s).

Every lease must contain a covenant by the lessee for payment of the rent, which covenant must be a legal covenant that can be sued on at law (t), and a condition of re-entry on the rent not being paid within a time therein specified, not exceeding thirty days (u).

A counterpart of every lease must be executed by the lessee and delivered to the tenant for life, of which execution and delivery the execution of the lease by the tenant for life is sufficient evidence (v).

Failure to observe these conditions renders the lease void (a).

1140. A statement contained in a lease, or in an indorsement thereon, respecting any matter of fact or of calculation under the Act in relation to the lease, is, in favour of the lessee and those claiming under him, conclusive evidence of the matter stated (b).

1141. Every building lease (c) must be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected (d), or agreeing to erect, buildings new or additional, or having improved or repaired, or agreeing to improve or repair (e), buildings, or having executed, or

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Covenant
for rent.

Counterpart.

Effect of
recitals and
indorsements.

Building
leases.

357, C. A.; compare *Re Medows, Norie v. Bennett*, [1898] 1 Ch. 300; and see p. 607, *ante*.

(r) These words refer to money to be laid out under an obligation imposed by the transaction of lease on the tenant, and do not include voluntary past expenditure by him (*Re Chawner's Settled Estates*, [1892] 2 Ch. 192).

(s) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 7 (2).

(t) *Boyce v. Edbrooke*, [1903] 1 Ch. 836. Consequently a tenant for life cannot grant a lease to himself either alone or jointly with others (*ibid.*). An agreement takes the place of a covenant in the case of a lease under the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 7 (iii.); see p. 654, *ante*.

(u) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 7 (3). An outrageous omission of covenants might be evidence of fraud; see *Davies v. Davies* (1888), 38 Ch. D. 499.

(v) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 7 (4); and see title LANDLORD AND TENANT, Vol. XVIII., pp. 394 *et seq.*

(a) *Mogridge v. Clapp*, [1892] 3 Ch. 382, 398, C. A.; *Chandler v. Bradley*, [1897] 1 Ch. 315; see *Re Handman and Wilcox's Contract*, [1902] 1 Ch. 599, C. A. (where the point whether the lease was void or voidable was left open by the Court of Appeal).

(b) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 7 (5). This refers to any statement that the rent reserved is the best rent (*ibid.*, s. 7 (2)), or as to apportionment of rents on a contract for lease in lots (*ibid.*, s. 8 (3)), or as to the value of the lessee's interest in a surrendered lease (*ibid.*, s. 13 (5)).

(c) A building lease is a lease for any building purposes, which term includes the erecting and the improving of and the adding to and the repairing of buildings, or purposes connected therewith (*ibid.*, s. 2 (10) (iii.)); and see *Re Ellesmere (Earl)*, [1898] W. N. 18.

(d) These words do not include the case of a past voluntary expenditure by the lessee (*Re Chawner's Settled Estates*, *supra*; and see note (r), *supra*).

(e) These words include an agreement to lay out a fixed sum in improvements and repairs (*Re Daniell's Settled Estates*, [1894] 3 Ch. 503, C. A.), and appear to include a lease whereby the tenant covenants to do all necessary repairs; see *Truscott v. Diamond Rock Boring Co.* (1882), 20 Ch. D. 251, C. A.

SMOT. 1.
Under the
Settled
Land Acts.

Rent.
Land leased
in lots.

agreeing to execute, on the land leased, an authorised improvement for or in connexion with building purposes (*f*).

A peppercorn or a nominal or other rent less than the rent ultimately payable may be made payable for the first five years, or any less part of the term (*g*).

Where the land is contracted to be leased in lots, the entire amount of rent to be ultimately payable may be apportioned among the lots in any manner, but the annual rent reserved by any lease must not be less than 10s.; the total amount of the rents reserved on all leases for the time being granted must not be less than the total amount of the rents which, in order that the leases may conform with the statutory requirements, ought to be reserved in respect of the whole land for the time being leased; and the rent reserved by any lease must not exceed one fifth part of the full annual value of the land comprised in that lease with the buildings thereon when completed (*h*).

A lease, however, may be an improper exercise of the power; though it conforms in terms to these provisions (*i*).

Options in
building
leases.

1142. Any building lease, and any agreement for granting building leases, may contain an option, to be exercised at any time within an agreed number of years not exceeding ten, for the lessee to purchase the land leased at a price fixed at the time of the making of the lease, such price to be the best which, having regard to the rent reserved, can reasonably be obtained, and to be either a fixed sum of money or such a sum of money as shall be equal to a stated number of years' purchase of the highest rent reserved by the lease or agreement (*k*). Such price when received is for all purposes capital money arising under the Act (*l*).

Reservation
of rentcharge
on grant of
land for
building
purposes.

1143. Where on a grant for building purposes by a tenant for life the land is expressed to be conveyed in fee simple with or subject to a reservation thereof of a perpetual rent or rentcharge, the reservation operates to create a rentcharge in fee simple issuing out of the land conveyed, and having incidental thereto all statutory (*m*) powers and remedies for recovery thereof, and the rentcharge so created goes and remains to the uses, on the trusts, and subject to the powers and provisions which immediately before the conveyance were subsisting with respect to the land out of which it is reserved (*n*).

Mining leases.

1144. Mining leases must contain a covenant for payment of the rent, and a power of re-entry on default in payment for a period not

(*f*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 8 (1). As to authorised improvements, see title LAND IMPROVEMENT, Vol. XVIII., pp. 283 *et seq.*

(*g*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 8 (2).

(*h*) *Ibid.*, s. 8 (3).

(*i*) *Re Sabin's Settled Estates*, [1885] W. N. 197.

(*k*) Settled Land Act, 1889 (52 & 53 Vict. c. 36), s. 2.

(*l*) *Ibid.*, s. 3; and see p. 633, *ante*.

(*m*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 44; see title RENTCHARGES AND ANNUITIES, Vol. XXIV., pp. 514 *et seq.*

(*n*) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 9. The marginal note in the printed statutes to this provision is inaccurate, as the provision does not confer any power to reserve a rentcharge on a grant in fee simple. The enactment seems to relate to rentcharges reserved on a grant in perpetuity for building purposes under the authority of the court; see p. 657, *post*.

exceeding thirty days (*o*). The best rent must be reserved, but it may be ascertained or vary according to the acreage worked or the quantities of minerals gotten (*p*), and a portion must be set aside as capital money, unless a contrary intention is expressed in the settlement (*q*).

SECT. 1.
Under the
Settled
Land Acts.

1145. Where it is shown to the court (*r*) with respect to the district in which any settled land is situate either that it is the custom for land therein to be leased or granted for building or mining purposes for a longer term, or on other conditions than the statutory term or conditions specified in that behalf, or in perpetuity, or that it is difficult to make leases or grants for building or mining purposes of land therein except for a longer term or on other conditions than the statutory term or conditions specified in that behalf, or except in perpetuity, the court may, if it thinks fit, authorise the tenant for life generally to make from time to time leases or grants of or affecting the settled land in that district, or parts thereof, for any term (*s*), or in perpetuity, at fee farm or other rents, secured by condition of re-entry or otherwise, as expressed in the order of the court, or may, if it thinks fit, authorise the tenant for life to make any such lease or grant in any particular case (*t*). Thereupon the tenant for life, and, subject to any direction in the order of the court to the contrary, each of his successors in title, being a tenant for life, or having the powers of a tenant for life (*u*), may make in any case, or in the particular case, a lease or grant of or affecting the settled land, or part thereof, in conformity with the order (*a*).

Variation of
statutory
terms or
conditions.

SUB-SECT. 7.—*Powers of Exchange and Partition.*

1146. A tenant for life may make an exchange of the settled land (*b*), or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange (*c*), and where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, may concur in making partition of the entirety, including a partition in consideration of money paid for equality of partition (*d*).

Powers of
exchange and
partition.

(*o*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 7 (3). As to such mining leases, see, further, title MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 531, 532.

(*p*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 9.

(*q*) *Ibid.*, s. 11. As to the expression of a contrary intention, see *Re Daniels, Weeks v. Daniels*, [1912] 2 Ch. 90.

(*r*) For forms of summons, see Settled Land Act Rules, 1882, Appendix, Forms iii., iv., v.

(*s*) A building lease for a term of 500 years has been authorised in Ireland (*Re O'Connell's Estate*, [1903] 1 I. R. 154).

(*t*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 10 (1); and see Settled Land Act Rules, 1882, r. 9.

(*u*) See pp. 625 *et seq.*, *ante*.

(*a*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 10 (2).

(*b*) As to the meaning of "settled land," see pp. 624, 625, *ante*. As to exchange of the principal mansion-house, see p. 641, *ante*.

(*c*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 3 (iii.). As to exchange generally, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 295 *et seq.*

(*d*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 3 (iv.). As to partition generally, see title PARTITION, Vol. XXI., pp. 809 *et seq.*

**SECT. 1.
Under the
Settled
Land Acts.**

Considera-
tion.

Stipulations
and con-
ditions.

Every exchange and every partition must be made for the best consideration in land, or in land and money, that can reasonably be obtained (*e*), and such consideration may be the reservation of an undivided share in mines or minerals (*f*), but settled land in England may not be given in exchange for land out of England (*g*).

An exchange or partition may be made subject to any stipulations respecting title, or evidence of title, or other things (*h*), and on an exchange or partition restrictions or reservations may be imposed with regard to building or other user of land, or with respect to mines or minerals, as on a sale (*i*).

SUB-SECT. 8.—Powers as to Copyholds.

Powers to
enfranchise
copyholds.

1147. Where the settlement comprises a manor, the tenant for life may sell the seigniorship of any freehold land within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes, so as in every such case to effect an enfranchisement (*k*), which may be made with or without a regrant of any right of common or other right, easement, or privilege theretofore appendant or appurtenant to or held or enjoyed with the land enfranchised or reputed so to be (*l*).

Power to
license leases
by copy-
holders.

A tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof, as the tenant for life is by statute empowered to make of freehold land (*m*).

The licence.

The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of those fines, fees, or payments, and must be entered on the court rolls of the manor, of which entry a certificate in writing by the steward is sufficient evidence (*n*).

SUB-SECT. 9.—Power to Cut Timber.

Power to cut
timber.

1148. Where a tenant for life is impeachable for waste in respect of timber (*o*), and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees

(*e*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 4 (2). As to sales for the erection of dwellings for the working classes or allotments, see p. 653, *ante*.

(*f*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 17 (2).

(*g*) *Ibid.*, s. 4 (8).

(*h*) *Ibid.*, s. 4 (5).

(*i*) *Ibid.*, s. 4 (6); see p. 653, *ante*.

(*k*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 3 (ii.). As to enfranchisement of copyholds generally, see title COPYHOLDS, Vol. VIII., pp. 111 *et seq.*

(*l*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 4 (7).

(*m*) *Ibid.*, s. 14 (1); see pp. 653 *et seq.*, *ante*.

(*n*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 14 (2), (3).

(*o*) As to the rights of a tenant for life generally to cut down timber, see pp. 601, 602, *ante*.

of the settlement or an order of the court (*p*), may cut and sell that timber or any part thereof (*q*).

Three-fourths of the net proceeds of the sale must be set aside as and be capital money arising under the Act (*r*), and the other fourth part goes as rent and profits (*s*).

SMO. 1.
Under the
Settled
Land Acts.

Proceeds
of sale.

SUB-SECT. 10.—Power to Sell Heirlooms.

1149. Where personal chattels are settled on trust so as to devolve with land (*t*) until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land (*u*) may sell the chattels or any of them (*v*).

Power to sell
heirlooms.

The money arising from such sale is capital money arising under the Act (*a*), and must be paid, invested, or applied and otherwise dealt with in like manner in all respects as to other capital money arising under the Act (*b*), or may be invested in the purchase of

Proceeds
of sale.

(*p*) As to the form of summons, see Settled Land Act Rules, 1882, Appendix, Forms vi., vii.

(*q*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 35 (1). As to the cutting of timber planted as an improvement, see *ibid.*, s. 28 (2), and, as to the cutting of timber for executing authorised improvements, see *ibid.*, s. 29; and title LAND IMPROVEMENT, Vol. XVIII., p. 293.

(*r*) See p. 633, *ante*.

(*s*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 35 (2). Until severance has been effected, the timber remains part of the inheritance and the tenant for life is not absolutely entitled to it. Consequently, on a sale of the estate with the timber, the price of the timber to be ascertained at a valuation, he is in the same position as a tenant for life under the old law who was impeachable for waste selling under a power, and the amount of the valuation must be considered capital money, being really an addition to the price which the purchaser agrees to pay (*Re Llewellyn, Llewellyn v. Williams* (1887), 37 Ch. D. 317); and see pp. 602, 603, *ante*.

(*t*) Chattels settled to devolve with a dignity, e.g., a baronetcy, are chattels settled to devolve with land according to this provision, and can be sold under it by the holder for the time being of the dignity (*Re Rivett-Carnac's (Sir J.) Will* (1885), 30 Ch. D. 136). Chattels settled to devolve with land are insurable by the trustees of the settlement, and the premiums may be paid out of the income of capital money in their hands (*Re Egmont's (Earl) Trusts, Lefroy v. Egmont (Earl)*, [1908] 1 Ch. 821); and see p. 614, *ante*.

(*u*) The "land" means the land with which the chattels are to devolve, and it makes no difference that the land and chattels are settled by different instruments (*Re Stafford's (Lord) Settlement and Will, Gerard v. Stafford*, [1904] 2 Ch. 72). As to the settlement of chattels to devolve with land, see pp. 703 *et seq.*, *post*.

(*v*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 37 (1). Prior to the passing of this enactment there was no jurisdiction in the court to sell chattels settled in strict settlement (*D'Eyncourt v. Gregory* (1876), 3 Ch. D. 635), except for the purpose of discharging debts (*Fane v. Fane* (1876), 2 Ch. D. 711). The Settled Land Act, 1882 (45 & 46 Vict. c. 38), does not confer any power to lease chattels, and a tenant for life who lets a house with the chattels in it under the statutory powers is not entitled to any part of the compensation recovered from the tenant in respect of chattels damaged or missing (*Re Lacon's Settlement, Lacon v. Lacon*, [1911] 1 Ch. 351; reversed on another point, [1911] 2 Ch. 17, C. A.).

(*a*) See p. 633, *ante*.

(*b*) As to the application of "capital money arising under the Act," see pp. 644 *et seq.*, *ante*. Money arising from the sale of chattels settled to devolve

SECT. 1.
Under the
Settled
Land Acts.

Control of
court.

Circum-
stances
affecting
exercise
of court's
discretion.

Purchase of
new mansion-
house.

other chattels of the same or any other nature which, when purchased, must be settled and held on the same trusts and devolve in the same manner as the chattels sold (c). But no such sale or purchase of chattels may be made without an order of the court (d). This controlling power of the court is a discretionary power, and must be exercised with regard to the circumstances of each particular case (e).

As a general rule, the circumstance that the tenant for life, who is in the position of a trustee having a discretionary power of sale which must be honestly exercised in the interest of all parties concerned (f), has incumbered his life estate under the settlement ought to be excluded from consideration by the court (g), but the court does not sanction a sale merely to relieve a tenant for life from the consequences of his own extravagance (h), or to enable him to pay succession duties and live in the mansion-house (i), or merely to increase his income (k). Moreover, as public considerations do not intervene, the court may be less ready to consent to the sale of heirlooms than to the sale of a mansion-house (l). A sale, however, has been sanctioned to enable the tenant for life to keep up his position, where he was in straitened circumstances through no fault of his own (m).

On the purchase of a new mansion-house, chattels settled to devolve with the old one may be sold if not suitable to be

with land has been allowed to be applied in the discharge of incumbrances, notwithstanding that the position of an infant tenant in tail in remainder was thereby prejudiced (*Re Marlborough's (Duke) Settlement, Marlborough (Duke) v. Marjoribanks* (1885), 30 Ch. D. 127; affirmed (1886), 32 Ch. D. 1, C. A.; *Re Stafford's (Lord) Settlement and Will, Gerard v. Stafford*, [1904] 2 Ch. 72). It has also been applied in payment for authorised improvements (*Re Houghton Estate* (1885), 30 Ch. D. 102). As to authorised improvements, see title LAND IMPROVEMENT, Vol. XVIII., p. 283, note (f).

(c) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 37 (2). The repair and renovation of other heirlooms settled by the same settlement, but remaining unsold, is within this provision (*Re Waldegrave, Waldegrave (Earl) v. Selborne (Earl)* (1899), 81 L. T. 632).

(d) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 37 (3). For the form of summons, see Settled Land Act Rules, 1882, Appendix, Form vii. Service on the children of the tenant for life is not required when their interests are sufficiently represented by the trustees (*Re Brown's Will* (1884), 27 Ch. D. 179). On the other hand, service on a remainderman has been directed, to relieve the trustees from the sole burden of arguing the case (*Re Radnor's (Earl) Will Trusts* (1890), 45 Ch. D. 402, 404, C. A.).

(e) *Ibid.*, at pp. 407, 418, 424; *Re Hope's Settled Estates* (1910), 26 T. L. R. 413.

(f) *Re Radnor's (Earl) Will Trusts, supra*; *Re Hope's Settled Estates, supra*.

(g) *Re Marlborough's (Duke) Settlement, Marlborough (Duke) v. Marjoribanks, supra*; *Re Beaumont's Settled Estates* (1888), 58 L. T. 916; *Re Radnor's (Earl) Will Trusts, supra*, at p. 410.

(h) *Re Hope's Settlement* (1893), [1899] 2 Ch. 691, n.; *Re Hope, De Celto v. Hope*, [1899] 2 Ch. 679, C. A.

(i) *Re Featherstonhaugh's Settlement* (1898), 14 T. L. R. 167.

(k) *Re Sebright, Sebright v. Brownlow* (1912), 28 T. L. R. 191.

(l) *Bruce (Lord Henry) v. Ailesbury (Marquis)*, [1892] A. C. 356, 363.

(m) *Re Thynne (Lord John)* (1884), 77 L. T. Jo. 195 (where the income had been reduced by agricultural depression); *Re Townshend's Settlement* (1904), 89 L. T. 691; but see *Re Beaumont's Settled Estates, supra*.

removed (*n*), and, where chattels were directed to be annexed to and at all times kept in the mansion-house, the court declined to make an order for sale of the house without a direction as to what should be done with the chattels (*o*). No statutory provision is made for the authority of the court being given *ex post facto*, but where an advantageous sale had been made a direction was given that the trustees should take no steps to recover the sold chattels (*p*).

SECT. 1.
Under the
Settled
Land Acts.

Trustees having a power of sale of settled land, but having no power of sale of chattels settled to devolve with the land, are trustees for the purposes of the Acts for the sale of such chattels, and can give a good discharge for the purchase-money (*q*).

Trustees for
the purposes
of the Acts.

SUB-SECT. 11.—Power to Mortgage.

1150. The tenant for life may by mortgage (*r*) of the settled land raise money required (*s*) for enfranchisement (*t*), or for equality of exchange or partition (*a*), or for the amount required for the purpose of discharging an incumbrance (*b*) on the settled land or part thereof, the amount so required including the amount properly required for payment of the costs of the transaction (*c*).

Power to
mortgage.
Purposes for
which money
may be raised.

1151. The mortgage may be of the settled land or any part thereof, and may be given over the entire property, although the incumbrance to be discharged affects only a part (*d*), but a tenant for life is not justified in trying to preserve a heavily incumbered

Exercise of
power.

(*n*) *Browne v. Collins* (1890), 62 L. T. 566.

(*o*) *Re Brown's Will* (1884), 27 Ch. D. 179.

(*p*) *Re Ames, Ames v. Ames*, [1893] 2 Ch. 479.

(*q*) *Constable v. Constable* (1886), 32 Ch. D. 233; and see pp. 631, 632, *ante*.

(*r*) For forms, see *Encyclopædia of Forms and Precedents*, Vol. VIII., pp. 546, 578, 623.

(*s*) "Required" does not mean absolutely necessary, but reasonably required having regard to the circumstances of the settled land. It includes not only the case of the calling in of a mortgage by the mortgagee, but also all cases in which the economical administration of the settled estate reasonably demands that a mortgage shall be paid off, whether for the purpose of transfer or otherwise (*Re Clifford, Scott v. Clifford*, [1902] 1 Ch. 87). Where something is proposed to be done which ought to be done and the money is not forthcoming, then the money is required (*Re Bruce, Halsey v. Bruce*, [1905] 2 Ch. 372, 376).

(*t*) "Enfranchisement" includes the conversion of leasehold into freehold by purchase of the reversion (*Re Bruce, Halsey v. Bruce, supra*).

(*a*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 18.

(*b*) This includes the expenses of making a street which have become a charge on the settled land either under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 257 (*Re Smith's Settled Estates*, [1901] 1 Ch. 689), or under the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 13 (*Re Pizzi, Scrivener v. Aldridge*, [1907] 1 Ch. 67), but does not include any annual sum payable only during a life or lives, or during a term of years absolute or determinable (Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 11 (2)).

(*c*) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 11 (1). As to raising costs on mortgage by order of the court, see pp. 648, 649, *ante*.

(*d*) *Hampden v. Buckinghamshire (Earl)*, [1893] 2 Ch. 531, C. A.; *Re Monson's (Lord) Settled Estates*, [1898] 1 Ch. 427; *Re Ooull's Settled Estates*, [1905] 1 Ch. 712.

SECT. 1.
Under the
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Land Acts.

estate by mortgaging it if he thereby sacrifices the interest of existing incumbrancers upon it (e). The mortgage may be created by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land or any part thereof or otherwise, and the money so raised is capital money arising under the Act (f), and must be paid or applied accordingly (f).

SUB-SECT. 12.—Ancillary Powers.

(i.) Power to Shift Incumbrances.

Power to shift
incumbrances.

1152. Where on a sale, exchange, or partition there is an incumbrance (g) affecting land sold, or given in exchange or on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, and by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly (h).

(ii.) Power to Deal with Surface and Minerals Separately.

Power to deal
with surface
and minerals
separately.

1153. A sale, exchange, partition, or mining lease may be made either of land; with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, wayleaves (i), or rights of way, rights of water and drainage, and other powers, easements, rights, or privileges for or incident to, or connected with mining purposes, in relation to the settled land, or any part thereof, or any other land (k).

(iii.) Creation of Easements.

Creation of
easements.

1154. On an exchange or partition any easement, right, or privilege of any kind may be reserved, or may be granted over or in relation to the settled land or any part thereof, or other land or an easement, right, or privilege of any kind may be given or taken

(e) *Hampden v. Buckinghamshire (Earl)*, [1893] 2 Ch. 531, C. A.

(f) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 18; Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 11 (1); and, as to its application, see pp. 644 *et seq.*, *ante*.

(g) This includes a rentcharge created under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114) (*Re Strafford (Earl) and Maples*, [1896] 1 Ch. 235, C. A.); and, as to such charges, see title LAND IMPROVEMENT, Vol. XVIII., pp. 296 *et seq.*

(h) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 5. Incumbrances, at any rate such as might lawfully be discharged out of capital money, might on a sale be discharged by the method provided by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 5; see title SALE OF LAND, p. 414, *ante*. For forms of transfer of such incumbrance, see Encyclopædia of Forms and Precedents, Vol. VIII., pp. 578, 918.

(i) This enables the grant of a wayleave for foreign coal; in respect of such a wayleave no separate rent need be reserved and, if the circumstances of the particular case justify it, it may be granted for only a nominal rent after the ceasing of the minimum rent required by a mining lease (*Re Aldam's Settled Estate*, [1902] 2 Ch. 46, C. A.).

(k) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 17 (1).

in exchange or on partition for land or for any other easement, right, or privilege of any kind (l).

SECT. 1.

Under the
Settled
Land Acts.

(iv.) *Power to Accept Surrender of Leases.*

1155. A tenant for life may, for or without consideration, accept a surrender of any lease of settled land, whether made under the statutory powers or not, in respect of the whole land leased or any part thereof, with or without an exception of all or any of the mines or minerals therein, or in respect of mines or minerals or any of them (m). If compensation for a surrender is payable to the lessee, there is no statutory power which enables the tenant for life to apply capital money arising under the Act (n) for the purpose, but if on the surrender, and wholly or partly in consideration therefor, a new lease is granted, whether for the same or for any extended or other term, and whether or not subject to the same or any other covenants, provisions, or conditions, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of rent to be reserved, and of the nature of the covenants, provisions, and conditions to be inserted in the new lease (o).

Power to
accept
surrender
of leases.

Compensation
payable to
lessee.

If compensation is payable by the lessee, then, in a case outside the Settled Land Acts (p), money paid to a legal tenant for life as the consideration for accepting the surrender of a lease belongs to that life tenant (q). The reason for this, however, is that *prima facie* the position of a legal tenant for life is not fiduciary, and also that in cases where powers of leasing are conferred on a legal or equitable tenant for life by deed or will such powers are construed as non-fiduciary and as having no reference to the interests of the remaindermen, but only to those of the tenant for life. On the other hand, if the tenant for life accepts a surrender under the Settled Land Acts (p), he must do so in the interests not only of himself, but of the remaindermen, and if he receives a consideration for accepting it, then a court of equity distributes the money between the tenant for life and the remainderman on principles which it thinks fair (r).

Compensation
payable by
lessee.

(l) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 5. The words "on an exchange or partition" do not govern the whole provision, and an exchange of easements may be authorised apart from any exchange or partition of land (*Re Bracken's Settlement*, [1903] 1 Ch. 205). It is doubtful whether this provision authorises an exchange of easements between two settled estates (*Re Brotherton, Brotherton v. Brotherton, Re Markham's Settlement* (1907), 77 L. J. (CH.) 58), but such an arrangement can be carried out by cross sales of the easements (S. C. (1908), 77 L. J. (CH.) 373, C. A.).

(m) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 13 (1).

(n) See p. 633, *ante*.

(o) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 13 (5).

(p) See note (e), p. 624, *ante*.

(q) *Re Hunloke's Settled Estates, Filzroy v. Hunloke*, [1902] 1 Ch. 941; see p. 608, *ante*; and see pp. 635, 636, *ante*.

(r) *Re Rhodes, Sanders v. Hobson*, [1909] 1 Ch. 815 (where the compensation money was directed to be paid by instalments to the tenant for life or other the person or persons entitled for the time being; though the surrendered lease was a mining lease, no portion of the compensation

SECT. 1.
Under the
Settled
Land Acts.

Lease of
surrendered
land or
mines.

On a surrender of a lease in respect of part only of the land or mines or minerals leased, the rent may be apportioned (*s*).

On a surrender, the tenant for life may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots (*t*). Such new or other lease may comprise additional land or mines and minerals, and may reserve any apportioned or other rent (*u*), but it must conform with the statutory requirements as to leases (*v*).

(v.) *Power to Dedicate Land for Streets and Open Spaces.*

Dedication of
land for
streets and
open spaces.

1156. On or in connexion with a sale or grant for building purposes or a building lease, the tenant for life, for the general benefit of the residents on the settled land or on any part thereof (*w*), may cause or require any parts of the settled land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces, for the use, gratuitously or on payment, of the public or individuals, with sewers, drains, watercourses, fencing, paving, or other works necessary or proper in connexion therewith (*x*), and may secure the continuance of such appropriation by vesting such lands either in the trustees of the settlement or any other trustees or company or public body, and may execute any deed declaring the mode, terms, and conditions of such appropriation (*a*).

(vi.) *Power to Contract.*

Power to
contract.

1157. A tenant for life may contract to exercise the statutory powers conferred on him, that is, he may contract to make any sale, exchange, partition, mortgage or charge (*b*), and may, with or without consideration, vary or rescind the contract as if absolute owner, provided that the varied contract is within the statutory powers, any monetary consideration paid for such variation or rescission being capital money arising under the Act (*c*). He may contract to make any lease, and may vary the terms of any such lease, with or without

money was directed to be treated as capital). A tenant for life who is unimpeachable for waste is entitled to damages recovered from a tenant under a lease granted under the statutory powers for breach of a covenant to repair (*Re Lacon's Settlement*, *Lacon v. Lacon*, [1911] 2 Ch. 17, C. A., reversing S. C., [1911] 1 Ch. 351); and see pp. 607, 608, *ante*.

(*s*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 13 (2).

(*t*) *Ibid.*, s. 13 (3).

(*u*) *Ibid.*, s. 13 (4).

(*v*) *Ibid.*, s. 13 (6); see pp. 653 *et seq.*, *ante*.

(*w*) Any appropriation or dedication must be in connexion with a building scheme and for the benefit of the settled land (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 16).

(*x*) *Ibid.*, s. 16 (i.). For the similar power conferred on the court by the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 20, see p. 679, *post*. The expenses of making streets and other works under this provision may be raised out of capital money; see title LAND IMPROVEMENT, Vol. XVIII., p. 285. As to open spaces generally, see title OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., pp. 577 *et seq.*

(*a*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 16 (ii.), (iii.).

(*b*) *Ibid.*, s. 31 (1) (i.). For various forms of such contracts, see *Encyclopædia of Forms and Precedents*, Vol. XII., pp. 151, 166, 169, 789.

(*c*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 31 (1) (ii.); and see p. 633, *ante*.

consideration, but so that the lease is within the statutory powers(*d*), and may accept the surrender of a contract for a lease, and make a new contract in the like manner and on the like terms on which he might accept the surrender of a lease and make a new lease(*e*), but a statutory preliminary contract for or relating to a lease is no part of the title or evidence of the title of any person to the lease or to the benefit thereof(*f*). He may also enter into a contract for or relating to the execution of any statutory improvement, or to do any act for carrying any statutory purpose into effect, and may vary or rescind such contract(*g*).

SECT. 1.
Under the
Settled
Land Acts.

A contract made under the statutory power binds, and enures for the benefit of, the settled land, and is enforceable by and against every successor in title for the time being of the tenant for life, and may be carried into effect by such successor, who may vary and rescind it as if it had been made by himself(*h*). The court may on the application(*i*) of the tenant for life or of any such successor, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying or rescinding thereof(*k*), but it cannot adjudicate on the claims of persons not parties to the contract(*l*).

Effect of
statutory
contract.

(vii.) *Completion of Sale etc. by Conveyance.*

1158. On a sale, exchange, partition, lease, mortgage, or charge, the tenant for life may as regards land sold, given in exchange or on partition, leased, mortgaged, or charged, or intended so to be, including copyhold or customary or leasehold land vested in trustees, or as regards easements or other rights or privileges sold or leased, or intended so to be, convey or create the same by deed, for the estate or interest the subject of the settlement(*m*) or for any less

Completion
of sale by
deed.

(*d*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 31 (1) (iii.). It seems that this provision would not authorise a contract for a lease containing a covenant for renewal or the insertion of such a covenant in a lease; see *Re Farnell's Settled Estates* (1886), 33 Ch. D. 599. An option to purchase may be inserted in a building lease; see p. 656, *ante*.

(*e*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 31 (1) (iv.). As to the acceptance of surrenders of leases, see pp. 663, 664, *ante*.

(*f*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 31 (4); see *Hughes v. Fanagan* (1891), 30 L. R. Ir. 111, 117, C. A.

(*g*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 31 (1) (v.), (vi.). As to statutory improvements, see title LAND IMPROVEMENT, Vol. XVIII., pp. 283 *et seq.*

(*h*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 31 (2). As the contract enures for the benefit of the settled land, a forfeited deposit is capital money; compare *Shrewsbury (Earl) v. Shrewsbury (Countess)* (1854), 18 Jur. 397.

(*i*) As to applications to the court, see p. 633, *ante*.

(*k*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 31 (3). For an order under this provision, see *Re Ailesbury (Marquis) and Iveagh (Lord)*, [1893] 2 Ch. 345, 358.

(*l*) *Re Ailesbury Settled Estates* (1893), 62 L. J. (CH.) 1012.

(*m*) These words comprise, by force of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (2) (see note (*m*), p. 625, *ante*), a reversion which is separated from the particular estate by the settlement itself and remains vested in the grantor (*Re Hunter and Hewlett's Contract*, [1907] 1 Ch. 46). As to settled copyholds or customary lands, see title COPYHOLDS, Vol. VIII., p. 108.

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Under the
Settled
Land Acts.**

**Effect of
deed.**

estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease or mortgage (*n*).

1159. Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under the Settled Land Acts (*o*) is effectual to pass the land conveyed, or the easements, rights, or privileges created, subject to all estates, interests and charges having priority to the settlement (*p*), but discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests and charges subsisting or to arise thereunder (*q*), with the exception of all such estates, interests and charges as have been conveyed or created for securing money actually raised at the date of the deed (*r*), and subject to all

(*n*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 20 (1).

(*o*) See note (*e*), p. 624, *ante*. A deed which the tenant for life has no power to grant under the Acts is not validated by this provision (*Re Newell and Nevill's Contract*, [1900] 1 Ch. 90, overruled on another point by *Re Gladstone, Gladstone v. Gladstone*, [1900] 2 Ch. 101, C. A.). The words "to the extent and in the manner to and in which it is expressed or intended to operate" mean not further or otherwise than expressed or intended. A lease, therefore, made by a tenant for life, who believes himself to be absolute owner, is valid, provided that the lease is one which could be made under the statutory powers (*Mogridge v. Clapp*, [1892] 3 Ch. 382, C. A.). The case of a sale is different, inasmuch as a purchaser, by reason of the provisions of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 22 (see p. 642, *ante*), could hardly pay his purchase-money without ascertaining that there were trustees to whom it might be paid (*Mogridge v. Clapp*, *supra*, at p. 400).

(*p*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 20 (2) (i.); *Re Dickinson and Kelsall's Contract*, [1908] 1 Ch. 213. Examples of estates and interests having priority to the settlement are a mortgage in fee created prior to the settlement, the freehold in the case of a settlement of leaseholds, or a charge of succession duty, but not charges prior to the estate of the tenant for life but arising under the settlement (*Re Ailesbury (Marquis) and Iveagh (Lord)*, [1893] 2 Ch. 345).

(*q*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 20 (2). The land may be conveyed free from charges arising under the settlement, so long as they have not been actually raised (*Re Keck and Hart's Contract*, [1898] 1 Ch. 617; *Re Du Cane and Nettlefold's Contract*, [1898] 2 Ch. 96), even though, the settlement consisting of a series of deeds, the charges in question have been created by a deed prior to that by which the estate of the tenant for life is limited (*Re Ailesbury (Marquis) and Iveagh (Lord)*, *supra*; approved in *Re Mundy and Roper's Contract*, [1899] 1 Ch. 275, C. A.; *Re Phillimore's Estate*, *Phillimore v. Milnes*, [1904] 2 Ch. 460; and see pp. 671, 672, *post*). A person whose only interest is an equitable right to redeem as trustee for the tenant for life is not a necessary party to a conveyance (*Grainge v. Wilberforce* (1889), 5 T. L. R. 436, 437).

(*r*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 20 (2) (ii.); *Re Dickinson and Kelsall's Contract*, *supra*. These include mortgages created under the statutory powers (see pp. 661, 662, *ante*), or under any powers for that purpose contained in the settlement (*Re Dickinson and Kelsall's Contract*, *supra*, at p. 217), and charges for securing sums of money actually raised for portions (*Re Keck and Hart's Contract*, *supra*, at p. 624). They do not include mortgages on the life estate of the tenant for life (*Re Dickinson and Kelsall's Contract*, *supra*, not following *Re Sebright's Settled Estates* (1886), 33 Ch. D. 429, 433, C. A.; *Re Davies and Kent's Contract*, [1910] 2 Ch. 35, C. A.; see *Cardigan v. Curzon-Howe* (1888), 40 Ch. D. 338, 342; *Re Du Cane and Nettlefold's Contract*, *supra*, at p. 108;

leases and grants at fee farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth, or agreed so to be granted or made, before the date of the deed, by the tenant for life or by any of his predecessors in title, or by any trustees for him or them, under the settlement or under any statutory power, or being otherwise binding on the successors in title of the tenant for life (a).

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Under the
Settled
Land Acts.

1160. A tenant for life may make any conveyance necessary or proper for giving effect to a contract entered into by a predecessor in title, which if made by such predecessor would have been valid as against his successors in title (b).

Conveyance
in pursuance
of contract of
predecessor
in title.

SUB-SECT. 13. *Extensions of Statutory Powers.*

1161. A settlor may confer on the tenant for life, or the trustees of the settlement, any powers additional to or larger than the statutory powers (c), and such additional or larger powers, as far as may be, operate and are exercisable in the like manner and with all the like incidents, effects and consequences as if they were statutory powers, unless a contrary intention is expressed in the settlement (d). The statutory powers are themselves cumulative, and nothing in the statutes conferring them takes away, abridges, or prejudicially affects any power for the time being subsisting under a settlement, or by statute (e), or otherwise exercisable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise (f).

Extensions of
statutory
powers.

Statutory
powers
themselves
cumulative.

A tenant for life, if he purports to exercise "every power and

Re Mundy and Roper's Contract, [1899] 1 Ch. 275, 289, C. A.), or mortgages created by a remainderman (*Re Dickinson and Kelsall's Contract*, [1908] 1 Ch. 213). In an Irish case (*Connolly v. Keating*, [1903] 1 I. R. 353), the deed was taken to mean the deed creating the charge, not the deed for effecting the conveyance. It seems doubtful whether this interpretation is consistent with what has been said in *Re Keck and Hart's Contract*, [1898] 1 Ch. 617, and others of the foregoing cases. The principle is that mortgagees who have actually lent their money on the security of the land are regarded as strangers to the settlement, and are not to have the security which they bargained for on the land itself transferred to the purchase-money at the will of the tenant for life (*Re Mundy and Roper's Contract*, *supra*, at p. 289).

(a) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 20 (2) (iii.); *Re Dickinson and Kelsall's Contract*, *supra*.

(b) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 6. This provision does not apply to leases (*Re Kemeys-Tynte, Kemeys-Tynte v. Kemeys-Tynte*, [1892] 2 Ch. 211, 213). As to contracts for leases by a predecessor, see p. 654, *ante*.

(c) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 57 (1). For various forms of clauses conferring such additional powers, see *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 300—344.

(d) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 57 (2). If a testator desires to confer extended powers free from restrictions imposed on the exercise of the statutory powers, such desire should be expressed in the settlement.

(e) *E.g.*, the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18); *Re Bentinck (Lady) and London and North Western Rail. Co.* (1895), 12 T. L. R. 100.

(f) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 56 (1).

SECT. 1.
Under the
Settled
Land Acts.

Conflict
between
settlement
and statutory
provisions.

authority enabling him," is presumed to have exercised the power which is most beneficial to him (g).

1162. In case of conflict between the provisions of a settlement and the statutory provisions (h) relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any statutory power, the statutory provisions prevail: accordingly, notwithstanding anything in the settlement, the consent of the tenant for life is necessary to the exercise by the trustees of the settlement, or other person, of any power conferred by the settlement (i) exercisable for any statutory purpose (k). The result is that, if the tenant for life has one power by statute, and the trustees have another power under the settlement, there is a conflict between the provisions of the settlement and the statutory provisions. In such a case the tenant for life's power is paramount (l), and can be exercised free from any restraint imposed by the settlement, or by a private Act of Parliament (m); and the consent of the tenant for life is required for the exercise by the trustees of any power conferred by the settlement which embraces any of the objects embraced by any of the statutory powers (n). Where two or more persons together constitute the tenant for life, the consent of one of them suffices (o), but if undivided shares are separately settled the consent of all the tenants for life is required to the exercise by the trustees of a power of sale over the entirety (p). If, however, the settlement is one by way of trust for sale (q), any consent not required by the settlement is not to be deemed necessary to enable the trustees of the settlement, or any

Settlement
by way of
trust for sale.

(g) *Lonsdale (Earl) v. Lowther*, [1900] 2 Ch. 687; *Re Bentinck (Lady) and London and North Western Rail. Co.* (1895), 12 T. L. R. 100.

(h) The provisions here referred to are provisions connected with the execution of the power, e.g., consent of a third person, not with the results of such execution: they deal with the act of execution, not with the proceeds thereof (*Lonsdale (Earl) v. Lowther, supra*).

(i) Powers of management conferred by a private Act of Parliament, which does not incorporate the settlement or affect the limitations of the settled land thereunder, are not powers conferred by the settlement, and may be exercised without the consent of the tenant for life (*Talbot v. Scarisbrick*, [1908] 1 Ch. 812).

(k) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 56 (2). The consent need not be in writing, and if there is evidence of consent a purchaser from the trustees is not entitled to insist on the tenant for life joining in the conveyance (*Re Pope's Contract*, [1911] 2 Ch. 442).

(l) *Clarke v. Thornton* (1887), 35 Ch. D. 307; *Re Stamford's (Lord) Settled Estates* (1889), 43 Ch. D. 84; *Re Thomas, Weatherall v. Thomas*, [1900] 1 Ch. 319. These cases decided that if there is a power under the settlement to pay for improvements out of income and a power under the Settled Land Acts (see note (e), p. 624, *ante*) to pay for them out of capital, effect will be given to the statutory power, but the statutory provisions do not override an absolute trust to pay for improvements out of income, the tenant for life in such a case being entitled only to the net balance (*Re Farrington, Reigh v. Kane*, [1902] 1 Ch. 711).

(m) *Re Chaylor's Settled Estate Act* (1884), 25 Ch. D. 651.

(n) *Re Newcastle's (Duke) Estates* (1883), 24 Ch. D. 129, 139; *Re Atherton*, [1891] W. N. 85.

(o) Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 6 (2); see p. 626, *ante*.

(p) *Re Osborne and Bright's, Ltd.*, [1902] 1 Ch. 335.

(q) As to settlements by way of trust for sale, see p. 625, *ante*.

PART IX.—STATUTORY POWERS IN RELATION TO PROPERTY.

other person, to execute any of the trusts or powers created by the settlement (r).

SMOR. 1.
Under the
Settled
Land Acts.

Decision of
court on
matters of
doubt.

1163. If a question arises or a doubt is entertained respecting any of the foregoing matters, the court may on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested (s), give its decision, opinion, advice, or direction thereon (t).

SUB-SECT. 14.—*Protection of Purchasers and Others.*

1164. On a sale, exchange, partition, lease, mortgage or charge, a purchaser, lessee, mortgagee or other person, dealing in good faith with a tenant for life, is, as against all parties entitled under the settlement, conclusively taken to have given the best price, consideration or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the statutory requirements (u). The fact that the transaction is at an undervalue, without anything more, is insufficient to invalidate it, if the person dealing with the tenant for life acted in good faith (v), but, if he is not acting in good faith, the objection is open at the instance of the beneficiaries, not only against himself, but also against his transferees who have acquired the property without notice of the defect (a).

Protection of
purchasers
and others.

Effect of
mala fides.

1165. A vendor conveying land by the direction of the tenant for life so as to subject it to a charge is not concerned to inquire into the propriety of the transaction (b).

Vendor con-
veying by
direction of
tenant for
life.

SUB-SECT. 15.—*Protection of Trustees.*

1166. The trustees of the settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking or doing any such application, action, proceeding or thing as they might make, bring, take or do; and in case of purchase of land with capital money, or of an exchange, partition or lease, they are not liable for adopting any contract made by the tenant for life, nor are they bound to inquire as to the propriety of the purchase, exchange, partition or lease, or answerable as regards any price, consideration or fine, nor are they liable to see to, or answerable for, the investigation of the title (c), or answerable for a conveyance of land,

Protection of
trustees.

(r) Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 6 (1). This provision confirms the doctrine laid down in *Taylor v. Poncia* (1884), 25 Ch. D. 646, that an absolute trust for sale may be carried out by the trustees without the consent of the tenant for life, and it also enables the trustees to dispense with such consent in executing discretionary trusts or powers annexed to the trust for sale.

(s) The application must be by summons (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 46 (1); Settled Land Act Rules, 1882, r. 2). For form of summons, see Settled Land Act Rules, 1882, Appendix, Form xxi.

(t) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 56 (3).

(u) *Ibid.*, s. 54. As to notice to and receipt by the trustees of the settlement, see pp. 638 *et seq.*, *ante*.

(v) *Hurrell v. Littlejohn*, [1904] 1 Ch. 689.

(a) *Re Handman and Wilcox's Contract*, [1902] 1 Ch. 599, C. A.

(b) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 24 (6).

(c) The trustees are, however, entitled to see that the tenant for life has had proper professional advice as to the investigation of title (*Re Hotham*,

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Land Acts.**

if the conveyance purports to convey the land in the proper mode; nor are they liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease (*d*).

**Liability for
personal acts
only.**

1167. Each person who is for the time being a trustee of the settlement is also entitled to the ordinary protection afforded to trustees, and is answerable for what he receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts, and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for any loss not happening through his own wilful default (*e*).

**Expenses of
the trustees.**

1168. Trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them (*f*).

SUB-SECT. 16.—Dealings with Tenant for Life.

**Dealings with
tenant for
life.**

1169. Where a sale of settled land is to be made to a tenant for life, or a purchase is to be made from him of land to be made subject to the limitations of the settlement, or an exchange is to be made with him of settled land for other land, or a partition is to be made with him of land of which an undivided share is subject to the limitations of the settlement, the trustees of the settlement stand in the place of and represent the tenant for life, and, in addition to their powers as trustees, have all the powers of the tenant for life in reference to negotiating and completing the transaction (*g*).

**Position of
trustees.**

SUB-SECT. 17.—Compound Settlements.

(i.) Their Nature.

**Nature of
compound
settlements.**

1170. A settlement for the purposes of the Settled Land Acts (*h*) may consist of any number of instruments by virtue of which land stands limited to or in trust for any persons by way of succession (*i*).

Hotham v. Doughty, [1902] 2 Ch. 575, C. A.), and they are entitled to inquire into both the title and value of land which it is proposed to purchase (*Re Theobald* (1903), 19 T. L. R. 536). As to investigation of title generally, see title SALE OF LAND, pp. 341 *et seq.*, *ante*.

(*d*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 42.

(*e*) *Ibid.*, s. 41. For the liability of trustees for the acts of their agents and co-trustees generally, see title TRUSTS AND TRUSTEES.

(*f*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 43. For the rights of trustees to reimbursement generally, see title TRUSTS AND TRUSTEES.

(*g*) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 12. This provision only authorises sales, exchanges, and partitions to or with a tenant for life; a tenant for life cannot lease to himself. (*Boyce v. Edbrooke*, [1903] 1 Ch. 836), and the trustees have no power under the statute to grant a lease to him.

(*h*) See note (*e*), p. 624, *ante*.

(*i*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (1). As to the meaning of the words "limited to or in trust for any persons by way of

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Under the
Settled
Land Acts.

Where a series of settlements extending over several generations has been effected by means of powers of appointment and disentailing assurances, the whole series forms one settlement, so that a tenant for life can sell settled land free from jointures created under powers prior to the deed by which his life estate was created (*k*). No life estate under a resettlement need be expressed to be in restoration of a life estate subsisting under an original settlement (*l*). Where an owner in fee of land declared trusts under which he made himself tenant for life, with trusts in remainder to pay certain annuities, and subject thereto for himself absolutely, and then by his will devised the land to a tenant for life with remainders over, the tenant for life under the settlement compounded of the trust deed and the will was able to sell the land discharged from the annuities (*m*). The result is that, if land at the date of the final settlement is limited by previous deeds to persons by way of succession, such words being used in no technical sense (*n*), the tenant for life under the final settlement can sell the land discharged from the previous limitations.

(ii.) Co-existing Settlements.

1171. There may be at the same time a more comprehensive settlement consisting of several deeds, and a less comprehensive settlement constituted by one of the deeds only (*o*). Inasmuch as the powers of a tenant for life are not capable of assignment or release and remain exercisable after and notwithstanding any assignment by operation of law or otherwise (*p*), it follows that several settlements within the meaning of the Settled Land Acts (*q*) can co-exist at the same time, and the tenant for life can exercise

Co-existing
settlements.

succession," see note (*k*), p. 624, *ante*. For forms of compound settlements, see Encyclopædia of Forms and Precedents, Vol. XIII., pp. 304, 376, 397.

(*k*) *Re Ailesbury (Marquis) and Iveagh (Lord)*, [1893] 2 Ch. 345.

(*l*) *Re Mundy and Roper's Contract*, [1899] 1 Ch. 275, C. A. In this case the tenant for life who was selling was tenant for life under the original settlement, with powers of jointuring and charging portions which he had exercised by a subsequent deed. The vendor and his eldest son executed a disentailing deed in the ordinary form and then by a resettlement the settled lands were limited to the use of the vendor for life, but this life estate was not in terms limited to him in restoration of his old life estate. It was held that, as tenant for life under the settlement compounded of the original settlement, the jointure deed, the disentailing deed, and the resettlement, he could sell the land discharged from the jointure and portions. Inasmuch as the tenant for life under both the original settlement and the resettlement was the same person, the actual point involved was narrower than that decided in *Re Ailesbury (Marquis) and Iveagh (Lord)*, *supra*. But that case was expressly approved (see *Re Mundy and Roper's Contract*, *supra*, at pp. 294, 295), and it seems to follow from the reasoning that the result would have been the same if the vendor had been, not the original tenant for life, but his successor.

(*m*) *Re Phillimore's Estate, Phillimore v. Mitnes*, [1904] 2 Ch. 460.

(*n*) *Re Mundy and Roper's Contract*, *supra*; and see pp. 666, 672, *post*.

(*o*) *Re Du Cane and Nettlefold's Contract*, [1898] 2 Ch. 96, 105; *Re Mundy and Roper's Contract*, *supra*, at p. 295; *Re Wimborne (Lord) and Browne's Contract*, [1904] 1 Ch. 537.

(*p*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 50 (1); see pp. 636, 637, *ante*.

(*q*) See note (*e*), p. 624, *ante*.

SECT. 1.
Under the
Settled
Land Acts.

his statutory powers under any one of them, and the trustees for the purposes of the Settled Land Acts (*r*) of any one of such settlements retain their powers of receiving and giving receipts for purchase-money, notwithstanding the existence of the other settlements. Thus, if a settlement is followed by a disentailing deed and resettlement which extinguish the original life interest of the tenant for life under the settlement, there may be in existence at one and the same time three settlements for the purposes of the Acts (*r*), the original settlement, the resettlement, and the settlement compounded of the original settlement, the disentailing deed, and the resettlement. The tenant for life under the original settlement, if still in existence, can then sell either under the original settlement (*s*), or under the compound settlement (*t*), or under the resettlement only, but in the last case he cannot convey the estate freed from estates, interests or charges arising under the original settlement, as these have priority to the settlement under which his conveyance is made (*u*).

Restoration of
original life
estate.

If, however, the life estate created by the resettlement is expressed to be given in restoration of the life estate limited by the original settlement, then the sole life estate that exists is the life estate under the original settlement. Consequently the tenant for life can sell either under the compound settlement (*v*), or under the original settlement (*w*); but he cannot sell under the resettlement alone, even with the concurrence of the persons having estates or interests which have priority thereto (*a*).

(iii.) *Assignment of Life Interest on Marriage or by Way of Family Arrangement.*

Position of
trustees of
original
settlement.

§. 1172. Whenever a deed has been executed affecting the estates created by the original settlement, so that that settlement is no longer the only instrument under or by virtue of which land stands limited for the time being to or in trust for persons by way of succession, as a general rule the land may be dealt with under the statutory powers conferred by the original settlement without the appointment of trustees of the compound settlement created by the original settlement and the subsequent deed (*b*). Thus, dealings

(*r*) See note (*e*), p. 624, *ante*.

(*s*) *Re Wimborne (Lord) and Browne's Contract*, [1904] 1 Ch. 537; but see *Re Domville and Callwell's Contract*, [1908] 1 I. R. 475, C. A.

(*t*) *Re Mundy and Roper's Contract*, [1899] 1 Ch. 275, C. A.

(*u*) *Ibid.*; and see p. 671, *ante*.

(*v*) *Re Cornwallis-West and Munro's Contract*, [1903] 2 Ch. 150.

(*w*) *Re Wimborne (Lord) and Browne's Contract*, *supra*, explaining *Re Cornwallis-West and Munro's Contract*, *supra*. In *Re Domville and Callwell's Contract*, *supra*, the Court of Appeal in Ireland seems, however, to have taken the view that if charges are created under a power reserved by a disentailing deed prior to the restoration to the tenant for life of his original life estate, such charges cannot be treated as subsisting or arising under the original settlement and that trustees of the compound settlement must be appointed, if on no other ground, on the ground that the title, as it stands, is too doubtful to be forced on a purchaser. It seems, however, doubtful whether this decision can be reconciled with the English authorities.

(*a*) *Re Cornwallis-West and Munro's Contract*, *supra*.

(*b*) *Re Du Cane and Nettlefold's Contract*, [1898] 2 Ch. 96, 107.

with his interest by a remainderman do not deprive the trustees of the original settlement of their power of receiving and giving receipts for purchase-money (c). If the new interest is brought into existence by the tenant for life himself, as, for example, if he charges the estate with a jointure (d) or portions for younger children, the trustees for the purposes of the Settled Land Acts (e) already existing do not cease to be such (f), though if the new interest is an alienation for value the tenant for life must procure the consent of his alienee (g). If, however, the instrument is one whereby the tenant for life, in consideration of marriage or as part or by way of family arrangement, not being a security for money advanced—in which case the obligation remains on the part of the tenant for life to procure the assent of his assignee (h)—makes an assignment of or creates a charge upon his estate or interest under the settlement (i), it is to be deemed not an instrument vesting in any person any right as assignee for value (k), but one of the instruments creating the settlement (l). It is not, however, one of the instruments creating the settlement for all the purposes of the Acts (e), but only to be deemed such to avoid the necessity of obtaining the consent of assignees thereunder, and it is not necessary in such a case to appoint trustees of the settlement made up of the original settlement and the additional instrument (m), though, if desired, the court has jurisdiction to appoint trustees of a settlement so compounded (n).

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Settled
Land Acts.

Instrument in
consideration
of marriage
or as family
arrangement.

(iv.) *Settlements to Same Uses by Different Instruments.*

1173. When two estates are settled in the same way, though by different instruments, for the purposes of the Settled Land Acts (c) the two estates are to be regarded as one, the instruments taken together being the settlement for the purposes of the Acts (o). Thus, where an estate was settled by deed, and subsequently by a will moneys were directed to be laid out in the purchase of land to be settled in the same way as the estate, the moneys were applicable

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to same
uses by
different
instruments.

(c) *Re Knowles' Settled Estates* (1884), 27 Ch. D. 707; *Re Du Cane and Nettlefold's Contract*, [1898] 2 Ch. 96.

(d) *Re Keck and Hart's Contract*, [1898] 1 Ch. 617.

(e) See note (e), p. 624, *ante*.

(f) *Re Du Cane and Nettlefold's Contract*, *supra*.

(g) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 50; see p. 637, *ante*.

(h) *Re Du Cane and Nettlefold's Contract*, *supra*.

(i) Pin-money may be, but a jointure charge is not, a charge on the estate of the tenant for life within these words (*Re Keck and Hart's Contract*, *supra*; *Re Hayes' Settled Estates*, [1907] 1 I. R. 88).

(k) Under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 50; see p. 637, *ante*.

(l) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 4 (1). This provision is retrospective (*ibid.*, s. 4 (2)). As to family arrangements, generally, see title FAMILY ARRANGEMENTS, Vol. XIV., pp. 539 *et seq.*

(m) *Re Keck and Hart's Contract*, *supra*; *Re Du Cane and Nettlefold's Contract*, *supra*; *Re Hayes' Settled Estates*, *supra*. If *Re Tibbits' Settled Estates*, [1897] 2 Ch. 149, and *Re Meade's Settled Estates*, [1897] 1 I. R. 121, decide anything to the contrary they must be taken to be overruled.

(n) *Re Tibbits' Settled Estates*, *supra*; *Re Meade's Settled Estates*, *supra*.

(o) *Re Monson's (Lord) Settled Estates*, [1898] 1 Ch. 427.

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Under the
Settled
Land Acts.

Application
of capital
moneys.

Interposition
of term.

as capital moneys in improvements on the settled estate (*p*); and where land was settled by will, and then by deed money was settled in trust to purchase land to be settled on limitations identical with those of the will, though not by reference to the will, capital money arising under the settlement created by the deed was applicable in paying the cost of improvements on the land devised by the will (*q*).

Inasmuch as the two estates are to be regarded as one for the purposes of the Settled Land Acts (*r*), it follows that capital moneys arising from the estate first settled can be applied for the purposes of the estate secondly settled (*s*).

Where two estates are settled, whether by two instruments or one, they can be treated as one estate, notwithstanding the interposition in one set of limitations of a term of years (*t*), or the possibility that, owing to technical rules of law, they may ultimately devolve in different ways (*u*).

(v.) *Appointment of Trustees of Compound Settlements.*

Appointment
of trustees of
compound
settlements.

1174. Where a compound settlement is created by a series of settlements and resettlements, the trustees appointed by any one deed being only trustees of the settlement made by that deed (*v*), the court has got over any difficulty by appointing trustees for the purposes of the Acts (*r*) of the compound settlement (*a*). It is possible to declare that trustees of a settlement shall be trustees for the purposes of the Acts of all compound settlements subsequently created (*b*), though trustees of a compound settlement created by a later deed and earlier deeds (*c*) cannot be appointed by the later deed.

(*p*) *Re Mundy's Settled Estates*, [1891] 1 Ch. 399, C. A.; *Re Stafford's (Lord) Settlement and Will, Gerard v. Stafford*, [1904] 2 Ch. 72.

(*q*) *Re Byng's Settled Estates*, [1892] 2 Ch. 219.

(*r*) See note (*e*), p. 624, *ante*.

(*s*) *Re Monson's (Lord) Settled Estates*, [1898] 1 Ch. 427; see *Re Coull's Settled Estates*, [1905] 1 Ch. 712.

(*t*) *Re Stamford's (Lord) Settled Estates* (1889), 43 Ch. D. 84 (where the trusts of the term were to pay off incumbrances on certain other estates settled by the same instrument but with different remainders); *Re Byng's Settled Estates*, *supra* (where the terms were satisfied).

(*u*) *Re Freme, Freme v. Logan*, [1894] 1 Ch. 1, C. A.; *Re Stafford's (Lord) Settlement and Will, Gerard v. Stafford*, *supra*. In *Re Stamford's (Lord) Settled Estates*, *supra*, the question whether several estates settled by the same instrument upon the same tenant for life, but with different remainders, constitute one settled estate was raised, but not decided, STIRLING, J., *ibid.*, at p. 91, saying that he felt great difficulty on the point. Even if they do constitute one settled estate, it seems difficult to imagine a case in which capital money arising from one could be applied for the benefit of another having regard to the fact that the tenant for life is a trustee for all parties interested (Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 53; see p. 635, *ante*).

(*v*) *Re Ailesbury (Marquis) and Iveagh (Lord)*, [1893] 2 Ch. 345, 358. But where a widow under a general power of appointment conferred on her by her husband's will appointed lands by her will to the same uses as those declared by her husband's will, after her own death in default of appointment a good title was made by the tenant for life without a further appointment of new trustees of the compound settlement, there being a continuing power of sale in the trustees of the husband's will (*Re Gordon and Adams' Contract, Re Pritchard's Settled Estate*, [1913] 1 Ch. 561).

(*a*) *Re Ailesbury (Marquis) and Iveagh (Lord)*, *supra*.

(*b*) See *Encyclopædia of Forms and Precedents*, Vol. XIII., p. 304.

(*c*) *Re Spencer's Settled Estates*, [1903] 1 Ch. 75. If, however, the

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If two estates are settled by different instruments upon the same limitations, trustees should be appointed of the compound settlement created by the different instruments, at any rate if the intention is to deal with the property settled as a whole (*d*). Trustees of a compound settlement, once appointed by the court for the purposes of the Settled Land Acts (*e*), remain such, notwithstanding that all the land originally subject to the settlement has been sold and new estates have been purchased out of capital money (*f*).

SECT. 2.—*Statutory Powers under the Settled Estates Act, 1877.*

SUB-SECT. 1.—*Leases by Tenant for Life.*

1175. Any person entitled (*g*) to the possession or to the receipt of the rents and profits of any settled estates (*h*) for an estate for any Power of leasing.

resettlement is effected by owners who have a complete dominion over the property and are competent to dispose of it as they please, and they choose to create a compound settlement, they can also appoint trustees for the purposes of the Settled Land Acts of the compound settlement so created (*Re Spearman Settled Estates*, [1906] 2 Ch. 502); and see note (*h*), p. 631, *ante*.

(*d*) *Re Coull's Settled Estates*, [1905] 1 Ch. 712. The court has, however, sanctioned the application of money for the purposes of the compound settlement without appointing trustees (*Re Mundy's Settled Estates*, [1891] 1 Ch. 399, C. A.; *Re Byng's Settled Estates*, [1892] 2 Ch. 219; *Re Monson's (Lord) Settled Estates*, [1898] 1 Ch. 427).

(*e*) See note (*e*), p. 624, *ante*.

(*f*) *Re Arran (Earl) and Knowlesden & Creer's Contract*, [1912] 2 Ch. 141 (where the compound settlement originally comprised land in Ireland alone and trustees were appointed by the court in Ireland; subsequently land in England was purchased with capital money. Held that there was no necessity to have trustees appointed by the court in England).

(*g*) A person is entitled to possession or to the receipt of rents and profits notwithstanding incumbrances (Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 54); compare note (*r*), p. 625, *ante*.

(*h*) Settled estates are all hereditaments of any tenure and all estates or interests therein which are the subject of a settlement, a settlement being any Act of Parliament, deed, agreement, copy of court roll, will or other instrument, or any number of such instruments (*Re Dendy* (1877), 4 Ch. D. 879; compare p. 624, *ante*), under or by virtue of which any hereditaments of any tenure, or any estates or interests therein, stand limited to or in trust for any persons by way of succession (Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 2). *Ibid.*, s. 58, repeals five prior Acts (stat. (1856) 19 & 20 Vict. c. 120; stat. (1858) 21 & 22 Vict. c. 77; stat. (1864) 27 & 28 Vict. c. 45; Leases and Sales of Settled Estates Amendment Act, 1874 (37 & 38 Vict. c. 33); Settled Estates Act, 1876 (39 & 40 Vict. c. 30)), all of which are re-enacted with slight alterations. For what are settled estates within the statute, see *Re Laing's Trusts* (1866), L. R. 1 Eq. 416; and see *Collett v. Collett* (1866), L. R. 2 Eq. 203; *Beioley v. Carter* (1869), 4 Ch. App. 230; *Re Morgan's Settled Estates* (1870), L. R. 9 Eq. 587; *Carlyon v. Truscott* (1875), L. R. 20 Eq. 348, 352; they do not include estates limited in fee subject to an annuity (*Re Burdin's Will* (1859), 5 Jur. (N. S.) 1378, C. A.), or to an executory devise over in certain events; see *Re Clark* (1866), 1 Ch. App. 292. Where a person entitled to land in fee simple or for any leasehold interest at a rent is an infant, the land is a settled estate within the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 2 (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 41); and this is so even if the infant's interest is contingent (*Re Liddell*, *Liddell v. Liddell* (1882), 52 L. J. (OH.) 207; *Re Sparrow's Settled Estate*, [1892] 1 Ch. 412; see title INFANTS AND CHILDREN, Vol. XVII., p. 94).

**SECT. 2.
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under the
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Estates Act,
1877.**

life (*i*), or for a term of years determinable with any life or lives, or for any greater estate, either in his own right or in right of his wife, in the absence of an express declaration to the contrary in the settlement; or any person entitled to the possession or receipt of the rents and profits of unsettled estates as tenant by the curtesy, or in dower, or in right of a wife who is seised in fee, may demise the same or any part thereof, except the principal mansion-house, and demesnes and other lands usually occupied therewith, for any term not exceeding twenty-one years for English estates and thirty-five years for Irish estates (*k*).

Form of lease.

1176. Such demise must take effect in possession at or within one year after the making thereof; it must be by deed and reserve the best rent that can reasonably be obtained without fine, which rent must be incident to the reversion; it must not be made without impeachment of waste (*l*), and must contain usual and proper covenants (*m*) and a condition of re-entry on non-payment of rent.

Counterpart.

A counterpart of every deed of lease must be executed by the lessee (*n*), but the execution of any lease by the lessor is sufficient evidence of the execution of the counterpart (*o*).

**Effect of
lease.**

1177. Every such demise is valid against the person granting it and all other persons entitled to estates subsequent to the estate of such person under or by virtue of the same settlement if the estates are settled, and in the case of unsettled estates against the wife of any husband granting such demise of estates to which he is entitled in right of such wife, and against all persons claiming through or under the wife or husband, as the case may be, of the person granting the same (*p*).

SUB-SECT. 2.—Leases by the Court.

**Leases by the
court.**

1178. The court (*q*) may authorise leases of any settled estates, or

(*i*) Tenant for life includes a tenant in tail after possibility of issue extinct (Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 2); and see title **REAL PROPERTY AND CHATTELS REAL**, Vol. XXIV., pp. 174, 175. A person entitled for life to the net rents of estates devised to trustees upon trust to receive the rents and defray expenses of management is not entitled to possession or receipt of the rents or profits (*Taylor v. Taylor, Ex parte Taylor* (1875), L. R. 20 Eq. 297), the provision referring only to persons entitled to receive the rents for their own benefit (*Vine v. Raleigh* (1883), 24 Ch. D. 238); and compare p. 628, *ante*.

(*k*) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 46. The Act does not extend to Scotland (*ibid.*, s. 60). This power of leasing extends only to settlements made after the 1st November, 1856 (*ibid.*, s. 57). No lease beyond twenty-one years is authorised of any settled estates of which the tenants in tail are by Act of Parliament restrained from barring or defeating their estates tail, or where the reversion is vested in the Crown (*ibid.*, s. 55). A lease of copyhold land may not be granted contrary to the custom of the manor without the lord's consent (*ibid.*, s. 56).

(*l*) A lease exempting the lessee from liabilities for "fair wear and tear and damage by tempest" is void as not complying with this provision (*Davies v. Davies* (1888), 38 Ch. D. 499). As to waste, see pp. 600 *et seq.*, *ante*.

(*m*) The lessor's discretion as to what are usual and proper covenants is not controlled unless there is an outrageous omission of covenants (*Davies v. Davies, supra*).

(*n*) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 46.

(*o*) *Ibid.*, s. 48.

(*p*) *Ibid.*, s. 47; and compare pp. 653, 654, *ante*.

(*q*) The court, so far as estates in England are concerned, means the

of any rights or privileges over or affecting any settled estates, for any purpose whatever, whether involving waste or not, provided the following conditions are observed :—

SECT. 2.
Statutory
Powers
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Estates Act,
1877.

Conditions of
such leases.

Every such lease must take effect in possession (*r*) at or within one year next after the making thereof, and must be for a term of years (*s*) not exceeding for an agricultural or occupation lease in England twenty-one years or in Ireland thirty-five years, for a mining lease (*t*), or a lease of water-mills, way-leaves, water-leaves, or other rights or easements forty years, for a repairing lease sixty years, and for a building lease ninety years; but the court, if satisfied that it is the custom of the district and beneficial to the inheritance, may direct any lease, except an agricultural lease, to be for any longer term (*u*).

Every such lease must reserve the best rent (*v*) that can be reasonably obtained without taking any fine, but in the case of a mining lease, a repairing lease, or a building lease, a peppercorn rent or any smaller rent than the rent to be ultimately made payable may, if the court thinks fit so to direct, be made payable during all or any part of the first five years of the term of the lease. In mining leases there must be set aside and invested, where the person for the time being entitled to the receipt of the rent is a person entitled to work minerals for his own benefit, one fourth part of the rent reserved, and otherwise three fourth parts thereof (*a*). Rent.

No such lease may authorise the felling of any trees except so far as necessary for clearing the ground for any buildings, excavations, or other works authorised by the lease. Timber.

Every such lease must be by deed, must contain a condition of re-entry for non-payment of rent (*b*), and such covenants, conditions, and stipulations as the court deems expedient in the special circumstances of the case (*c*). Form of deed.

High Court of Justice (Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 3), whose powers, so far as relates to estates within the County Palatine of Lancaster, may be exercised by the Court of Chancery of the County Palatine (*ibid.*, s. 44), and as regards estates within the County Palatine of Durham by the Palatine Court of Durham (Palatine Court of Durham Act, 1889 (52 & 53 Vict. c. 47), s. 10); and compare p. 633, *ante*.

(*r*) A lease may be sanctioned on the surrender of an existing lease, though a sub-lease granted by the lessee is unexpired (*Re Ford's Settled Estate* (1869), L. R. 8 Eq. 309), but not a lease containing a covenant for renewal (*Re Farnell's Settled Estates* (1886), 33 Ch. D. 599).

(*s*) As to entails created by Act of Parliament, see Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 55; note (*k*), p. 676, *ante*.

(*t*) A mining lease may include so much contiguous land as is necessary for the effective working of the minerals (*Re Reveley's Settled Estates* (1863), 11 W. R. 744).

(*u*) Building leases for 600 and 999 years have been sanctioned (*Re Cross's Charity* (1857), 27 Beav. 592; *Re Carr's Settled Estates* (1861), 9 W. R. 776); and compare p. 657, *ante*.

(*v*) The court may take into consideration the value of a lease to be surrendered in determining the question of the amount of rent to be required (*Rawlins' Estate* (1865), L. R. 1 Eq. 286); and compare p. 654, *ante*.

(*a*) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 4; and see, further, title MINES, MINERALS, AND QUARRIES, Vol. XX., p. 530.

(*b*) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 4.

(*c*) *Ibid.*, s. 5. The court does not sanction a demise by one lease of

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Statutory
Powers
under the
Settled
Estates Act,
1877.

Extent of
power.

Mode of
exercising
powers.

Vesting order.

1179. The power to authorise leases extends to authorising preliminary contracts for leases (*d*), and to authorising leases of the whole or any parts of the settled estates (*e*), and, in the absence of a declaration to the contrary in the settlement (*f*), may be exercised from time to time (*g*). Lords of settled manors may be authorised and are empowered to give licences to copyhold or customary tenants to grant leases (*h*). Leases may be surrendered, and leases of the whole or any part of the hereditaments comprised in any surrendered lease may be authorised (*i*).

The power to authorise leases may be exercised by the court either by approving of particular leases, or by ordering that powers of leasing may be vested in trustees (*k*). On an application for either purpose, the applicant must produce evidence as to the nature, value, and circumstances of the estate, and the terms and conditions on which leases ought to be granted (*l*). After approval of a particular lease or contract, the court directs who is to execute the same as lessor (*m*), and the lease or contract takes effect as if such person executing were at the time of execution absolutely entitled to the whole estate or interest which is bound by the settlement and had immediately afterwards settled the same (*n*). If the court deems it expedient to vest general powers of leasing in trustees, it may by order vest such powers either in the existing trustees of the settlement or in any other person, and such powers when exercised by such trustees take effect as if they had originally been contained in the settlement. The court may impose any conditions as to consent or otherwise on the exercise of such power, and may also authorise the insertion of provisions for the appointment of new trustees for the purpose of exercising such power (*o*). But, unless the parties applying desire it or for other special reasons, no conditions may be inserted in the vesting order requiring the leases to be settled by the court, and if any such condition is inserted the order may be amended by striking out the condition (*p*).

contiguous estates held on separate trusts (*Tolson v. Sheard* (1877), 5 Ch. D. 19, C. A.).

(*d*) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 8; compare p. 664, *ante*.

(*e*) The court declined to authorise a seven years' lease of the mansion-house where a testator had expressed a wish that it should not be let (*Re Cleveland's (Duchess) Settled Estates* (1874), 22 W. R. 818, a case, however, decided on stat. (1856) 19 & 20 Vict. c. 120, s. 26, which was in wider terms than the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 38.

(*f*) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 38.

(*g*) *Ibid.*, s. 6.

(*h*) *Ibid.*, s. 9; and see *ibid.*, s. 58; note (*k*), p. 676, *ante*.

(*i*) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 7.

(*k*) *Ibid.*, s. 10.

(*l*) *Ibid.*, s. 11. As to applications to the court and who may apply, see pp. 679, 680, *post*.

(*m*) The court may direct the tenant for life to execute the lease (*Re Farnell's Settled Estates* (1886), 33 Ch. D. 599).

(*n*) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 12.

(*o*) *Ibid.*, s. 13.

(*p*) *Ibid.*, ss. 14, 15.

SUB-SECT. 3.—*Sales.*

1180. The court may from time to time authorise a sale (q) of the whole or any parts of the settled estates, or of any timber not being ornamental timber (r).

On a sale of land for building purposes the court may allow the whole or any part of the consideration to be a rent issuing out of such land (s).

On a sale of land any mineral may be excepted, and any rights or privileges may be reserved, and the purchaser may be required to enter into any covenants or submit to any restrictions which the court may deem advisable (t).

The court may also authorise a dedication of any part of the settled land for streets (a).

1181. On every sale or dedication the court may direct what person or persons shall execute the deed of conveyance, and the deed executed by such person or persons takes effect as if the settlement had contained a power enabling such person or persons to effect such sale or dedication (b).

SUB-SECT. 4.—*Applications to the Court.*

1182. Any person entitled (c) to the possession or receipt of the rents and profits of any settled estates for a term of years

(q) No sale is authorised of any settled estates of which the tenants in tail are by Act of Parliament restrained from barring or defeating their estates tail, or where the reversion is vested in the Crown (Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 55).

(r) *Ibid.*, s. 16. As to the principles on which the court exercises its discretion, see *Camden (Marquis) v. Murray* (1883), 27 Sol. Jo. 652, more fully reported in the Appendix to Hood and Challis's Conveyancing and Settled Land Acts, 7th ed., p. 582. As to ornamental timber, see pp. 604 *et seq.*, *ante*.

(s) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 18. For a form for a conveyance under *ibid.*, see Encyclopædia of Forms and Precedents, Vol. XII., pp. 549, 550; and compare p. 656, *ante*.

(t) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 19. The court may authorise a sale of minerals apart from the surface, with rights for the purchasers to enter upon the surface for the purpose of the workings, reserving a rentcharge in respect of the surface damaged from time to time by the workings (*Re Milward's Estate* (1868), L. R. 6 Eq. 248).

(a) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), ss. 20, 21. The object of these powers is the development of the land as a building estate (*Re Poynder's Settled Estates, Dickson-Poynder v. Cook* (1881), 45 L. T. 403), and they should be exercised with a view to the immediate benefit of the estate (*Re Hurle's Settled Estates* (1864), 2 Hem. & M. 196). A formal scheme may be dispensed with (*Re Hargreave's Settled Estates* (1866), 15 W. R. 54; *Re Christy's Settled Estate* (1894), 42 W. R. 613). The court formerly declined to raise the expenses of such appropriation by sale (*Re Hurle's Settled Estates, supra*; *Re Chambers* (1860), 28 Beav. 453), but see title LAND IMPROVEMENT, Vol. XVIII., p. 285. As to the dedication of land for streets and open spaces, see title OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., p. 590.

(b) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 22.

(c) This does not necessarily mean beneficially entitled, so where there is no equitable owner the trustees may make the application (*Vine v. Raleigh* (1883), 24 Ch. D. 238); but the case is different where there is an equitable owner (*Vine v. Raleigh, supra*; *Taylor v. Taylor* (1876), 3 Ch. D. 145, C. A.; compare *Re Harris's Settled Estates* (1880), 42 L. T. 583). The

SECT. 2.
Statutory
Powers
under the
Settled
Estates Act,
1877.

Sales.

Direction as
to execution
of convey-
ance.

Applications
to the court.

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Settled
Estates Act,
1877.**

determinable on his death, or for an estate for life (d) or any greater estate, and also any person entitled to the possession or to the receipt of the rents and profits of any settled estates as the assignee of any person who but for such assignment would be entitled to such estates for a term of years determinable with any life, or for an estate for any life or any greater estate, may apply to the court to exercise the statutory powers (e).

SUB-SECT. 5.—Mode of Exercise of Powers.

**Mode of
exercise of
powers.**

1183. The court may exercise the statutory powers from time to time, but they may not be exercised if the settlement contains an express declaration that they shall not be exercised (f). The court may not authorise any sale, lease, or other act which could not have been authorised by the settlor (g), but, after completion, no act under

assignee of a tenant for life can petition the court for a sale (*Re Elsworth and Tidy's Contract* (1889), 42 Ch. D. 23, C. A.); and compare pp. 635, 636, 637, 675, 676, *ante*.

(d) This includes a widow and her children having an estate for life or widowhood with remainder to her children (*Williams v. Williams* (1861), 9 W. R. 888).

(e) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 23. As to applications relating to land in Ireland, see *ibid.*, s. 45, and as to costs, *ibid.*, s. 41. The application must be with the consent or concurrence of the first tenant in tail, if there is one of full age, and of all persons having estates or interests prior to the tenancy in tail. If there is no such tenant in tail, it must be made with the concurrence or consent of all persons having any beneficial estate or interest under the settlement and all trustees having any estate or interest on behalf of any unborn child (*ibid.*, s. 24). Persons beneficially interested in the proceeds of sale of an estate directed to be sold after the death of the tenant for life (*Re Ives, Bailey v. Holmes* (1876), 3 Ch. D. 690, not following *Re Potts' Estate* (1866), L. R. 16 Eq. 631, n.) have beneficial interests within this provision, but not unascertained contingent remaindermen (*Beioley v. Carter* (1869), 4 Ch. App. 230; *Re Strutt's Trusts* (1873), L. R. 16 Eq. 629). If an infant is tenant in tail the court may dispense with the consent of persons entitled to estates subsequent to the tenancy in tail (Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 25). If the consent or concurrence of any necessary party cannot be obtained he may be required by notice, which may be given by advertisement if the court so directs, but not otherwise (*ibid.*, s. 31; and see *ibid.*, s. 30, as to service on trustees), to notify his assent or dissent, and in the absence of notification he is taken to have submitted his rights to be dealt with by the court (*ibid.*, s. 26). The court may, however, dispense with both notice (*ibid.*, s. 27; see *Re Rayner's Settled Estates*, [1891] W. N. 152; *Re Harris's Settled Estates* (1880), 42 L. T. 583; *Re Chamberlain* (1875), 23 W. R. 852; *Re Franklin's Settled Estate* (1858), 7 W. R. 45) and consent (Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 28). The discretion should be exercised in the cases of the dissent of persons unimportant as regards value or interest in the estate, but where the persons are equal in number, and the values of interest approach closely, the court does not dispense with their concurrence (*Taylor v. Taylor, Taylor v. Keily, Ex parte Taylor* (1875), 1 Ch. D. 426, 433). For cases where consents have been dispensed with, see *Re Spurway's Settled Estates* (1878), 10 Ch. D. 230; *Re Cundee's Settled Estates* (1877), 37 L. T. 271; *Re Kilmorey's (Earl) Settled Estates* (1877), 26 W. R. 54; *Re Lewis's Settled Estates* (1875), 24 W. R. 103; *Re Slark's Settled Estates*, [1875] W. N. 224. The rights of non-consenting parties may be preserved (Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 29).

(f) *Ibid.*, s. 38; see *Re Peake's Estates*, [1893] 3 Ch. 430.

(g) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 39.

authority of the court can be invalidated on the ground of want of jurisdiction (*h*).

There is no obligation on any person to make or consent to any application to the court or to exercise any power (*i*).

SECT. 2.
Statutory
Powers
under the
Settled
Estates Act,
1877.

Persons under
disability:
infants;

married
women.

1184. The statutory powers, and all applications to the court and consents to and notifications respecting such applications, may be executed, made or given by, and all notices may be given to, guardians on behalf of infants, committees on behalf of lunatics, and trustees or assignees of the property of bankrupts; but in the case of infant or lunatic tenants in tail a special direction of the court is required (*k*).

Subject to their being separately examined (*l*), married women may make or consent to any applications, whether they are of full age or infants (*m*).

SUB-SECT. 6.—*Application of Capital Money.*

1185. Money arising from sales or to be set aside out of rent or payments reserved on mining leases may be paid, if the court thinks fit, to any trustees approved by the court, or paid into court and applied from time to time to one or more of the following purposes (*n*), namely:—the purchase or redemption of land tax (*o*) on estates in England; the purchase or redemption of rentcharge in lieu of tithes (*p*), Crown rent or quit-rent on estates in Ireland; the discharge or redemption of any incumbrance affecting the heredita-

Application
of capital
money.

(*h*) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 40.

(*i*) *Ibid.*, s. 53.

(*k*) *Ibid.*, s. 49. The consent of the father of an infant has been held to be not sufficient, there being no guardian (*Re Caddick's Settled Estates* (1859), 7 W. R. 334), nor the consent of a testamentary guardian (*Re James (Robert), Deceased* (1868), L. R. 5 Eq. 334).

(*l*) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), ss. 50, 51. The consent of a married woman who is a minor must be taken by examination in the same way as if she were of full age (*Re Broadwood's Settled Estates* (1872), 7 Ch. App. 323). Separate examination has been dispensed with where the married woman was represented by trustees (*Re Kilmorey's (Earl) Settled Estates* (1877), 26 W. R. 54; *Re De Tabley's (Lord) Settled Estates* (1863), 11 W. R. 936); where her interest was very small (*Re Cundee's Settled Estates* (1877), 37 L. T. 271), or arose under a discretionary trust (*Re Tessyman's Trusts* (1897), 77 L. T. 484); where taking the examination involved considerable delay (*Re Halliday's Settled Estates* (1871), L. R. 12 Eq. 199); where she was married before but acquired the property after 1882 (*Re Harris' Settled Estates* (1884), 28 Ch. D. 171; *Re Bait's Settled Estates*, [1897] 2 Ch. 65); and where she was married after 1882 (*Riddell v. Errington* (1884), 26 Ch. D. 220). As to separate examination of married women, see title HUSBAND AND WIFE, Vol. XVI., pp. 381 *et seq.*

(*m*) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 52.

(*n*) *Ibid.*, s. 34. In the case of purchase-money paid in respect of leases or reversions, the court may give directions as to investment, accumulation, or payment, in order to give the parties the same benefit that they would otherwise have had from the lease or reversion (*ibid.*, s. 37); compare Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 34; and see p. 644, *ante*. As to payment into court, see title PRACTICE AND PROCEDURE, Vol. XXIII., pp. 147 *et seq.*

(*o*) See title LAND TAX, Vol. XVIII., pp. 321 *et seq.*

(*p*) See title ECCLESIASTICAL LAW, Vol. XI., pp. 750, 751.

SECT. 2.
Statutory
Powers
under the
Settled
Estates Act,
1877.

ments in respect of which such money was paid, or affecting any other hereditaments subject to the same uses or trusts; the purchase of other hereditaments (*q*) to be settled in the same manner as the hereditaments in respect of which the money was paid; and the payment to any person becoming absolutely entitled (*r*).

Such application may, if so directed by the court, be made by the trustees without application to the court or upon an order of the court made on petition by the person who, on purchase of land with the money, would be entitled to receipt of the rents and profits (*s*).

Temporary
investment.

Pending investment, the money may be invested in any investments in which cash under the control of the court is for the time being authorised to be invested (*t*).

Part X.—Administrative Powers and Duties of Trustees.

SECT. 1.—Investment.

Investment
clauses.

1186. A settlement, whether created by deed or will, usually contains a clause specifying what investments of the trust funds may lawfully be made by the trustees (*u*). This clause primarily determines the powers of the trustees of the settlement in making investments, but, unless expressly forbidden by the settlement (*v*), they have the extensive powers of investment which are now conferred on them by statute (*w*). If the investment clause purports still further to enlarge these powers, it should be construed strictly for the protection of trustees and remaindermen (*x*).

(*q*) This includes the erection of new buildings (*Re Newman's Settled Estates* (1874), 9 Ch. App. 681); and see title LAND IMPROVEMENT, Vol. XVIII., p. 276.

(*r*) Where lands settled upon trust for sale after the death of the tenant for life were sold under the Act in the lifetime of the tenant for life, the proceeds of sale were directed to be paid to the trustees to be held by them on the trusts of the settlement (*Re Morgan's Settled Estates* (1870), L. R. 9 Eq. 587). Where land is settled on a tenant in tail, a disentailing deed must be executed before payment out is ordered; see *Re Butler's Will* (1873), L. R. 16 Eq. 479; *Re Reynolds* (1876), 3 Ch. D. 61, C. A., not following *Re Wood's Settled Estates* (1875), L. R. 20 Eq. 372; and, for the necessity of an affidavit of no incumbrances, see *Thornhill v. Milbank* (1864), 12 W. R. 523.

(*s*) Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 35.

(*t*) *Ibid.*, s. 36. As to investments in which cash under the control of the court is authorised to be invested, see R. S. C., Ord. 22, r. 17; title TRUSTS AND TRUSTEES.

(*u*) For investment clauses under deeds, see *Encyclopædia of Forms and Precedents*, Vol. XIII., p. 679; for clauses under wills, see *ibid.*, Vol. XV, pp. 407, 430.

(*v*) A direction that the trustees shall invest in a particular way is not an express prohibition (*Re Maire, Maire v. De La Batut* (1905), 49 Sol. Jo. 383; *Re Burke, Burke v. Burke*, [1908] 2 Ch. 248).

(*w*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1. As to the powers and duties of trustees to invest generally, see title TRUSTS AND TRUSTEES.

(*x*) *Re Maryon-Wilson's Estate*, [1912] 1 Ch. 55, C. A.

SECT. 2.—Accumulations.

SECT. 2.

Accumulations.

Statutory powers of accumulation.

1187. Formerly it was usual to insert in settlements express clauses directing the accumulation by the trustees of surplus income during the minorities of beneficiaries under the settlement and the destination of such accumulation. Now, however, the statutory powers of accumulation hereinafter stated are deemed to be incorporated in the settlement (a), and express clauses* are generally omitted in reliance on them (b).

Trustees holding property in trust for an infant are, in the absence of expression of intention to the contrary in the settlement (c), bound to accumulate all surplus income not required for the infant's maintenance by investing the same and the resulting income thereof from time to time on securities in which they are by the settlement, if any, or by law authorised (d) to invest trust money, and to hold the accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise (e), that is to say, to the property the income arising from which has been accumulated (f). The accumulations, therefore, become an accretion to the capital, with the result that all persons interested therein, whether as tenant for life or otherwise, in due course and order take precisely the same interests in the accumulations as they take in the original capital (g).

Property held in trust for infant.

1188. When trustees have the statutory powers of management of an infant's land (h), subject to any contrary intention expressed in the instrument under which an interest of the infant arises (i), they must invest the surplus income of the land in securities authorised for investment either by the settlement or by law (d) and accumulate the investments so made by way of compound interest, and stand possessed of the accumulated fund, if the infant attains twenty-one,

Accumulation by trustees having statutory powers of management of infant's land.

(a) *Re Moody, Woodroffe v. Moody*, [1895] 1 Ch. 101, 105.

(b) As to the cases where the statutory powers are not applicable, see p. 684, *post*.

(c) Where an infant took in a legacy an interest for life that vested immediately, the gift of the income to the infant was considered the expression of a contrary intention in the instrument under which the interest of the infant arose (see *Conveyancing and Law of Property Act, 1881* (44 & 45 Vict. c. 41), s. 43 (3)), so as to exclude the statutory provision for accumulation (*Re Wells, Wells v. Wells* (1889), 43 Ch. D. 281; *Re Humphreys, Humphreys v. Levett*, [1893] 3 Ch. 1, C. A.), the object of the statutory provision being merely to shorten and simplify conveyances and not to affect the construction of instruments or alter the devolution of property (*Re Dickson, Hill v. Grant* (1885), 29 Ch. D. 331, C. A.; *Re Wells, Wells v. Wells*, *supra*; *Re Humphreys, Humphreys v. Levett*, *supra*); and, as to cases where a legacy to an infant carries interest, see title EXECUTORS AND ADMINISTRATORS, Vol. XIV., p. 273.

(d) As to securities authorised by law, see title TRUSTS AND TRUSTEES.

(e) *Conveyancing and Law of Property Act, 1881* (44 & 45 Vict. c. 41), s. 43 (2). The trustees may apply such accumulations or any part thereof as if they were income arising in the then current year (*ibid.*); and see title INFANTS AND CHILDREN, Vol. XVII., pp. 88, 89.

(f) *Re Bowlby, Bowlby v. Bowlby*, [1904] 2 Ch. 685, C. A.

(g) *Re Bowlby, Bowlby v. Bowlby*, *supra*, overruling *Re Scott, Scott v. Scott*, [1902] 1 Ch. 918.

(h) See p. 688, *post*.

(i) *Conveyancing and Law of Property Act, 1881* (44 & 45 Vict. c. 41), s. 42 (7).

SECT. 2.
Accumulations.

in trust for the infant; if the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, is a good discharge; but if the infant dies while an infant, and being a woman without having married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by the settlement; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple absolute or determinable, then in trust for the infant's personal representatives as part of the infant's personal estate. The accumulations, or any part of them, may, however, at any time be applied as if the same were income arising in the then current year (*k*).

SECT. 3.—Maintenance of Infants.

Powers of maintenance of infants.

1189. It is usual in settlements to rely on the power conferred by statute (*l*) to apply the property of an infant for his maintenance, and to omit the trusts or discretionary powers, which until 1860 it was usual to insert in settlements, authorising the trustees during the minority of any beneficiary to apply the yearly produce of his share of the settled fund to his maintenance. Express powers of maintenance (*m*) should, however, be inserted if the proposed settlement is not governed by English law, or if the interests thereby provided for children are of such a nature that the statutory power does not apply; thus the statutory powers do not apply if the infant takes a defeasible interest under the settlement (*a*). They apply, however, to a gift to a class contingently on their attaining twenty-one (*b*).

(*k*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 42 (5) (*i*.), (*ii*.), (*iii*.); and see title INFANTS AND CHILDREN, Vol. XVII., p. 88.

(*l*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 43, replacing Lord Cranworth's Act, stat. (1860) 23 & 24 Vict. c. 145, s. 26, which is repealed by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 71; and see title INFANTS AND CHILDREN, Vol. XVII., pp. 88, 89.

(*m*) For forms, see Encyclopædia of Forms and Precedents, Vol. XIII., p. 669; Vol. XV., p. 625.

(*a*) *Re Buckley's Trusts* (1883), 22 Ch. D. 583; see, further, title INFANTS AND CHILDREN, Vol. XVII., pp. 88, 89. The statutory powers do not provide for the maintenance of a beneficiary whose interest is contingent on his attaining a greater age than twenty-one during the period between his attaining twenty-one and the vesting of his interest (*Re Breeds' Will* (1875), 1 Ch. D. 226). In such a case, an express provision should be inserted either that the statutory powers shall be available till the share vests or that the beneficiary shall be entitled to the whole income on attaining twenty-one; see Encyclopædia of Forms and Precedents, Vol. XV., p. 627. As to the cases in which a contingent legacy carries interest, see titles EXECUTORS AND ADMINISTRATORS, Vol. XIV., pp. 272, 273; INFANTS AND CHILDREN, Vol. XVII., p. 120; WILLS.

(*b*) *Re Holford, Holford v. Holford*, [1894] 3 Ch. 30, C. A., overruling *Re Jeffery, Burt v. Arnold*, [1891] 1 Ch. 671; see *Re Burton's Will, Banks v. Heaven*, [1892] 2 Ch. 38. So long as no member of the class has attained a vested interest, the income is applicable for the maintenance

If a portions fund is provided by the settlement, it is usual to empower the trustees to provide maintenance in respect of a portion to which any child may be presumptively entitled at the death of a tenant for life (c).

SECT. 3.
Mainten-
ance of
Infants.

SECT. 4.—Advancement.

1190. A power of advancement (d) authorises the trustees of the settlement—but during the lives of the spouses or the life of the survivor of them only with their, his, or her consent in writing (e)—to raise any part or parts not exceeding a specified proportion of the expectant, presumptive, or vested (f) share of any child of the marriage and pay or apply the same as the trustees shall think fit for the advancement or benefit of that child (g). In settlements of realty the power is to raise a specified sum by mortgage of the settled land, such sum to be a charge on the child's interest (h). Advancement has a definite meaning, that is, that a certain portion of the fund is actually taken out of the settlement altogether and paid over to the object of the power (i). An advancement as a rule does not fall within

Power of
advance-
ment.

of all (*Re Adams, Adams v. Adams*, [1893] 1 Ch. 329). If some members of the class have attained twenty-one, the infant members are entitled to maintenance out of the income of their contingent shares, and it makes no difference that the class is capable of increase (*Re Jeffery, Arnold v. Burt*, [1895] 2 Ch. 577); and, as to maintenance, see, further, title INFANTS AND CHILDREN, Vol. XVII., pp. 87 *et seq.* As to whether trustees, having exercised their discretion by capitalising income, can apply income accrued in past years for maintenance after those years have elapsed, see title INFANTS AND CHILDREN, Vol. XVII., p. 89, note (j); *Re Wise, Jackson v. Parrott*, [1896] 1 Ch. 281; *Re Cooper (Sir Daniel), Cooper v. Cooper*, [1913] W. N. 40. If no discretion has been exercised, accumulated income may be applied for maintenance (*Edwards v. Grove* (1860), 2 De G. F. & J. 210, C. A.; *Re Tod, Bradshaw v. Tod* (1913), 134 L. T. Jo. 386). As to the duty of parents to maintain and educate their children, see title INFANTS AND CHILDREN, Vol. XVII., pp. 114, 115. As to how far the court controls the discretion of the trustees, and the powers of the court as to maintenance generally, see *ibid.*, p. 89; and, as to the application of the infant's property for his benefit, *ibid.*, p. 85.

(c) *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 293, 314; and, as to interest on portions, see pp. 594, 595, *ante*.

(d) A power of advancement is a usual power in settlements (*Turner v. Sargent* (1853), 17 Beav. 515; *Spirett v. Willows* (1869), 4 Ch. App. 407); and see p. 543, *ante*. For forms of clauses in settlements, see *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 357, 419, 427; and in wills, *ibid.*, Vol. XV., pp. 413, 625. There is no statutory power of advancement.

(e) A tenant for life who has assigned his life interest or become bankrupt cannot consent (*Noel v. Henley (Lord)* (1825), M'Cle. & Yo. 302; *Notridge v. Green* (1875), 33 L. T. 220; *Oliver v. Lowther* (1880), 28 W. R. 381), except with the sanction of his assignee or trustee in bankruptcy (*Re Cooper, Cooper v. Slight* (1884), 27 Ch. D. 565). The committee of a lunatic tenant for life may be authorised to consent on his behalf (*Re Nevill, a Lunatic* (1885), 31 Ch. D. 161, C. A.).

(f) A power of advancement out of a presumptive share cannot be exercised after the share has become vested (*Molyneux v. Fletcher*, [1898] 1 Q. B. 648).

(g) As to the extent and purpose of the power, see title INFANTS AND CHILDREN, Vol. XVII., p. 93.

(h) *Encyclopædia of Forms and Precedents*, Vol. XIII., p. 357. As to advances out of portions, see *ibid.*, pp. 298, 315.

(i) *Re Gosset's Settlement* (1854), 19 Beav. 529; *Re Fox, Wodehouse v. Fox*, [1904] 1 Ch. 480.

SECT. 4.

**Advance-
ment.****Effect of
appointment.**

the operation of the ordinary hotchpot clause which only relates to appointed shares (*k*), but the exercise of a power of appointment does not operate to take the appointed share out of the provisions of the original settlement so as to defeat an advancement clause contained therein (*l*).

SECT. 5.—*Powers in Respect of Settled Policies and Choses in Action.* •**Powers in
respect of
settled
policies.**

1191. If a settlement contain a covenant by any person to pay the premiums on a policy of assurance which forms part of the subject matter of such settlement, it is the duty of the trustees of the settlement, though it is usual to restrict their responsibility by the instrument creating the trust (*m*), to take all necessary steps to enforce payment of the premiums by the covenantor; but the trustees incur no liability if their efforts are unsuccessful, nor are they bound to take any steps to enforce payment if by reason of the poverty of the covenantor there is ground for believing that such steps would have been ineffectual (*n*). If there are no funds properly applicable to the keeping up of the policy, it is the duty of the trustees to do what they can to protect the policy and advance or obtain money for the purpose of paying the premiums (*o*). In such case the trustees, or any person advancing money for the purpose at their request, are entitled to a lien on the policy for the amount so advanced, together with interest at 4 per cent. (*p*). Where no funds are available to keep up a policy, it may be ordered to be surrendered (*q*), or sold, and the trustees may be recouped the amount of premiums paid by them out of the proceeds (*r*). But if the *cestui que trust* supplies funds, or if the trustees by duly performing their trust ought to be in possession of funds applicable for the purpose, then the trustees acquire no lien on the policy, and cannot confer one on another person who provides the necessary funds (*s*). Trustees should insist on having the policy and assignment handed over to them for custody, though the possession may not confer on them any legal estate or advantage (*t*).

**Lien for
premiums
paid.****Notices.**

Whether the subject of the settlement is a policy of insurance, or

(*k*) *Re Fox, Wodehouse v. Fox*, [1904] 1 Ch. 480. As to hotchpot clauses, see pp. 574, 575, *ante*.

(*l*) *Re Hodgson, Weston v. Hodgson*, [1913] 1 Ch. 34, following *M' Mahon v. Gausseu*, [1896] 1 I. R. 143.

(*m*) See Encyclopædia of Forms and Precedents, Vol. XIII., p. 432. As to a life policy taken out by a husband for the benefit of his wife and children, see title HUSBAND AND WIFE, Vol. XVI., pp. 399 *et seq.*; *Re Weststead, Weststead v. Leeds* (1882), 47 L. T. 331. As to life insurance generally, see title INSURANCE, Vol. XVII., pp. 543 *et seq.*

(*n*) *Clack v. Holland* (1854), 19 Beav. 262; *Hobday v. Peters* (No. 3) (1860), 28 Beav. 603; *Ball v. Ball* (1847), 11 I. Eq. R. 370.

(*o*) *Clack v. Holland, supra*, at p. 276.

(*p*) *Clack v. Holland, supra*; *Gill v. Downing* (1874), L. R. 17 Eq. 316; compare *Shearman v. British Empire Mutual Life Assurance Co.* (1872), L. R. 14 Eq. 4; and, as to liens on policies generally, see titles INSURANCE, Vol. XVII., pp. 563, 564; LIEN, Vol. XX., p. 22.

(*q*) *Beresford v. Beresford* (1857), 23 Beav. 292. It is desirable in settlements of policies to insert express powers enabling the trustees in case of difficulty to surrender the policy for a fully paid up one of smaller amount.

(*r*) *Hill v. Trenery* (1856), 23 Beav. 16.

(*s*) *Clack v. Holland, supra*.

(*t*) *Sep Meux v. Bell* (1841), 1 Hare, 73, 89.

any other chose in action, the trustees should see that their title is perfected by the giving of the necessary notices (a).

If the chose in action which is the subject of the settlement be capable of reduction into possession, it is the duty of the trustees to reduce it into possession without unnecessary delay, and if they fail to do so the burden of proof lies on them to show that if speedy steps had been taken the money could not have been recovered (b).

SECT. 5.
Powers in
Respect of
Settled
Policies and
Choses in
Action.

Reduction
into posses-
sion.

Personal
chattels in
settlement.

SECT. 6.—*Powers and Duties in Respect of Personal Chattels.*

1192. If furniture or jewels or other personal chattels are the subject of the settlement, the trustee, if and while they are in his possession, is bound to keep them as if they were his own, as in the case of any other trust property (c). But since such articles by their nature can only be enjoyed by the beneficiaries by delivery to them, it is usual to provide in the settlement that the trustees shall not be liable for such articles or to see to their condition or insurance. If, however, the *cestui que trust* in whose possession such articles are fails to insure them, the trustees have power to insure them and pay the premiums out of the income of capital moneys in their hands (d).

Insurance.

The trustees should keep an inventory of the articles, and may interfere with advantage in the event of its being apprehended that the *cestui que trust* will dispose of them (e). If the articles are assigned to the trustees by the settlement, the possession of them is that of the trustees, who may maintain an action against a wrongdoer for the conversion thereof (f). It is generally expedient that the settlement should contain express powers for the trustees to sell and exchange settled chattels.

Inventory.

Possession.

SECT. 7.—*Powers in Respect of Land.*

1193. It was formerly the practice to insert in settlements powers for the trustees, with the concurrence of the persons, if adults, for the time being entitled to the possession or receipt of the rents and profits of the property, to sell, exchange, make partition, and enfranchise, and during the minorities of the beneficiaries to manage land. Powers of leasing were sometimes given to the trustees, but were more commonly reserved to the tenant for life if

Express
powers in
respect of
land.

(a) As to these, see titles CHOSSES IN ACTION, Vol. IV., pp. 379 *et seq.*; INSURANCE, Vol. XVII., p. 559.

(b) *Styles v. Guy* (1849), 1 Mac. & G. 422; *Wiles v. Gresham* (1854), 5 De G. M. & G. 770, C. A.; *Grove v. Price* (1858), 26 Beav. 103; *Re Brogden, Billing v. Brogden* (1888), 38 Ch. D. 546, C. A.; and, as to the duties of trustees to convert outstanding property, see, further, title TRUSTS AND TRUSTEES.

(c) As to the duties of trustees in respect of safe custody of trust property, see *ibid.* For forms of settlement of chattels, see *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 325, 583.

(d) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 18; *Re Egmont's (Earl) Trusts, Lefroy v. Egmont (Earl)*, [1908] 1 Ch. 821.

(e) *Kay v. Watkins* (1869), 17 W. R. 983.

(f) *Barker v. Furlong*, [1891] 2 Ch. 172; and see title TROVER AND DETINUE. For the possession of the trustees as against creditors of the husband, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 275 *et seq.*

SECT. 7.
Powers in
Respect of
Land.

adult. The powers of sale, exchange, partition, enfranchisement, and leasing have been superseded by the statutory powers conferred by the Settled Land Act, 1882 (*g*), which are capable of being exercised by the trustees during the minority of an infant tenant for life (*h*), so that special powers for these purposes are now generally omitted, except in the case of settlements of land by way of trust for sale (*i*).

Power of
management.

1194. The power of management during minorities is also generally omitted in reliance on the statutory powers of management (*k*). In such a case the trustees enter into possession and manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course for sale, or for repairs or otherwise, and to erect, pull down, rebuild, and repair houses, and other buildings or erections, and to continue the working of mines, minerals, and quarries which have usually been worked, and to drain or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in due course of management; but so that, where the infant is impeachable for waste, the trustees must not commit waste, and must cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same (*l*). The trustees may from time to time, out of the income of the land (*m*), including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by the statute, and all outgoings not payable by any tenant or other person, and must keep down any annual sum, and the interest of any principal sum, charged on the land (*a*).

Insurance.

Trustees have also a statutory power to insure buildings or other insurable property against loss or damage by fire and to charge the trust estate with the premiums (*b*).

Extent of
powers to
repair and
build.

1195. Apart from the statutory powers, trustees of land for an infant absolutely entitled could repair but not rebuild (*c*). A power

(*g*) 45 & 46 Vict. c. 38, see pp. 652 *et seq.*, *ante*.

(*h*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 60; see pp. 629, 630, *ante*.

(*i*) See Encyclopædia of Forms and Precedents, Vol. XIII., pp. 689, 691. As to sales, leases etc. by trustees, see titles POWERS, Vol. XXIII., pp. 72 *et seq.*; TRUSTS AND TRUSTEES. As to settlements by way of trust for sale, see p. 530, *ante*.

(*k*) See Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 42 (1); title INFANTS AND CHILDREN, Vol. XVII., pp. 87 *et seq.*

(*l*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 42 (2). As to the powers of a tenant for life to cut timber, see pp. 600 *et seq.*, 658, 659, *ante*.

(*m*) There is no power to pay the expenses of management out of *corpus* (*Re Jackson, Jackson v. Talbot* (1882), 21 Ch. D. 780).

(*a*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 42 (3).

(*b*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 18; see title TRUSTS AND TRUSTEES. As to the insurable interest of trustees, see title INSURANCE, Vol. XVII., p. 523.

(*c*) *Bridge v. Brown* (1843), 2 Y. & C. Ch. Cas. 181.

to keep buildings in good repair only authorises trustees to keep them in habitable repair (*d*), and does not authorise the rebuilding of a mansion (*e*); but a power to erect a mansion-house involves a power to make suitable appendages, such as lawns, pleasure grounds and approaches (*f*). A power to improve an estate by the erection of farmhouses and outbuildings authorises the erection of labourers' cottages (*g*), and a general power to manage and superintend an estate covers expenditure for the erection of farmhouses and other buildings, repairs to old farmhouses, draining and fencing, making and sinking wells and pumps, erecting a bridge, and forming, altering, and repairing roads (*h*). A power to lay out rents in repairing does not authorise a mortgage of the property to raise money for that purpose (*i*).

SECT. 7.
Powers in
Respect of
Land.

If trustees, acting *bond fide* but without authority, lay out trust money in improving an estate, they are only chargeable with the loss, if any, thereby occasioned to the estate (*k*).

Liability for
loss.

SECT. 8.—Power to Employ Agents and Charge for Services.

1196. It is usual to insert in settlements a power for the trustees to employ agents (*l*). This power has never been considered judicially, but it is conceived that it does not authorise a trustee to delegate his personal discretion, but merely confers on him in all cases in which a prudent man, acting for himself in the ordinary course of business, usually employs them, the exoneration which is given to trustees by statute in the case of bankers, brokers and other persons with whom trust money may be deposited (*m*). The nomination in the settlement of a particular agent has always been held to relieve trustees from any responsibility for employing him in the absence of laches on their part (*n*); but a person nominated as agent has no right to compel the trustees to employ him (*o*) or to continue him in employment (*p*).

Employment
of agents.

Nominated
agent.

(*d*) *Cooke v. Cholmondeley* (1858), 4 Drow. 326.

(*e*) *Ibid.*; *Bleazard v. Whalley* (1854), 2 Eq. Rep. 1093.

(*f*) *Lombe v. Sloughton* (1849), 17 Sim. 84. As to what is a mansion-house, see note (*r*), p. 641, *ante*.

(*g*) *Rivers (Lord) v. Fox* (1853), 2 Eq. Rep. 776.

(*h*) *Bowes v. Strathmore* (1843), 8 Jur. 92; *Re Leslie's Settlement Trusts* (1876), 2 Ch. D. 185. As to land improvement generally, see title LAND IMPROVEMENT, Vol. XVII., pp. 275 *et seq.*

(*i*) *Fazakerley v. Culshaw* (1871), 24 L. T. 773.

(*k*) *Vyse v. Foster* (1872), 8 Ch. App. 309; (1874), L. R. 7 H. L. 318; *Cooke v. Cholmondeley*, *supra*; *Jesse v. Lloyd* (1883), 48 L. T. 656.

(*l*) For forms, see *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 302, 348, 440.

(*m*) *Anon.* (1701), 12 Mod. Rep. 560. As to the employment of agents by trustees generally, see title TRUSTS AND TRUSTEES; and as to their exoneration from liability for the employment of bankers and brokers, see *ibid.*; Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 24.

(*n*) *Gibbs v. Herring* (1692), Prec. Ch. 49; *Kilbee v. Sneyd* (1828), 2 Mol. 186, 200.

(*o*) *Finden v. Stephens* (1846), 2 Ph. 142.

(*p*) *Shaw v. Lawless* (1838), 5 Cl. & Fin. 129, H. L.; *Belaney v. Kelly* (1871), 19 W. R. 1171; *Foster v. Elsley* (1881), 19 Ch. D. 518; but see *Williams v. Corbet* (1837), 8 Sim. 349.

SECT. 8.
Power to
Employ
Agents and
Charge for
Services.

Trustees of settled estates may appoint a receiver and manager with the consent of the tenant for life (q).

It is also usual to provide that a trustee shall receive remuneration for services rendered by him to the trust estate in a professional capacity (r).

Remunera-
tion.

Part XI.—Resettlements.

SECT. 1.—*Nature and Object.*

Nature and
object of
resettlements.

1197. A resettlement is a deed to carry out a family arrangement, which is commonly entered into with regard to settled land on the marriage or coming of age of an eldest son, or other first tenant in tail in remainder expectant on the death of the tenant for life in possession. In the great majority of cases the purpose of the resettlement is to provide an immediate income for the eldest son in lieu of his continuing dependent on the bounty of his father during the father's lifetime, while in return he curtails his reversionary estate in the inheritance of the settled property, so that in the event of his death without issue the property goes over to the younger members of the family. The essential requirements of a resettlement in no way differ from those of other deeds of family arrangement, that is to say, the resettlement must be mutual and reasonable (a). Parental influence is an inseparable incident of a resettlement, but if properly exercised is not objected to by the court (b). It is not necessary, though it is advisable, that a son on the making of a resettlement should have separate legal advice (c).

SECT. 2.—*Usual Provisions.*

Usual pro-
visions.

1198. Where an estate is limited to the ordinary uses in strict settlement, that is to say, to the use of a man for life, with remainder, subject to charges for the jointure of his wife and portions for his younger children, to the use of his first son in tail or in tail male, the son having attained his majority, a resettlement is generally carried out by the execution by him of a disentailing deed (d), in which the father commonly joins, both as protector of

(q) See *Bagot v. Bagot* (1841), 10 L. J. (CH) 116. As to the appointment of a receiver by the court as against the tenant for life, or as against the trustees, see title RECEIVERS, Vol. XXIV., p. 352.

(r) See *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 302, 348, 440. As to the remuneration of trustees, see title TRUSTS AND TRUSTEES.

(a) See title FAMILY ARRANGEMENTS, Vol. XIV., pp. 548, 549. For a case where the court ordered that a resettlement should contain a restraint on anticipation similar to that contained in the original settlement, see *De Martana v. De Martana* (1875), 33 L. T. 685. As to family arrangements generally, see title FAMILY ARRANGEMENTS, Vol. XIV., pp. 530 *et seq.*

(b) *Hoblyn v. Hoblyn* (1889), 41 Ch. D. 200, 206; and see title FAMILY ARRANGEMENTS, Vol. XIV., p. 549.

(c) *Hoblyn v. Hoblyn*, *supra*, at p. 205; see title FAMILY ARRANGEMENTS, Vol. XIV., p. 551; and see title SOLICITORS.

(d) As to disentailing deeds, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 255; and for forms, see *Encyclopædia of Forms*

SECT. 2.
Usual Pro-
visions.

the settlement (e) and for the purpose of conveying his life estate. By such disentailing deed the estate is usually conveyed to a grantee to uses to hold to such uses as the father and son shall jointly appoint, and in default of such appointment to the uses subsisting under the existing settlement. The resettlement proper is then effected by the father and son in exercise of the joint power conferred on them by the disentailing deed (f). The new uses are generally expressed to be subject to the uses and charges preceding the son's former estate tail, except the father's life estate. If the resettlement is made on the marriage of the son, the first of the new uses is generally to provide by rentcharges pin-money (g) for the son's wife, and then an annuity for the son during the joint lives of himself and his father, and a jointure for the son's wife if she shall survive him (h). If the son is neither married nor about to marry, power is generally reserved to him to charge the estate with pin-money and jointure rentcharges. Subject to these charges, the father's old life estate is by the resettlement restored, which restoration has the effect of also giving back to him the powers annexed to the life estate by the original settlement (i). That estate is followed by the limitation of an estate to the son for his life. After the determination of this latter estate, the property is given to the son's first and other unborn sons successively in tail, or in tail male, with remainder to such sons successively in tail general. These are followed by limitations of life estates to the son's younger brothers and estates tail or tail male in favour of the issue of the son's younger brothers, and sometimes by limitations in favour of collateral branches of the family. If limitations in favour of the son's daughters are introduced, they are generally made to the daughters successively in tail male. The ultimate limitation is generally to the son in fee.

New uses.

Restoration
of old life
estate.
Subsequent
limitations.

and Precedents, Vol. V., pp. 434 *et seq.* As to estates tail, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., pp. 241 *et seq.*

(e) See p. 692, *post.*

(f) For a precedent of a resettlement, see Encyclopædia of Forms and Precedents, Vol. XIII., p. 375.

(g) See title HUSBAND AND WIFE, Vol. XVI., pp. 357, 358; and see p. 585, *ante.*

(h) As to jointure, see title REAL PROPERTY AND CHATELS REAL, Vol. XXIV., p. 192, note (g); pp. 585, 586, *ante.*

(i) *Re Wright's Trustees and Marshall* (1884), 28 Ch. D. 93. The statutory powers conferred by the Settled Land Acts (see note (c), p. 624, *ante*) are not affected by the resettlement; see pp. 636, 637, *ante.* Concurrency in a settlement which revoked the uses, trusts, limitations, intents and purposes of the original settlement does not put an end to a power to charge thereby conferred (*Evans v. Evans* (1853), 1 W. R. 215, C. A.).

Part XII.—Miscellaneous Clauses in Settlements.

SECT. 1.

SECT. 1.—Protector of the Settlement.

Protector of the Settlement.

Protector of the settlement.

Limit as regards number.

Enrolment of deed.

Appointment by court.

Survivorship of office.

1199. Any settlor (*k*) entailing lands may appoint by the settlement by which the lands are entailed any number of persons *in esse*, not exceeding three, and not being aliens, to be protector of the settlement in lieu of the person who would otherwise have been protector (*l*), and either for the whole or any part of the period for which such person might have continued protector, and may by means of a power inserted in such settlement perpetuate during the whole or any part of such period the protectorship of the settlement in any one person or number of persons *in esse*, and not being an alien or aliens, whom the donee of the power shall think proper by deed to appoint protector in lieu of any person or persons dying, or by deed relinquishing the office. The person or persons so appointed may be protector, either alone or jointly with any other person then protector, but the number of persons to compose the protector must never exceed three. The person who would otherwise have been sole protector may be one of the persons appointed protector if the settlor thinks fit, and, unless otherwise directed by the settlor, he acts as sole protector, if the other persons constituting the protector have ceased to do so by death, or relinquishment of the office by deed, and no other person has been appointed in their place (*m*).

Every deed under which a protector relinquishes his office, or is appointed under a power in the settlement, is void unless duly enrolled within six months after execution (*n*).

A protector should not be appointed by the court except upon a special case (*o*).

The office of protector survives, and does not cease on the death of one of the persons appointed protector by the settlement, unless survivorship is excluded in clear words (*p*); but, if all the persons who are appointed protectors are dead, the office falls back to the tenant for life (*q*), unless the settlor has otherwise directed, in which case the Chancery Division, of the High Court is the protector (*a*).

(*k*) This includes a trustee upon trust to settle (*Bankes v. Le Despencer (Baroness)* (1843), 11 Sim. 508, 527.

(*l*) That is, the owner of the first existing estate, not being an estate for years under the settlement prior to the estate tail under the same settlement. As to the persons who are protectors of the settlement and as to disentailing assurances generally, see title REAL PROPERTY AND CHATTELS REAL, Vol. XXIV., pp. 250 *et seq.*, 255 *et seq.*

(*m*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 32.

(*n*) *Ibid.* For form of a deed appointing a new protector under a power in a settlement, see Encyclopædia of Forms and Precedents, Vol. XIII., p. 705.

(*o*) *Bankes v. Le Despencer (Baroness)*, *supra*.

(*p*) *Bell v. Holby* (1873), L. R. 15 Eq. 178; *Cohen v. Bayley-Worthington*, [1908] A. C. 97.

(*q*) *Clarke v. Chamberlin* (1880), 16 Ch. D. 176.

(*a*) Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 33; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34.

SECT. 2.—*Shifting Clauses.*SECT. 2.
Shifting
Clauses.SUB-SECT. 1.—*In General.*

1200. Shifting clauses are provisions inserted in settlements which have the effect of shifting the estates from the persons taking under the settlement on the happening of a contingency designated in the shifting clause, such as the accession to another estate, or to a title of honour, or failure to comply with some condition imposed by the settlement (b). Shifting clauses must be so framed as to take effect within the period laid down by the rule against perpetuities (c), and if so expressed as to be divisible they may be good in one event and bad in another (d).

Shifting
clauses.

1201. It has been laid down that five points in shifting clauses deserve special attention (e):—

The event in
which the
clause is to
operate.

(1) The event in which the shifting clause is to take effect must be accurately described (f). A general direction that it shall take effect on a person's accession to the family estate may not apply to the event of his succeeding to a proportion of it, however large (g); nor to the event of his succeeding to the whole, if it is charged with an incumbrance to which it was not, in fact or in contingency, liable when the settlement was framed (h); nor to accession to the family estate under a subsequent and independent instrument or by act of law (i).

(b) For form of shifting clause, see *Encyclopædia of Forms and Precedents*, Vol. XIII., p. 627.

(c) For the rule against perpetuities, see title PERPETUITIES, Vol. XXII., p. 295. As to its applicability to common law conditions, see *ibid.*, p. 314.

(d) *Miles v. Harford* (1879), 12 Ch. D. 691.

(e) Co. Litt. 327 a, Butler's note.

(f) It seems that if the estate is stated to be divested because other provision has been made for the person from whom it is taken, the gift over fails if the provision turns out not to have been made (*Carter v. Ducie* (Earl) (1871), 41 L. J. (CH.) 153).

(g) Thus a man was held not to succeed to estates where the whole of a particular property had been subtracted therefrom in favour of other persons (*Meyrick v. Laws*, *Meyrick v. Mathias* (1874), 9 Ch. App. 237; and see *Gardiner v. Jellicoe* (1862), 12 C. B. (N. S.) 568, 637). On the other hand, succession to a portion of estates settled on a marriage was held to bring into operation a shifting clause where the scheme of the will was that part of the estates referred to should be severed from the rest (*Micklethwait v. Micklethwait* (1858), 4 C. B. (N. S.) 790; see *Stackpoole v. Stackpoole* (1843), 2 Con. & Law. 489, 501).

(h) Where the limitations of the estate are extrinsic to the settlement containing the shifting clause, if a charge is created, the clause does not operate (*Harrison v. Round* (1852), 2 De G. M. & G. 190, 203; *Fazakerly v. Ford* (1831), 4 Sim. 390; see *Meyrick v. Laws*, *Meyrick v. Mathias*, *supra*). On the other hand, the operation of the shifting clause is not prevented by the fact that a man has anticipated a portion of the estate which descends to him (*Harrison v. Round*, *supra*).

(i) Thus, where there was a shifting clause in the event of the testator's eldest son coming into actual possession of estates entailed on the testator in remainder, it was held that this meant coming into possession under the limitations of the entail, and that the eldest son having come into possession under a devise in the will of a prior tenant in tail who had barred the entail and acquired the fee simple, the shifting clause did not operate (*Taylor v. Harewood* (Earl) (1844), 3 Hare, 372; *Meyrick v. Laws*, *Meyrick v. Mathias*, *supra*). But if an estate tail is barred and resettled as

SECT. 2.
Shifting
Clauses.

The estates
to be given.

The persons
to take.

(2) The clause should describe accurately what estates or interests the younger brother solely, or both the younger brother and his issue male, are to take in the family property, so as to give the clause the effect of making the second estate shift from them (*k*).

(3) Equal attention must be observed in describing the person to whom the settlor wishes the second estate to devolve when the party accedes to the family estate. It sometimes happens that the settlor directs that, on the accession of any of the subsequent tenants for life to the family estate, the second estate shall devolve to the person next entitled in remainder, who in the case proposed is the son of the tenant for life, or, where such a limitation is introduced, the trustees for preserving the contingent remainders (*l*).

part of one transaction, the estate being undiminished in quality and unimpaired in value, the new limitations may be considered as a continuation of the old, the question being not whether the estate, which has once been taken out of the settlement, comes back or not, but whether in coming back it goes in the mode in which it was to go according to the terms of the settlement (*Harrison v. Round* (1852), 2 De G. M. & G. 190; see *Fazakerly v. Ford* (1831), 4 Sim. 390, 415; and see *Monypenny v. Dering* (1852), 2 De G. M. & G. 145, where it was held that a shifting clause operated notwithstanding the enlargement of a tenancy in tail in remainder into a fee simple in remainder). But shifting clauses which take away an estate are construed strictly, and where a shifting clause was to operate in the event of succession to a certain estate "under any now existing or future will or settlement or other assurance," it was held that it did not affect succession thereto as heir-at-law (*Walmesley v. Gerard* (1861), 29 Beav. 321). In construing shifting clauses, the words "eldest" and "younger" are always read and construed in their primary signification (*Wilbraham v. Scarisbrick* (1847), 1 H. L. Cas. 167; see *Scarisbrick v. Eccleston* (1838), 5 Cl. & Fin. 398, H. L.; compare *Meredith v. Treffry* (1879), 12 Ch. D. 170; and see pp. 587, 588, *ante*), unless it is impossible to interpret the shifting clause according to the literal meaning of the words (*Balhurst v. Errington* (1877), 2 App. Cas. 698).

(*k*) Thus, where a testator directed that, in the event of his brother or any son of his brother's body succeeding to a named estate, estates which were by the will settled upon trust for the brother for life with remainder to his first and other sons in tail should go to the person and persons who by virtue of the will would become next entitled to the same, the brother having become tenant for life of the named estate and his eldest son tenant in tail in remainder, the son was held not to have succeeded to the named estate, and to have become by virtue of the shifting clause tenant in tail in remainder of the estates devised by the will (*Bagot v. Legge* (1864), 10 Jur. (N. S.) 994). "Entitled" in such a clause means entitled in possession and beneficially (*Othorley v. Loveland* (1863), 33 Beav. 189; *Umbers v. Jaggard* (1870), L. R. 9 Eq. 200). A person does not come into possession of an estate for the purposes of a shifting clause by becoming entitled to an estate in remainder either for life (*Monypenny v. Dering, supra*; see *Curzon v. Curzon* (1859), 1 Giff. 248), or in tail (*Bagot v. Legge, supra*), nor by actual possession obtained as a purchaser for value, a mortgagee from the owner, a tenant from year to year, or a lessee for years rendering rent, a judgment creditor, or tenant by *elegit* (*Taylor v. Harewood (Earl)* (1844), 3 Hare, 272, 384). Where trustees were entitled under a management clause to receive the rents and profits of an estate during the minority of an infant, the infant was held not to be entitled in possession within a shifting clause (*Leslie v. Rothes (Earl)*, [1894] 2 Ch. 499, C. A.); but a man may be entitled in possession notwithstanding that the whole income of the property is eaten up by charges and that there are no surplus rents and profits (*Re Varley, Thornton v. Varley* (1893), 62 L. J. (Ch.) 652).

(*l*) For a case where the person entitled in remainder is the son of the

SECT. 2.
Shifting
Clauses.

Provisions for next taker not being in existence at time of shifting.

(4) The clause should also direct to whom the second estate should devolve, if at the time of its shifting the person to whom it is limited is not in existence, but may afterwards come *in esse*, as where an estate is limited to the sons of I. S., a person in existence, successively in tail male, with a clause directing that, on the accession of any son of I. S. to a particular estate, the lands in settlement shall devolve to the next son of I. S., and while I. S. is living, and has one son only, that son accedes to the estate. It is proper to provide for this case by directing who is to be entitled to the estate while there is a possibility of a subsequent son, but the existence of a subsequent son is in suspense (*m*).

(5) In many cases it is necessary to provide for the return of the property to a person from whom it has been divested by the shifting clause, as when a person settles his family estate on himself for his life with successive remainders to each of his sons, A., B., C., and D., in order of birth, with remainders over to the sons of each of them successively in tail male, and settles a second estate on himself for life with successive remainders over to each of his sons, B., C., and D., in the order of birth, with remainders to the sons of each of them successively in tail male, with ulterior remainders to the collateral branches of his family, with a clause divesting the second estate from B., C., or D. and their respective issue male on their respectively acceding to the family estate. On the death of A. without issue male B. would accede to the family estate, and the second estate would therefore shift from him. Now if C. and D.

The return of the property to the person from whom it has been divested

tenant for life, see *Bagot v. Legge*, (1864), 10 Jur. (N. S.) 994. For cases where under a direction that an estate should go over as if the tenant for life were dead, the estate has shifted to trustees to preserve contingent remainders where there were contingent remainders to unborn sons of the tenant for life whose estate has ceased, see *Doe d. Henneage v. Henneage* (1790), 4 Term Rep. 13; *Stanley v. Stanley* (1809), 16 Ves. 491; *Morrice v. Langham* (1840), 11 Sim. 260; *Lambarde v. Peach* (1859), 4 Drew. 553; *Turton v. Lambarde*, *Lambarde v. Turton* (1860), 1 De G. F. & J. 495, C. A. In *Kenlis (Lord) v. Beotwe (Earl)* (1865), 34 Beav. 587, an original life estate was determined by a shifting clause, but a life estate given, by reference, to the same person expectant on the failure of issue male of his younger brothers was held to be still subsisting. In the case, however, of a gift over on accession to a title as if the person succeeding had died without issue, it has been held that the next vested remainderman was entitled (*Carr v. Erroll (Earl)* (1805), 6 East, 58; *Doe d. Lumley v. Scarborough (Earl)* (1836), 3 Ad. & El. 2, 897, Ex. Ch.; *Morrice v. Langham* (1841), 8 M. & W. 194; see also *Sanford v. Morrice* (1884), 11 Cl. & Fin. 667, H. L.). For a case where "die without issue" was held to mean die without issue of a particular class, see *Jellicoe v. Gardiner* (1865), 11 H. L. Cas. 323; but see *Doe d. Lumley v. Scarborough (Earl)*, *supra*.

(*m*) Cases as to intermediate rents and profits during the period between the determination of the estate of a tenant for life and the birth of a son have generally arisen through the oversight dealt with in note (*l*), p. 695, *ante*, where the shifting clause is so framed as to carry an estate from the tenant for life to his issue. If an intention to dispose of the beneficial interest is either expressed in the instrument on which the question arises, or to be gathered from its provisions, the rents and profits cannot result to the heir, and the next remainderman takes them (*Turton v. Lambarde*, *Lambarde v. Turton*, *supra*; *D'Eyncourt v. Gregory* (1864), 34 Beav. 36); but, if no such intention is expressed in or to be gathered from the instrument, the intermediate rents and profits revert to the settlor or his heir-at-law (*Stanley v. Stanley*, *supra*; *Lambarde v. Peach*, *supra*).

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Clauses.

should die without issue male, the second estate would devolve to the collateral branches of the family under the ulterior limitations, but it could not be the intention of the settlor that this should take place while there should be issue male of his own body. To obviate this and other incongruities of a similar nature, the shifting clause should be so framed as not to take effect unless C. or D. or some issue male of their bodies should be living when B. accedes to the family estate; and so as to provide that if the second estate shall have shifted, and C. and D. shall afterwards die without issue male, the second estate shall again revert to B. and his issue male, according to the original limitations (*n*).

Recurrence
of the con-
tingency.

1202. A shifting clause takes effect immediately on the happening of the specified event, and there is no difference for this purpose whether the clause is expressed to take effect "then" or "then and immediately thereupon" (*o*). If the shifting clause is to operate as often as the event referred to is to recur, this should appear from its terms, but an intention may be gathered from the meaning of the clause as a whole in the absence of express words (*p*).

Provisions
to defeat
charges.

1203. It may be desirable that provision should be made to defeat charges for jointure and portions on the estate that shifts, but this largely depends on the probability of the charges being provided for out of the estate to which there is succession (*q*).

Other kinds
of shifting
clauses.

1204. Shifting clauses are not confined to carrying over an estate in the event of accession to another estate, but they are commonly employed to impose a penalty for disobedience to an injunction contained in the settlement. Thus, clauses have been introduced providing for the cesser of the interest of any taker of the estate who fails to profess a specified religion (*r*), or to comply with a name and arms clause (*s*), or to reside at a specified place (*t*).

(*n*) For form of reverter clause, see *Encyclopædia of Forms and Precedents*, Vol. XIII., p. 627; and compare *Trevor v. Trevor* (1842), 13 Sim. 108.

(*o*) *Cope v. De La Warr (Earl)* (1873), 8 Ch. App. 982.

(*p*) *Doe d. Lumley v. Scarborough (Earl)* (1835), 3 Ad. & El. 2, 38; but see *Scarborough (Earl) v. Doe d. Savile* (1836), 3 Ad. & El. 897, 964, Ex. Ch.; *Monypenny v. Dering* (1852), 2 De G. M. & G. 145, 188.

(*q*) See *Encyclopædia of Forms and Precedents*, Vol. XIII., p. 627; but see *Holmesdale (Viscount) v. West* (1871), L. R. 12 Eq. 280.

(*r*) *Carteret v. Carteret* (1723), 2 P. Wms. 132, and *Seymour v. Vernon* (1864), 10 Jnr. (N. S.) 487, are examples of cases of this kind; see also *Biddulph v. Lees* (1859), 5 Jur. (N. S.) 818, Ex. Ch.; *Ex parte Dickson* (1850), 1 Sim. (N. S.) 37. In *Clavering v. Ellison* (1856), 3 Drew. 451; (1857), 8 De G. M. & G. 662, C. A.; (1859), 7 H. L. Cas. 707, a gift over if the testator's grandchildren should be educated abroad, or not in the Protestant religion according to the rites of the Church of England, was held by all the judges before whom the case came not to be brought into operation by long residence abroad, and attendance at Roman Catholic schools. The court does not insert a clause of this nature in a settlement to be made by an infant on marriage (*Re Williams* (1860), 6 Jur. (N. S.) 1064).

(*s*) See p. 697, *post*.

(*t*) "Residence" implies not domicile, but personal presence in the locality at some time or other (*Walcot v. Botfield* (1854), Kay, 534). A condition

SUB-SECT. 2.—Name and

arms.

SECT. 2.

Shifting
Clauses.Name and
arms clause.

Form.

1205. One of the most common uses of shifting clauses in settlements occurs in what is known as the name and arms clause, whereby a settlor imposes upon all persons succeeding to an estate under the settlement an obligation to take his name and bear his arms. Such a clause (*u*) first indicates the persons on whom the obligation is imposed, that is, every person becoming entitled under the limitations of the settlement, whether legally or equitably, as tenant for life or tenant in tail male, or in tail, to the possession or receipt of the rents and profits of the settled property, and who shall not then use or bear the specified surname and arms (*a*). It then directs that any such person (*b*) within a specified period after becoming entitled as aforesaid (*c*), unless he shall be an infant, in which case the obligation is to be performed within the specified period after attaining twenty-one (*d*), shall apply for and endeavour to obtain a

as to residence, where no period for residence is fixed, has been held too vague to be enforced (*Fillingham v. Bromley* (1823), Turn. & R. 530; compare *Dunne v. Dunne* (1855), 7 De G. M. & G. 207, C. A.; *Wynne v. Fletcher* (1857), 24 Beav. 430); but a condition imposing residence in a house for a specified period in each year is enforced, though it need not involve spending a night in the house (*Walcot v. Botfield*, (1854), Kay, 534; or personal residence (*Re Moir, Warner v. Moir* (1884), 25 Ch. D. 605; compare *Re Wright, Mott v. Issott*, [1907] 1 Ch. 231). Absence on official duty is not a breach of such a condition (*Re Adair*, [1909] 1 I. R. 311). The condition as to residence is nowadays less important, inasmuch as it may be defeated by the exercise of the powers of sale and leasing conferred by the Settled Land Act, 1882 (45 & 46 Vict. c. 38); see p. 638, *ante*. The condition is, however, effectual so far as it does not hinder the tenant for life from disposing of the property (*Re Haynes, Kemp v. Haynes* (1887), 37 Ch. D. 306; *Re Trenchard, Trenchard v. Trenchard*, [1902] 1 Ch. 378; *Re Adair*, [1909] 1 I. R. 311).

(*u*) See Encyclopædia of Forms and Precedents, Vol. XIII., p. 624.

(*a*) "Entitled" means entitled in possession and not in interest (*Lanqdale (Lady) v. Briggs* (1856), 8 De G. M. & G. 391, C. A.; *Re Finch, Abbiss v. Burney* (1881), 17 Ch. D. 211, C. A.; see *Re Greenwood, Goodhart v. Woodhead*, [1903] 1 Ch. 749, C. A.); but a person is none the less entitled to possession because there are no rents to receive (*Re Varley, Thornton v. Varley* (1893), 62 L. J. (Ch.) 652; and see note (*k*), p. 694, *ante*).

(*b*) If the person entitled is a female, the obligation may be imposed on her husband (*Re Williams* (1860), 6 Jur. (N. S.) 1064); but an exception is sometimes made in favour of husbands who are peers or sons of peers; see *Egerton v. Brownlow (Earl)* (1853), 4 H. L. Cas. 1, 7.

(*c*) If no period is specified it is sufficient if the change of name is effected within a reasonable time, considering the circumstances of the case (*Davies v. Lowndes* (1835), 1 Bing. (N. C.) 597, 618). In the absence of a time limit the clause may be void as transgressing the rule against perpetuities (*Bennett v. Bennett* (1864), 2 Drew. & Sm. 266).

(*d*) In the argument in *Seymour v. Vernon* (1864), 10 Jur. (N. S.) 487, it was stated that the court had never decided that when in a name and arms clause the words "under twenty-one" had been omitted, the tenant in tail must assume before that age; but it would appear that non-compliance by the infant would involve forfeiture (*Bevan v. Mahon-Hagan* (1893), 31 L. R. Ir. 342, C. A.; and see *Partridge v. Partridge*, [1894] 1 Ch. 351); see *Carteret v. Carteret* (1723), 2 P. Wms. 132 (as to the compliance by infants with a provision as to professing religion); and see *Whittingham's Case* (1603), 8 Co. Rep. 42 b (as to loss of estate by failure of an infant to perform a condition). An infant, however, not having power to fix his place of residence cannot be said to "refuse or neglect" to perform a condition as

SECT. 2.
Shifting
Clauses.

The forfeiture
clause.

Application
of rules as
to shifting
clauses.

licence from the Crown (e) expressly authorising him to take and use (f) the specified surname (g) and the specified arms (h).

1206. This clause is generally followed by a shifting clause directing that, in the event of non-compliance with the direction to take the name and arms (i), the interest of the person so failing shall determine, and the settled estates shall go in the manner in which they would have gone if such person, being a tenant for life, were dead, or, being a tenant in tail, were dead and there were a failure of issue. The rules given (j) with regard to shifting clauses, except rule 5, apply in framing shifting clauses intended to operate on non-compliance with an injunction, but it must be remembered that in the name and arms proviso the cesser of estate is intended as a personal punishment against the individual neglecting to comply with it, while in the case of clauses intended to operate on accession to an estate the object is to prevent the union of two estates in the same branch of the family. In the case of a tenant for life, therefore, who refuses to comply with an injunction, the estate is made to devolve on the next remaindermen, who may be his children (k). In the case, however, of a defaulting tenant in tail, the

to residence (*Parry v. Roberts* (1871), 19 W. R. 1000; *Partridge v. Partridge*, [1894] 1 Ch. 351).

(e) If no method of assuming the name is specified, the voluntary assumption of it even by an infant is sufficient (*Doe d. Luscombe v. Yates* (1822), 5 B. & Ald. 544; *Davies v. Lowndes* (1835), 1 Bing. (N. C.) 597; *Bevan v. Mahon-Hagan* (1893), 31 L. R. Ir. 342, C. A.; see *Barlow v. Bateman* (1730), 3 P. Wms. 65). But where the condition was to "take the name for themselves and their heirs," it was said that many acts are to be done to oblige the heirs to take it, such as a grant from the King or an Act of Parliament (*Gulliver v. Ashby* (1766), 4 Burr. 1930, 1941). As to the methods by which a new name can be assumed, see title NAME AND ARMS, CHANGE OF, Vol. XXI., pp. 349 *et seq.*

(f) "Take and use" means "take and thereafter use," so that discontinuance of the name involves forfeiture (*Re Drax, Dunsany (Baroness) v. Sawbridge* (1906), 75 L. J. (CH.) 317; see *Blagrove v. Bradshaw* (1858), 4 Drew. 230).

(g) If the clause does not enjoin the assumption of the name as a surname it is sufficient that the devisee has the name as a christian name (*Bennett v. Bennett* (1864), 2 Drew. & Sm. 266). If the devisee is required to assume the prescribed surname, the use of it before his own family name is not a compliance with the condition (*D'Eyncourt v. Gregory* (1876), 1 Ch. D. 441, 445); but, if the prescribed surname is to be assumed "alone or together with" the devisee's family name, it may be used before the family name (*Re Eversley, Mildmay v. Mildmay*, [1900] 1 Ch. 96).

(h) If the royal licence through the Heralds College cannot be obtained, the devisee is relieved from the condition (*Re Croxon, Croxon v. Ferrers*, [1904] 1 Ch. 252, 255; see *Austen v. Collins* (1886), 54 L. T. 903). As to the Heralds College, see titles NAME AND ARMS, CHANGE OF, Vol. XXI., p. 353; PEERAGES AND DIGNITIES, Vol. XXII., pp. 288, 229. Inasmuch as arms can only be properly assumed by royal licence, it would seem that the voluntary assumption of arms is not a sufficient compliance, unless the person assuming them is entitled by descent to bear them (*Bevan v. Mahon-Hagan, supra*, at p. 356). As to grants of arms, see title PEERAGES AND DIGNITIES, Vol. XXII., pp. 288, 289.

(i) If the forfeiture is incurred by refusal to comply, see *Doe d. Kenrick v. Beauclerk (Lord William)* (1809), 11 East, 657, 667; but see *Doe d. Norfolk (Duke) v. Hawke* (1802), 2 East, 481, 487.

(j) See pp. 693 *et seq.*, *ante*.

(k) *Doe d. Lumley v. Scarborough (Earl)* (1835), 3 Ad. & El. 2, 39.

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Clauses.

law does not allow a clause of forfeiture by which his individual interest is to cease as to him only, and yet the estate tail, with all the remainders limited thereon, is to continue for the benefit of those to whom the testator intended the property to devolve after the death of the tenant in tail whose interest is made to cease (l). A forfeiture clause is effectual to terminate a tenancy in tail (m), but a name and arms clause ought to be held to be a condition subsequent where the intention of the testator, as evidenced by the words that he has used, is more consistent with the inference that he intended the condition to be a condition subsequent rather than a condition precedent, though the words are capable of admitting both constructions (n). It follows, therefore, that the execution of a disentailing deed operates to put an end to the condition (o). But when personal estate was settled by reference to the limitations of settled real estate, with a proviso that in the event of non-compliance with a name and arms clause, the personal estate should go over to the persons who would have been entitled to the real estate in case the person whose estate should cease, being tenant for life of the real estate, were dead, or being tenant in tail of the real estate were dead without issue, the clause was held to mean that the property was to go in the same way as if the tenant in tail, not having barred the entail, had died without issue, and the tenant in tail of the realty did not become indefeasibly entitled to the personalty by reason of his having barred his estate tail (p). If the condition that property should go over in the event of non-compliance with a name and arms clause as if the donee were dead is attached to an absolute gift, the condition is void (q).

Effect of
disentailing
deed.

Ignorance of the condition is no excuse for failure to comply with it (r).

Ignorance of
condition.

SECT. 3.—Renewable Leaseholds.

SUB-SECT. 1.—The Obligation to Renew.

1207. If renewable leaseholds (s) are included in the subject-matter of a settlement (t), the settlement should make it plain, first, whether an imperative trust for renewal is intended to be

The obligation
to renew.

(l) *Corbet's Case* (1600), 1 Co. Rep. 83 b, 85 b; *Mildmay's Case* (1605), 6 Co. Rep. 40 a; *Seymour v. Vernon* (1864), 10 Jur. (N. S.) 487.

(m) *Astley v. Esser (Earl)* (1874), L. R. 18 Eq. 290.

(n) *Re Greenwood, Goodhart v. Woodhead*, [1903] 1 Ch. 749, 755, C. A.; see *Bennett v. Bennett* (1864), 2 Drew. & Sm. 266, 275.

(o) *Doe d. Lumley v. Scarborough (Earl)* (1836), 3 Ad. & El. 2, 897, Ex. Ch.; *Milbank v. Vane*, [1893] 3 Ch. 79, C. A.

(p) *Re Cornwallis, Cornwallis v. Wykeham-Martin* (1886), 32 Ch. D. 388.

(q) *Re Oall's Trusts* (1864), 2 Hem. & M. 46; *Musgrave v. Brooke* (1884), 26 Ch. D. 792.

(r) *Astley v. Esser (Earl)*, *supra*. The case would be different if such party could make a good title apart from the instrument containing the condition of which he was ignorant (*Doe d. Kenrick v. Bequelerk (Lord William)* (1809), 11 East, 657).

(s) As to renewable leaseholds, see, further, title LANDLORD AND TENANT, Vol. XVIII., pp. 461 *et seq.*

(t) For forms, see *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 363, 657.

SECT. 3.
Renewable
Leaseholds.

Direction
to renew.

created. A direction to renew may be couched in discretionary terms in order to avoid placing the estate and the persons interested at the mercy of the lessor, and yet impose on the trustees a trust which the court will execute if they do not (*a*). If there is a direction to renew, whether express or implied (*b*), it must be obeyed, and the persons whose duty it is to renew, whether the trustees or the tenant for life, are liable to compensate the remainderman for the loss occasioned by their default (*c*), or if he himself renews, to repay him the amount of the fine, provided that it is reasonable (*d*). In the absence of a direction to renew, the mere circumstance of there being limitations over imposes no necessity on the tenant for life, and he may renew or let the term expire (*e*). If, however, a tenant for life in such circumstances chooses to renew, he is a trustee of the lease for all persons interested under the subsequent limitations, in accordance with the principle of equity that parties interested jointly with others in a lease cannot take to themselves the benefit of a renewal to the exclusion of the other parties interested with them (*f*).

Trustees'
power.

Trustees are now authorised by statute, subject to the provisions of the settlement, to obtain renewals of settled leaseholds (*g*).

SUB SECT. 2.—By Whom the Expenses of Renewal are Borne.

By whom the
expenses of
renewal are
to be borne.

1208. The settlement should provide how and by whom the expenses of renewal are to be raised and borne. If provision is made for raising the expenses of renewal by sale or mortgage of the estate itself, or of another estate, the tenant for life loses the rents of the part sold in the case of sale and keeps down the interest in the case of a mortgage (*h*). But if there is a direction

(*a*) *Mulgrave (Viscount) v. Mulgrave (Earl)* (1818), 3 Madd. 491; *sub nom. Mulvintown (Viscount) v. Porimore (Earl)* (1821), 5 Madd. 471; *Mortimer v. Watts* (1852), 14 Beav. 616.

(*b*) *Lock v. Lock* (1710), 2 Vern 666. The court is, however, slow on mere inference to impose an obligation on the tenant for life to renew (*Capel v. Wood* (1828), 4 Russ. 500).

(*c*) *Montford (Lord) v. Cadogan (Lord)* (1810), 17 Ves. 485; (1816) 10 Ves. 635, *Bennett v. Colley* (1833), 2 My. & K. 225; see *Hulkes v. Barrow* (1829), Taml 264. The trustees have a right to be recouped by the tenant for life, who has received the rents and profits that ought to have made good the fine (*Montford (Lord) v. Cadogan (Lord)*, *supra*); but, in a case where the estate of a tenant for life who neglected to renew was insolvent, the loss was borne by capital and not by the tenant for life in remainder (*Wadley v. Wadley* (1845), 2 Coll. 11).

(*d*) *Colegrave v. Manby* (1826), 2 Russ. 238

(*e*) *Stone v. Thred* (1787), 2 Bro. C. C. 243; *White v. White* (1804), 9 Ves. 554, 561; *O'Ferrall v. O'Ferrall* (1834), L. & G. temp. Plunk. 79. A tenant for life ought not, however, by surrendering a lease, to deprive himself of the option of renewing for the benefit of the parties in remainder (*Harvey v. Harvey* (1842), 5 Beav. 134).

(*f*) *Kawe v. Chichester* (1778), Amb. 715; *Re Biss, Biss v. Biss*, [1903] 2 Ch. 40, 61, C. A.; and see title EQUIT, Vol. XIII., p. 155.

(*g*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 19; and see title TRUSTS AND TRUSTEES. This provision does not alter the respective rights of the tenant for life and remainderman (*Re Baring, Jeune v. Baring*, [1893] 1 Ch. 61).

(*h*) *Plumtre v. Ozenden* (1855), 1 Jur. (N. S.) 1037; *Ainslie v. Harcourt* (1860), 28 Beav. 313; *Bradford v. Brownjohn* (1868), 3 Ch. App. 711, 715.

to renew leases out of rents and profits, the whole expense has to be borne by the tenant for life (i).

If there is no special direction in the settlement as to the raising of expenses of renewal (k), or the special direction is limited in amount (l), the expenses of renewal, or the excess of them over the limited sum, must be borne by the tenant for life and remaindermen in proportion to their actual enjoyment of the renewed lease (m). This rule applies to the case of leaseholds for lives as well as of leaseholds for years (n). If, therefore, the tenant for life derives no benefit from the renewal, as where he dies before the expiration of the original lease, the whole expense must fall on the remaindermen (o). On the other hand, if the remaindermen derive no benefit from the renewal, as in the case of a tenant for life renewing for his own life, his estate cannot make any claim in respect of the fines (p).

**SECT. 3.
Renewable
Leaseholds.**

Expenses
borne by
tenant for
life and
remainder-
men.

1209. If the expenses of renewal are paid by the tenant for life, his estate has a lien upon the residue of the term for whatever ought to be paid by the remainderman in respect of the period of which the tenant for life has not had the enjoyment (q), but the tenant for life cannot require repayment of the sum advanced in his lifetime (r). The remainderman pays compound interest on the amount found due from him for the period down to the death of the tenant for life and simple interest from that date till payment (s). If the renewal

Protection of
interests of
tenant for
life and
remainder-
man.

(i) *Solley v. Wood* (1861), 29 Beav. 482; *Shaftesbury (Earl) v. Marlborough (Duke)* (1833), 2 My. & K. 111. Where the custom was to renew annually and underlet, it was held that the fines upon renewal were payable out of rents and profits, and the tenant for life, undertaking to pay those fines, was entitled to the fines on renewal of the underleases (*Milles v. Milles* (1802), 6 Ves. 761). A direction to raise fines out of rents and profits has been held to authorise the raising of a gross sum by sale or mortgage (*Allan v. Backhouse* (1813), 2 Ves. & B. 65).

(k) If there is a power in the trustees to raise expenses of renewal either by sale or mortgage or out of rents and profits, and the trustees do not exercise their discretion, the court treats the case as one in which there is no direction binding the court (*Jones v. Jones* (1846), 5 Hare, 440, 462; *Ainslie v. Harcourt* (1860), 28 Beav. 313; but see *Milsintown (Viscount) v. Portmore (Earl)* (1821), 5 Madd. 471).

(l) *Plumtre v. Oxenden* (1855), 1 Jur. (N. S.) 1037.

(m) *Nightingale v. Lawson* (1785), 1 Bro. C. C. 440; *White v. White* (1804), 9 Ves. 554; *Giddings v. Giddings* (1827), 3 Russ. 241; *Cridland v. Luxton* (1835), 4 L. J. (Ch.) 65; *Jones v. Jones*, *supra*; *Hudleston v. Whelpdale* (1852), 9 Hare, 775; *Bradford v. Brownjohn* (1868), 3 Ch. App. 711. In *Re Baring, Jeune v. Baring*, [1893] 1 Ch. 61, KEKEWICH, J., thought that the enjoyment might properly be ascertained by actuarial valuation, but the point was not argued.

(n) *White v. White*, *supra*; *Allan v. Backhouse*, *supra*; *Cridland v. Luxton*, *supra*; *Jones v. Jones*, *supra*; *Bradford v. Brownjohn*, *supra*. As to leaseholds settled on trust for sale, see *Keir v. Robins* (1838), 2 Jur. 773.

(o) *Nightingale v. Lawson*, *supra*; *Adderley v. Clavering* (1789), 2 Cox, Eq. Cas. 192; *Harris v. Harris* (No. 3) (1863), 32 Beav. 333.

(p) *Lawrence v. Maggs* (1759), 1 Eden, 453.

(q) *Adderley v. Clavering*, *supra*; *Jones v. Jones*, *supra*, at p. 465.

(r) *Harris v. Harris* (No. 3), *supra*.

(s) *Nightingale v. Lawson*, *supra*; *Giddings v. Giddings*, *supra*; *Cridland v. Luxton*, *supra*; *Bradford v. Brownjohn*, *supra*. The rate of interest

SECT. 3.
Renewable
Leaseholds.

Security
 given by
 tenant for
 life.

is made by or at the expense of the remainderman, or the money is raised by a mortgage of the *corpus*, the difficulty arises that, unless some course is taken to protect the interest of the remainderman, the tenant for life may enjoy the estate during his whole life without bearing any greater charge than the interest on the debt created by the renewal, and he may have no assets to pay his proportion of the principal money. This inconvenience has been avoided by requiring the tenant for life to give security for an amount calculated upon the assumption that his life will last during a portion of the renewed lease. If he dies within the time during which it is assumed his life will last, the security is void for the excess. If he outlives that time, he may be called on to give a further security to cover the additional proportion then to be attributed to him (*t*); but his income cannot be impounded on account of a security that he may have to give in the future (*a*).

Impossibility
 of renewal.

1210. Should renewal from any cause become impossible, then if there is a paramount trust to renew the estate for the benefit of all persons entitled in succession, the lease should be sold on renewal becoming impracticable, and the proceeds of sale and of any sum set apart to provide for renewals invested as capital (*b*), or, if possible, the reversion in fee simple should be purchased by the trustees for the benefit of the estate (*c*). If, however, the court on the construction of the settlement comes to the conclusion that the tenant for life is entitled in specie to the whole rents and profits, charged only with the payment of such a sum as may be required for the renewal, then, on the renewal becoming impracticable, there is nothing by which the charge can be ascertained, and no means by which any substituted benefit to be given to the remainderman can be ascertained by the court; the tenant for life is, therefore, entitled to all rents and profits accruing during the co-existence of the existing term and his life, including any sums directed to be accumulated for purpose of renewal and, if the term is sold, to a corresponding proportion of the price obtained for it (*d*). The court does not sanction the purchase of the reversion to the prejudice of the tenant for life by trustees who have a mere power of renewal (*e*).

Copyholds.

1211. Where copyholds for lives are settled on persons by way of succession, the rule is the same, that the tenant for life and those in remainder should bear the burden of the fines on admissions in

allowed is 4 per cent. (*Bradford v. Brownjohn* (1868), 3 Ch. App. 711, 715); see title MONEY AND MONEY-LENDING, Vol. XXI., p. 42, note (*b*).

(*t*) *White v. White* (1804), 9 Ves. 554; *Reeves v. Creswick* (1839), 3 Y. & C. (EX.) 715; *Greenwood v. Evans* (1841), 4 Beav. 44; but see *Hudleston v. Whelpdale* (1852), 9 Hare, 775, 788; *Jones v. Jones* (1846), 5 Hare, 440.

(*a*) *Hudleston v. Whelpdale*, *supra*, at p. 789.

(*b*) *Maddy v. Hale* (1876), 3 Ch. D. 327, C. A.; *Re Barber's Settled Estates* (1881), 18 Ch. D. 624.

(*c*) *Re Radnelagh's (Lord) Will* (1884), 26 Ch. D. 590.

(*d*) *Morres v. Hodges* (1860), 27 Beav. 625; *Re Money's Trusts* (1862), 2 Drew. & Sm. 94; *Richardson v. Moore* (1817), Madd. & G. 83, n.; *Tardiff v. Robinson* (1819), 27 Beav. 629, n.

(*e*) *Hayward v. Pile* (1870), 5 Ch. App. 214.

the proportion of the advantage that they actually derive from such admissions (*f*).

1212. If the tenant for life, or his assignee, purchases the reversion on a renewable lease, he can only hold it as trustee for the remaindermen (*g*), but he is entitled to a charge on the property for the purchase-money, which carries interest at 4 per cent. from his death (*h*).

SECT. 2.
Renewable
Leaseholds.

Purchase of
reversion.

SECT. 4.—*Settlement of Personality to Devolve with Realty.*

1213. It is often desired that the enjoyment and devolution of personal estate and personal chattels shall, without conversion, accompany the limitations of some freehold estate settled by the same or another settlement. This object is generally effected by assigning such personal estate or personal chattels to trustees to hold upon such trusts and with and subject to such powers, provisoes, agreements and declarations as shall correspond with the uses, trusts, powers, provisoes, agreements and declarations limited, declared and expressed of and concerning the freehold estate as nearly as the different tenures and qualities of the said premises respectively, and the rules of law and equity will permit, but not so as to increase or multiply charges or powers of charging (*i*).

Settlements
of personality
with realty.

A settlement of chattels to devolve with land is commonly called making them heirlooms (*k*).

Heirlooms

1214. As an estate tail in personality is legally impossible (*l*), an assignment or bequest of personality, either by way of immediate gift or executed trust (*m*), to go on the same uses as realty—or in the case of chattels, a direction that they shall be treated as heirlooms so far as the rules of law and equity permit (*n*)—gives life

Devolution
of settled
personality.

(*f*) *Planters v. Abbott* (1833), 2 My. & K. 97; and see title *COPYHOLDS*, Vol. VIII., pp. 30, 35, 76.

(*g*) *Re Ranelagh's (Lord) Will* (1884), 26 Ch. D. 590; *Phillips v. Phillips* (1885), 29 Ch. D. 673, C. A.

(*h*) *Mason v. Hulke* (1874), 22 W. R. 622; *Isaac v. Wall* (1877), 6 Ch. D. 706. As to the purchase of reversions on settled leaseholds with capital moneys arising under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), see p. 647, *ante*.

(*i*) See *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 325, 326.

(*k*) The word "heirlooms" means something which, though not by its own nature heritable, is to have a heritable character impressed upon it (*Byng v. Byng* (1862), 10 H. L. Cas. 171, 183), and such character may be imposed by a voluntary donor (*Seale v. Hayne* (1863), 9 L. T. 570). As to heirlooms at common law, see title *REAL PROPERTY AND CHATTELS REAL*, Vol. XXIV., p. 240; and see title *EXECUTORS AND ADMINISTRATORS*, Vol. XIV., p. 218. As to sale of chattels settled to devolve with land, see *Settled Land Act*, 1882 (45 & 46 Vict. c. 38), s. 37; and see pp. 659 *et seq.*, *ante*. Articles which can only be enjoyed by consumption or are perishable in a short time are not included in a direction that furniture and household goods, chattels and effects in or about a house shall be annexed to the house as heirlooms (*Hare v. Pryce* (1864), 11 L. T. 101).

(*l*) *Stafford (Earl) v. Buckley* (1750), 2 Ves. Sen. 170; see *Ex parte Sterne* (1801), 6 Ves. 156.

(*m*) As to executory trusts to settle personality as realty, see p. 541, *ante*; titles *PERSONAL PROPERTY*, Vol. XXII., p. 413; *WILLS*.

(*n*) A bequest of household stuff to remain for those who should enjoy the estate by a settlement was held to give it absolutely to the first taker who was a tenant for life (*Wyth v. Blackman* (1749), 1 Ves. Sen. 190).

SECT. 4.
Settle-
ment of
Personalty
to Devolve
with Realty.

General rule
as to vesting.

Modification
of rule.

interests in the personalty or chattels to those who take life interests in the realty at birth (o), but such personalty or chattels vest absolutely in the first person who becomes entitled to the real estate for a vested estate of inheritance, whether in possession or remainder (p), subject of course, if the estate is in remainder, to all prior limited interests, such as estates for life. Such an interest in personalty may be defeated by any event which would defeat the estate of the person becoming entitled thereto in the realty (q), but if once vested it is not divested by death under twenty-one (r) or by death before the interest becomes indefeasibly vested, if ultimately in fact it does so vest (s).

A settlor may modify this rule, but he must use words which indicate his intention to do so with reasonable certainty. Thus it is possible to introduce provisions defeating the interest of a tenant in tail by purchase (t) who dies under the age of twenty-one years (a), or defeating the interest of a tenant in tail who does not come

(o) *Savile v. Scarborough (Earl)* (1818), 1 Swan. 537; *Gower v. Grosvenor* (1740), 5 Madd. 337; *Harrington v. Harrington* (1868), 3 Ch. App. 564, 573; *Robinson v. Robinson* (1875), 33 L. T. 663; compare *Montague v. Inchiquin (Lord)* (1875), 32 L. T. 427.

(p) *Trafford v. Trafford* (1746), 3 Atk. 347; *Bridgwater (Duke) v. Egerton* (1761), 2 Ves. Sen. 121; *Foley v. Burnell* (1783), 1 Bro. C. C. 274; (1785), 4 Bro. Parl. Cas. 319; *Vaughan v. Burslem* (1790), 3 Bro. C. C. 101; *Fordyce v. Ford* (1795), 2 Ves. 536; *Ware v. Polhill* (1805), 11 Ves. 257; *Carr v. Erroll (Lord)* (1808), 14 Ves. 478; *Southampton (Lord) v. Hertford (Marquis)* (1813), 2 Ves. & B. 54, 63; *Doncaster v. Doncaster* (1856), 3 K. & J. 26; *Scarsdale (Lord) v. Curzon* (1860), 1 John. & H. 40; *Re Johnson's Trusts* (1866), L. R. 2 Eq. 716; *Re Fothergill's Estate, Price-Fothergill v. Price*, [1903] 1 Ch. 149; *Re Parker, Parker v. Parkin*, [1910] 1 Ch. 581; compare *Schank v. Scott* (1874), 22 W. R. 513 (where a life interest in a sum of money was given to a tenant in tail with remainder upon the trusts of the settled land, and an absolute interest was acquired in the personalty on the execution of a disentailing deed).

(q) *Felham (Lady C.) v. Gregory* (1760), 3 Bro. Parl. Cas. 204; *Re Parker, Parker v. Parkin*, *supra*.

(r) *Foley v. Burnell*, *supra*; *Vaughan v. Burslem*, *supra*; *Carr v. Erroll (Lord)*, *supra*; *Re Parker, Parker v. Parkin*, *supra*.

(s) *Re Cresswell, Parkin v. Cresswell* (1883), 24 Ch. D. 102, distinguishing *Hogg v. Jones* (1863), 32 Beav. 45, where the decision was upon the effect of the words "actual possession and enjoyment." But where a testator who was entitled to leaseholds for three lives, which he had insured, gave his real and personal estate to his daughter for life, with remainder to her first and other daughters successively in tail, an infant tenant in tail in remainder took no interest in the surplus money arising from a policy on one of the lives which fell in after her death (*Meller v. Stanley* (1864), 12 W. R. 524).

(t) If such a provision referred to every tenant in tail of the settled land, whether claiming by purchase or descent, it would transgress the rule against perpetuities and consequently fail. The words "tenant in tail" have, however, been construed to mean tenant in tail by purchase (*Christie v. Gosling* (1866), L. R. 1 H. L. 279; *Martelli v. Holloway* (1872), L. R. 5 H. L. 532); and see title PERPETUITIES, Vol. XXII., p. 347.

(a) *Christie v. Gosling*, *supra*; *Harrington (Countess) v. Harrington (Earl)* (1871), L. R. 5 H. L. 87; *Martelli v. Holloway*, *supra*; *Re Dayrell, Hastie v. Dayrell*, [1904] 2 Ch. 496. Clauses of this nature, which are contingent limitations by way of trust in the nature of clauses of postponement and defeasance, must be clear and certain both in expression and operation (*Re Exmouth (Viscount), Exmouth (Viscount) v. Praed* (1883), 23 Ch. D. 158).

into actual possession of the land (b). But the court, in considering whether the settlor has manifested an intention to exclude the rule, ought not to be influenced by the actual events that have occurred or lay hold of doubtful expressions tending to restrict the interest in the personality to those who come into possession of the real estate (c).

It is sometimes desired to settle chattels to go with a title,^o but unless this is done by way of an executory trust (d) a gift of chattels as heirlooms, or so far as the rules of law and equity permit, to such persons as shall from time to time be holders of the title, confers an absolute interest on the first person who becomes beneficially entitled to the chattels as holder of the title (e).

SECT. 4.
Settle-
ment of
Personalty
to Devolve
with Realty.

Settlement
of chattels
to go with a
title.

(b) *Scarsdale (Lord) v. Curzon* (1860), 1 John. & H. 40 (limitation of chattels in trust for the person seised of or entitled to the actual freehold of a mansion-house thereby settled); *Potts v. Potts* (1848), 1 H. L. Cas. 671 (trust of chattels for the persons who should become seised of real estates); *Re Angerstein, Angerstein v. Angerstein*, [1895] 2 Ch. 883 (trust for person entitled to the actual possession of settled real estate); *Re Fothergill's Estate, Price-Fothergill v. Price*, [1903] 1 Ch. 149 (trust of chattels to go along with and be used and enjoyed so far as the rules of law and equity would permit by the person who should for the time being be in actual possession or entitled to the receipt of the rents and profits of settled land); *Re Chesham's (Lord) Settlement, Valentia (Viscount) v. Chesham (Lady)*, [1909] 2 Ch. 329, C. A. (trust to permit chattels to be used, held, and enjoyed with a mansion-house by the person who for the time being should be entitled to the mansion-house): see *Hogg v. Jones* (1863), 32 Beav. 45; *Cox v. Sutton* (1856), 2 Jur. (N. S.) 733; and, as to "actual possession," compare *Re Petre's Settlement Trusts, Legh v. Petre*, [1910] 1 Ch. 290.

(c) *Scarsdale (Lord) v. Curzon*, *supra*, at p. 51; *Re Parker, Parker v. Parkin*, [1910] 1 Ch. 581, 585. Thus the general rule has been held not to be negatived by a direction that chattels should be held and enjoyed by the several persons who from time to time should successively be entitled to the use and possession of the settled realty, as in the nature of heirlooms, to be annexed and go along with the settled realty (*Foley v. Burnell* (1783), 1 Bro. C. C. 274; (1785), 4 Bro. Parl. Cas. 319), or by a direction that chattels should continue annexed to real estate so long as the law would permit to be inherited by the several persons who should succeed thereto (*Re Cresswell, Parkin v. Cresswell* (1883), 24 Ch. D. 102), or by a direction that chattels should continue annexed to a mansion-house so long as the law would permit and be enjoyed by the several persons who should succeed to the mansion-house (*Re Parker, Parker v. Parkin, supra*). A simple direction that real estate and chattels shall go together as long as the rules of law and equity permit simply means that, inasmuch as there is a difference between realty and personality, the limitations are to be applied according to the quality of the property, and since the law does not permit personality to go as an estate tail, when such a limitation is reached, an absolute interest is given (*Scarsdale (Lord) v. Curzon, supra*, at p. 54). Consequently such a phrase does not make the trust executory (*Vaughan v. Burslem* (1790), 3 Bro. C. C. 101, overruling on this point *Gower v. Grosvenor* (1740), 5 Madd. 337; *Trafford v. Trafford* (1746), 3 Atk. 347; *Scarsdale (Lord) v. Curzon, supra*, at p. 50; *Harrington (Countess) v. Harrington (Earl)* (1871), L. R. 5 H. L. 87), or extend or alter the disposition made of the personal estate (*Christie v. Gosling* (1866), L. R. 1 H. L. 279, 299), or imply a provision that the interest of a tenant in tail by purchase, who dies under the age of twenty-one years, shall be defeated (*Re Parker, Parker v. Parkin, supra*).

(d) See p. 703, *ante*; title WILLS.

(e) *Tollemache (Lady Laura) v. Coventry (Earl and Countess)* (1834), 2 Cl. & Fin. 611, H. L.; *Mackworth v. Hinzman* (1838), 2 Keen, 659; *Re*

SECT. 4.
Settle-
ment of
Personalty
to Devolve
with Realty.
Custody of
heirlooms.

1215. The custody of chattels settled as heirlooms is generally given to the tenant for life for the time being of the settled lands, and the trustees of the settlement are usually expressly relieved from seeing to their insurance and preservation (*f*). The tenant for life may be required to sign an inventory of, but not to give security for, the chattels, unless there is reason to suppose that they will be in danger in his custody (*g*).

SECT. 5.—*Settlement of Personal Chattels.*

Personal
chattels.

1216. Personal chattels are sometimes made the subject of a settlement (*h*). The settlement in such a case should provide that the beneficiaries should have the enjoyment of the settled chattels, and that the trustees should not interfere with the custody, management or legal ownership thereof, or be responsible for the custody, preservation or insurance thereof against fire, or other damage or loss. It is expedient to provide for the substitution of new articles of equal value for those originally settled (*i*).

Description.

The settled chattels need not be specifically described (*k*), though it is often convenient to enumerate them in a schedule.

Registration.

A settlement, on marriage, of chattels does not require registration as a bill of sale (*l*).

SECT. 6.—*Referential Trusts.*

SUB-SECT. 1.—*Referential Uses and Trusts.*

Referential
trusts.

1217. Uses and trusts of one subject-matter of settlement are frequently declared by reference to the uses and trusts of another subject-matter of settlement set out in the same or a different instrument (*m*).

Exmouth (Viscount), Exmouth (Viscount) v. Praed (1883), 23 Ch. D. 158; *Re Hill, Hill v. Hill*, [1902] 1 Ch. 807, C. A.; compare *Rowland v. Morgan* (1848), 2 Ph. 764; *Campbell v. Ingilby* (1856), 4 W. R. 433; *Re Johnston, Cockerell v. Essex (Earl)* (1884), 26 Ch. D. 538; *Re Butts (Marquess), Butts (Marquess) v. Byder* (1884), 27 Ch. D. 196.

(*f*) See Encyclopædia of Forms and Precedents, Vol. XIII., pp. 325, 326.

(*g*) *Foley v. Burnell* (1783), 1 Bro. C. C. 274, 279; *Conduitt v. Soane* (1844), 1 Coll. 285; *Temple v. Thring* (1887), 56 L. J. (Ch.) 767.

(*h*) See Encyclopædia of Forms and Precedents, Vol. XIII., p. 479; and see title PERSONAL PROPERTY, Vol. XXII., pp. 413 *et seq.* As to the effect of such a settlement in exempting the chattels from seizure by creditors, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 175, 275 *et seq.* As to chattels settled to go as heirlooms, see pp. 703 *et seq., ante.* A settlement of a house together with the fixtures and fittings-up has been held not to include household furniture (*Simmons v. Simmons* (1847), 6 Hare, 352), and articles for the settlement of household goods or utensils of household stuff have been held not to attach to household goods in a building employed by the settlor as a hospital (*Pratt v. Jackson* (1727), 1 Bro. Parl. Cas. 222).

(*i*) For a case where fresh furniture was substituted, see *Lane v. Grylls* (1862), 6 L. T. 533.

(*k*) *Dean v. Brown* (1826), 5 B. & C. 336.

(*l*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4; and see title BILLS OF SALE, Vol. III., p. 16.

(*m*) See Encyclopædia of Forms and Precedents, Vol. XIII., pp. 299, 303, 323, 324, 455, 689, 691. Where property was settled by reference to the trusts of a deed which was never executed, there may be a resulting

Where the ultimate limitation in a settlement was to the next of kin of a wife in due course of distribution as if she had died a *feme sole* and intestate, and the settlement contained a covenant to settle the wife's after-acquired property "upon the like trusts," the ultimate limitation having taken effect and the wife having died possessed of after-acquired property both real and personal, her next of kin were held to be entitled to the personal estate and her heir-at-law to the realty, the words "the like trusts" not being equivalent to "the same trusts" (n); but where after-acquired property was settled "upon the same or the like trusts" in favour of the issue of a marriage as were declared concerning the originally settled fund, only issue who could have participated in the original fund were held to be entitled (o).

SECT. 6.
Referential
Trusts.

"The like trusts."

Where real estate was directed to go in the same manner as personal estate, which was settled upon trust for the settlor and his wife for their lives and, in default of children, for the settlor, his executors, administrators and assigns, upon the death of the settlor without children, it was held that the real estate, subject to the widow's life interest, went to the heir (p).

The same manner.

A conveyance to the subsisting uses of a settlement does not revive an estate tail which has been barred (q). Where a fund which had been appointed to the settlor under a power of appointment was settled to such of the trusts of the subsisting settlement as should be capable of taking effect, this was held to mean the trusts of the settlement as then subsisting without regard to intermediate appointments (a). A reference to the trusts of a settlement then subsisting and capable of taking effect incorporates the provisions of the trust referred to, but not directions as to the time when the benefits are to arise (b).

To the subsisting uses.

Where a sum was directed to be settled on like provisions as to maintenance "and otherwise" as a sum originally settled, the words "and otherwise" were held to include a gift over to which

Incorporation of gift over.

trust for the settlor; see *Re Wilcock*, *Wilcock v. Johnson* (1890), 62 L. T. 317; and, as to resulting trusts generally, see titles EQUIT, Vol. XIII., p. 155; GIFTS, Vol. XV., p. 417; TRUSTS AND TRUSTEES.

(n) *Brigg v. Brigg* (1885), 33 W. R. 454; compare *Re Smith*, *Bashford v. Chaplin* (1881), 45 L. T. 246.

(o) *Marshall v. Baker* (1862), 31 Beav. 608.

(p) *Ford v. Ruxton* (1844), 1 Coll. 403.

(q) *Wortham v. Mackinnon* (1831), 4 Sim. 485. For a case where the proviso for redemption in a mortgage of settled land was to the uses of the settlement, see *Re Oxenden's Settled Estates*, *Oxenden v. Chapman* (1904), 74 L. J. (CH.) 234; and see title MORTGAGE, Vol. XXI., p. 99, note (d). As to cases in which the limitations of the settlement have been varied by the proviso, see *Hipkin v. Wilson* (1850), 3 De G. & Sm. 738; *Whitbread v. Smith* (1854), 3 De G. M. & G. 727, C. A. For a case in which it was held that no variation was intended, see *Meadows v. Meadows* (1853), 16 Beav. 401; and title MORTGAGE, Vol. XXI., pp. 121, 122.

(a) *Smyth-Pigott v. Smyth-Pigott*, [1884] W. N. 149, C. A.

(b) *Hare v. Hare* (1876), 24 W. R. 575, where property was settled upon trust for a husband and wife during their respective lives with remainder to the issue of the marriage: another fund was settled by the husband's mother on trust for herself for life, and then upon such of the trusts declared concerning the first fund in favour of the issue as should be then subsisting or capable of taking effect: the husband's mother having died in the lifetime of the husband and wife. Held that the trust in favour of the issue arose on her death. See, further, title POWERS, Vol. XXIII., p. 13.

SECT. 6.
Referential
Trusts.

Reference
causes no
accretion.

the first sum was subject (c). Where lands were settled to the uses, intents, and purposes declared concerning certain other lands, a subsequent inaccurate reference to the limitations was rejected (d).

Where property is directed to be held upon the same trusts as property already settled, it is not thereby made an accretion to the original property (e), unless there is some context from which such an intention can be inferred (f).

SUB-SECT. 2.—Referential Powers.

Referential
powers.

1218. Powers created by reference to other powers are taken to be of the same nature and extent as such other powers (g), but, the power created by reference is divested of any conditions or restrictions personal to the donee of the original power (h); if, however, the original power is inconsistent with the limitations in the instrument creating the referential power, the referential power is limited so as to conform with those limitations (i).

Extent of
incorporation
of provisions.

Where estates were devised to the same uses and subject to like powers as settled estates stood limited, the effect was to make the property passing by the will subject to all the trusts, powers, and provisos contained in the settlement, so that powers of sale, leasing, and exchange had to be exercised by the same persons as those who had to exercise the similar powers contained in the settlement, namely, the trustees of the settlement (k). Where land was resettled upon the trusts and subject to the powers contained in the original settlement ulterior to a specified life estate, these powers were held to include a power of sale, exchange, and leasing to be exercised at the request of that tenant for life (l). Where a legacy was directed to go on the trusts of a settled fund, the power of the trustees of the settled fund to make a loan of a limited amount to the husband was held to be not increased (m). Where by deed £10,000 was settled upon trust for A. with power to appoint to her children or issue, and also power to appoint a life interest to a husband, and the settlor subsequently by will gave a similar sum for the sole benefit of B. in the same manner as nearly as might be as the £10,000 secured for A., B. was held to have the same power to appoint to children, issue, and husband as A. (n).

Power of
appointment.

A power of appointment over an original share operates on an

(c) *Re Shirley's Trusts* (1863), 32 Beav. 394.

(d) *Garde v. Garde* (1843), 3 Dr. & War. 435.

(e) *Montague v. Montague* (1852), 15 Beav. 565; *Re North, Meates v. Bishop* (1887), 76 L. T. 186; *Re Bristol (Marquis), Grey (Earl) v. Grey*, [1897] 1 Ch. 946.

(f) *Baskett v. Lodge* (1856), 23 Beav. 138; *Baker v. Richards* (1859), 27 Beav. 320; *Re Perkins, Perkins v. Bagot* (1892), 67 L. T. 743.

(g) See, however, *Cox v. Cox* (1855), 1 K. & J. 251 (where a referential power of sale was held not to include a power to give receipts); and see title **POWERS**, Vol. XXIII., pp. 12, 13.

(h) *Harrington (Earl) v. Harrington (Countess Dowager)* (1868), L. R. 3 H. L. 295.

(i) *Crossman v. Bevan* (1859), 27 Beav. 502; compare *Shrewsbury (Earl) v. Keightley* (1866), L. R. 2 C. P. 130, Ex. Ch.

(k) *Taylor v. Miles* (1860), 28 Beav. 411.

(l) *Morgan v. Rutson* (1848), 16 Sim. 234.

(m) *Eustace v. Robinson* (1880), 7 L. R. Ir. 85, C. A.

(n) *Berchtoldi (Countess) v. Hertford (Marquis)* (1844), 7 Beav. 172.

accruing share which becomes subject to the same trusts, powers, and provisoes as the original share (o).

SECT. 6.
Referential
Trusts.

SUB-SECT. 3.—*Multiplication of Charges.*

1219. Where trusts are created by reference a proviso is commonly inserted that charges on the estate shall not be increased or multiplied. In the absence of such a proviso, as a general rule a trust created by reference is not read so as to make a duplication of charges (p), although an intention to do so may be collected from the language of any particular instrument (q).

Presumption
against
multiplica-
tion of
charges.

SECT. 7.—*Advowsons.*

1220. An advowson may be made the subject of a settlement, but if the settlement is made by deed the restrictions imposed by the Benefices Act, 1898 (r), must be borne in mind. Whether the settlement is made by deed or will, it seems better that it should declare who are to be the beneficiaries of the advowson, that is, who have the right to present, and not who are the persons to be presented (s). The tenant for life of an advowson, if his estate is in possession, has the right to present to a vacancy (t); if his estate is equitable, the trustees must present his nominee (u).

Settlement
of advowson.

SECT. 8.—*Provisions for Subsequent Marriage.*

1221. It is not infrequent in settlements to make provision enabling the surviving spouse to provide for an after-taken husband or wife and the issue of such subsequent marriage.

Provisions for
subsequent
marriage.

In the case of realty settlements such provision is generally made by the insertion of powers to jointure an after-taken wife and charge portions in favour of the children of a subsequent marriage (a).

Realty
settlements.

In the case of personalty settlements such provision is made by a power to revoke the trusts declared by the settlement as to a portion of the trust fund, the amount being commonly made to depend on the number of children of the first marriage who become adult, and resettle such portion in favour of an after-taken spouse and the children of the subsequent marriage (b). Such a

Personalty
settlements.

(o) *Re Hutchinson's Settlement Trusts* (1852), 5 De G. & Sm. 681.

(p) *Hindle v. Taylor* (1855), 5 De G. M. & G. 577; *Boyd v. Boyd* (1863), 9 L. T. 166; *Trew v. The Perpetual Trustee Co.*, [1895] A. C. 264, P. C.

(q) *Cooper v. Macdonald* (1873), L. R. 16 Eq. 258; see *Re Beaumont, Bradshaw v. Packer*, [1913] 1 Ch. 325 (where a testator created a new trust by giving a fund to his own trustees on the trusts of his daughter's marriage settlement).

(r) 61 & 62 Vict. c. 48, s. 1. For these restrictions, see title ECCLESIASTICAL LAW, Vol. XI., p. 583. For form of settlement of an advowson, see *Encyclopædia of Forms and Precedents*, Vol. XVI., p. 667, Vol. XVII., Corrigenda, p. viii.

(s) See *Encyclopædia of Forms and Precedents*, Vol. XIII., p. 207.

(t) *Sherrard v. Harborough (Lord)* (1753), Amb. 165, 166.

(u) *Briggs v. Sharp* (1875), L. R. 20 Eq. 317; *Welch v. Peterborough Bishop* (1885), 15 Q. B. D. 432.

(a) See *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 319, 320.

(b) See *ibid.*, p. 441.

SECT. 8.
Provisions
for Subse-
quent
Marriage.

Infants'
 settlements.

power is generally made conditional on the making of a settlement on a subsequent marriage, but sometimes an absolute power is given to withdraw from the settlement a part of the fund made subject to it. Where a settlement is made on the marriage of an infant ward of court, the court directs that such settlement shall contain provisions for the children of a future marriage (c). Such provision is best made by a power to give each child of the second marriage a sum not exceeding that which the child of the first marriage had (d). A power to provide for a future husband has also been inserted (e).

SECT. 9.—Appointment of New Trustees.

Persons to
 exercise
 power of
 appointment.

Trustees.

Vacancy in
 trusteeship.

Appointment
 by the court
 of Settled
 Land Act
 trustees.

1222. It is unusual to insert in settlements express powers of appointing new trustees, and, as a rule, the only clause (f) inserted in a settlement is the nomination of the persons or person, commonly the husband and wife and the survivor of them, who shall exercise the statutory power of appointment (g).

If the settlement is a settlement of realty and no power of sale is thereby conferred on the trustees, a declaration may be inserted (h) that the trustees of the settlement shall be trustees for the purposes of the Settled Land Acts (i). In the event of a vacancy occurring among the trustees the statutory powers for the appointment of new trustees are available (j). If there are no trustees appointed for the purposes of the Acts (i), or if in any other case it is expedient (k) that trustees for the purposes of the Acts (i) should be appointed, the court may, on the application of the tenant for life, or of any other person having under the settlement an estate or interest in the settled land in possession, remainder, or otherwise, or, in the case of an infant, of his testamentary or other guardian or next friend, appoint fit persons to be trustees of the settlement for the purposes of the Acts (l). The persons so appointed and the survivors and survivor of them, while continuing to be trustees or

(c) *Wells v. Price* (1800), 5 Ves. 398; *Long v. Long* (1824), 2 Sim. & St. 119; *Rudge v. Winnall* (1848), 11 Beav. 98. As to the marriage of wards of court generally, see title INFANTS AND CHILDREN, Vol. XVII., p. 148.

(d) *Bathurst v. Murray* (1802), 8 Ves. 74; *Birkett v. Hibbert* (1834), 3 My. & K. 227; but see *Halsey v. Halsey* (1804), 9 Ves. 471.

(e) *Winch v. James* (1798), 4 Ves. 386.

(f) See *Encyclopædia of Forms and Precedents*, Vol. XIII., p. 349.

(g) Under the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10. As to appointments of new trustees under statutory powers, see title TRUSTS AND TRUSTEES.

(h) See *Encyclopædia of Forms and Precedents*, Vol. XIII., pp. 304, 331.

(i) As to the Settled Land Acts, see note (e), p. 624, *ante*; and see p. 631, *ante*.

(j) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 47.

(k) The court would probably consider it expedient to appoint new trustees for the purposes of the Settled Land Acts in cases similar to those in which it has seen fit to exercise its jurisdiction under the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 25; see title TRUSTS AND TRUSTEES.

(l) Settled Land Act, 1892 (45 & 46 Vict. c. 38), s. 38. An order appointing two persons trustees for the purposes of the Acts of a settlement created by a will was held to have the effect of appointing the persons named separate trustees of three several settlements created by the will (*Re Skerriell's Estate*, [1899] W. N. 240).

SECT. 9.
Appoint-
ment of
New
Trustees.

trustee, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, are the trustees or trustee of the settlement for the purposes of the Acts (*m*). The power is discretionary, and an application may be refused if the court is satisfied that it is impossible for the tenant for life to exercise the powers vested in him by the Acts (*n*), but it is right to give him an opportunity to exercise these powers (*o*).

The appointment of trustees being required to impose a check upon the extensive powers given by the Acts (*n*) to a tenant for life, the court has declined to appoint the tenant for life (*p*) or his solicitor (*q*), and has even refused to appoint two persons who were near relatives to one another (*r*). There is no rule of practice that the subsisting trustees of a settlement ought to be appointed trustees for the purposes of the Acts (*n*). The tenant for life may propose other persons if he sees fit (*s*), but the existing trustees, if willing and fit to act, are, as a general rule, appointed (*t*). In a proper case persons resident abroad have been appointed (*a*).

Persons
qualified
to act.

Trustees for the purposes of the management of the estate of an infant (*b*) may be appointed by the settlement (*c*), and, if no persons are so appointed, then trustees of the settlement, with a power of sale or of consent to the exercise of a power of sale, are trustees for this purpose, and, if there are no such trustees, the court may appoint trustees on the application of a guardian or next friend of the infant (*d*).

Trustees for
management
of estate
of infant.

(*m*) Settled Land Act, 1882 (45 & 46 Vict. c. 38) s. 38 (2); see p. 632, *ante*. Until the appointment of new trustees the personal representatives of a sole or a last surviving trustee can exercise and perform all powers and trusts (Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 8).

(*n*) See note (*e*), p. 624, *ante*.

(*o*) *Williams v. Jenkins*, [1894] W. N. 176. In *Burke v. Gore* (1884), 13 L. R. Ir. 367, it was stated that the court should not only require to be satisfied of the fitness of the proposed trustees, but also that the purpose for which their appointment is applied for is such as to render their appointment safe and beneficial to all parties interested, but this has not been followed in practice, at any rate in England.

(*p*) *Re Harrop's Trusts* (1883), 24 Ch. D. 717.

(*q*) *Re Kemp's Settled Estates* (1883), 24 Ch. D. 485, C. A.; *Re Stamford (Earl)*, *Payne v. Stamford*, [1896] 1 Ch. 288; *Re Spencer's Settled Estates*, [1903] 1 Ch. 75.

(*r*) *Re Knowles' Settled Estates* (1884), 27 Ch. D. 707; and see, further, title TRUSTS AND TRUSTEES.

(*s*) *Re Nicholas*, [1894] W. N. 165.

(*t*) *Re Stoneley's Will* (1883), 27 Sol. Jo. 554.

(*a*) *Re Simpson*, *Re Whichchurch*, [1897] 1 Ch. 256, C. A.; see *Re Maberly's Settled Estate* (1887), 19 L. R. Ir. 341.

(*b*) See p. 688, *ante*; Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 42; title INFANTS AND CHILDREN, Vol. XVII., pp. 87, 88.

(*c*) Encyclopædia of Forms and Precedents, Vol. XIII., p. 327.

(*d*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 42 (1).

Part XIII.—Stamps on Settlements.

SECT. 1.

Settle- ments on Marriage.

Settlement
of personalty
on marriage.

SECT. 1.—*Settlements on Marriage.*

1223. A settlement, or articles for a settlement, on marriage (*e*), of any definite and certain principal sum of money (*f*), whether charged or chargeable on lands or other hereditaments or heritable subjects or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not, or of any definite and certain (*g*) amount of stock or any security (*h*), is chargeable with a stamp duty of 5s. for every £100, and also for any fractional part, of £100 of the amount or value of the property settled or agreed to be settled (*i*).

Settlement
of policies.

1224. Where a settlement, or articles, includes money which may become payable under a policy of life insurance, or any security not being a marketable security, the settlement, or articles, is charged with *ad valorem* duty in respect of that money (*k*). If no provision is made for keeping up a settled policy (*l*), the *ad valorem* duty is chargeable only on the value of the policy at the date of the settlement, and a declaration of such value contained in the settlement is *prima facie* evidence thereof (*m*).

(*e*) The Stamp Act, 1891 (54 & 55 Vict. c. 39), does not contain any definition of "settlement" in the body of the Act. In *ibid.*, Sched. I., a settlement is defined as "any instrument, whether voluntary or upon any good or valuable consideration, other than a *bond fide* pecuniary consideration, whereby any definite and certain principal sum of money, etc., is settled or agreed to be settled in any manner whatsoever." A voluntary disposition *inter vivos* must now, however, be stamped as if it were a conveyance or transfer on sale; see p. 713, *post*. Presumably the marriage consideration would be held to extend to property settled by a third party, *e.g.*, a parent of one of the intending spouses. As to stamp duties, generally, see title REVENUE, Vol. XXIV., pp. 714 *et seq*.

(*f*) This does not include a settlement of land held on trust for sale (*Re Stucley's Settlement* (1870), L. R. 5 Exch. 85). It includes foreign bonds (*Re Alsager's Marriage Settlement and Inland Revenue Commissioners* (1864), 2 H. & C. 969).

(*g*) The words "definite and certain" apply not to the interest or nature of the interest, but to the amount of stock. Accordingly every interest, whether vested, whether liable to be divested, whether contingent or not in a certain and definite sum of stock, is included (*Onslow v. Inland Revenue Commissioners*, [1891] 1 Q. B. 239, C. A.).

(*h*) A deed which merely substitutes a fresh security for a security conferred by an original settlement is not a settlement (*Inland Revenue v. Oliver*, [1909] A. C. 427).

(*i*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1, Sched. I., title "Settlement." An order of court making a settlement, must bear a settlement stamp (*Re Gowan, Gowan v. Gowan* (1884), 17 Ch. D. 778).

(*k*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 104 (1). A resettlement which makes a new disposition of the policy moneys is within this provision (*Northumberland (Duke) v. Inland Revenue Commissioners*, [1911] 2 K. B. 343; reversed on another point, [1911] 2 K. B. 1011, C. A.).

(*l*) The provision for keeping up the policy need not necessarily be made by the settlement itself: if there is a pre-existing covenant to keep up a policy, and the settlement assigns directly, or by implication of law, the benefit of such covenant, such assignment is a provision for keeping up the policy (*Northumberland (Duke) v. Inland Revenue Commissioners*, [1911] 2 K. B. 1011, C. A., reversing the decision of HAMILTON, J., *supra*, on this point).

(*m*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 104 (2) (a), (b).

1225. No further duty is payable by reason of any provision contained in the settlement, or articles, for the payment or transfer of the money, stock, or security thereby settled or, where such money, stock, or security is in reversion or is not paid or transferred upon the execution of the settlement, or articles, by reason of any provision for the payment by the person entitled in possession to the interest or dividends of such money, stock, or security, during the continuance of such possession, of any annuity or yearly sum not exceeding interest at the rate of 4 per cent. per annum upon the amount or value of such money, stock, or security (*n*).

SECT. 1.
Settle-
ments on
Marriage.

Settlement
not charged
as security.

1226. Where several instruments are executed for effecting the settlement of the same property, and the *ad valorem* duty chargeable in respect of the settlement of the property exceeds 10s., one only of such instruments is charged with *ad valorem* duty and the rest are charged with a duty of 10s. (*o*).

Several
instruments.

A settlement made in pursuance of a previous agreement on which *ad valorem* settlement duty has been paid in respect of any property is chargeable with only 10s. duty in respect of the same property (*p*).

Settlement
pursuant to
agreement.

1227. No *ad valorem* duty is payable in respect of a settlement of real estate on marriage (*q*), but it is charged with 10s. duty as a conveyance or transfer for other than a pecuniary consideration (*r*).

Marriage
settlement
of realty.

SECT. 2.—*Voluntary Dispositions.*

1228. Before the 29th April, 1910 (*s*), a voluntary settlement of personal property was subject to *ad valorem* settlement duty in precisely the same way and to the same extent as a settlement on marriage (*t*).

Voluntary
settlements.

Now, however, any conveyance or transfer operating as a voluntary disposition *inter vivos* (*a*), is chargeable with the like stamp duty as

Voluntary
dispositions.

(*n*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 105.

(*o*) *Ibid.*, s. 106 (1), (3). This provision contemplates one transaction by way of settlement of property effected at the same time by several documents, not a series of documents effecting at different stages different dispositions with regard to the same property. It does not embrace the case of a settlement giving a power of revocation and appointment which is subsequently executed so as to effect what is in substance a fresh settlement (*Russell v. Inland Revenue Commissioners*, [1902] 1 K. B. 142, C. A.).

(*p*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 106 (2), (3).

(*q*) *Massereene and Ferrard (Viscount) v. Inland Revenue Commissioners*, [1900] 2 I. R. 138. A deed appointing a new trustee of what was originally a settlement of real estate is not a settlement within the Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., by reason of the sale of the settled real estate (*Massereene and Ferrard (Viscount) v. Inland Revenue Commissioners*, *supra*). For stamps on instruments appointing new trustees generally, see title TRUSTS AND TRUSTEES.

(*r*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., title "Conveyance or Transfer."

(*s*) The date of the passing of the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8).

(*t*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., title "Settlement."

(*a*) A conveyance or transfer operating as a voluntary disposition *inter vivos* includes not only any disposition that is not made in favour

SECT. 2.
Voluntary
Disposi-
tions.

if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration of the sale (*b*). It follows, therefore, that a voluntary settlement of personalty, whether of a certain and definite sum (*c*) or not, or a voluntary settlement of realty or of land settled by way of trust for sale, if executed after the 28th April, 1910, is chargeable with duty on the value of the property conveyed or transferred at the same rate as if it were a conveyance on sale for the like value (*d*).

Appointments
under special
powers.

1229. An instrument of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment, where duty has been duly paid in respect of the same property upon the settlement creating the power or the grant of representation of any will or testamentary instrument creating the power is exempt from *ad valorem* duty (*e*), and is only chargeable with a duty of 10s. as an appointment (*f*). It is to be observed that this exemption relates only to appointments under

of a purchaser, or incumbrancer, or other person in good faith and for valuable consideration, but also, except where marriage is the consideration, any conveyance or transfer where the Commissioners of Inland Revenue are of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 74 (5)). As to the stamp duty on voluntary dispositions *inter vivos*, and the need of adjudication thereon, see title REVENUE, Vol. XXIV., pp. 732 *et seq.*

(*b*) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 74 (1). For the duties on conveyances or transfers on sale, see Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., title "Conveyance or Transfer on Sale"; title SALE OF LAND, pp. 444 *et seq.*, *ante*. As to the exemption of a voluntary conveyance to a non-profit-sharing body, incorporated by special Act, of property to be held as an open space or preserved for the benefit of the nation, and of certain other excepted instruments, see Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 74 (1), (6); title REVENUE, Vol. XXIV., p. 734.

(*c*) An instrument chargeable with duty either as a settlement under the Stamp Act, 1891 (54 & 55 Vict. c. 39), or as a voluntary transfer or conveyance, is charged with duty as a conveyance or transfer, and not as a settlement (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 74 (4)).

(*d*) A settlement executed for adequate pecuniary consideration is chargeable with duty on the amount of the consideration as a conveyance on sale. If executed for inadequate pecuniary consideration, it is chargeable with a duty in respect of the property passing and not of the benefit conferred, i.e., the value of the property less the sum paid. It seems to follow that in the case of a voluntary settlement no deduction will be allowed in respect of any interest thereby conferred on the settlor.

(*e*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., title "Settlement, Exemption." An instrument cannot come within the exemption unless the donees of the power are parties to it, and thereby make an appointment. Where, therefore, a deed of revocation under a power provided that a fund should be transferred to the trustees of a deed already executed, which deed was a marriage settlement, the donees of the power not being parties thereto, duty was chargeable on the marriage settlement (*Russell v. Inland Revenue Commissioners*, [1902] 1 K. B. 142, C. A.).

(*f*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., title "Appointment."

special powers. In the case of appointments under such powers which only limit the proportions in which members of a class are to take (*g*), the court would probably look at the substance of the transaction and not hold them to be instruments operating as voluntary dispositions *inter vivos*, but the contrary view would probably be taken in the case of a voluntary appointment under a general power.

SECT. 2.
Voluntary
Disposi-
tions.

Appointments
under general
powers.

1230. Settlements, whether made in consideration of marriage or voluntarily, may, without penalty, be stamped within thirty days after execution, or after they have been first received in the United Kingdom if executed outside it, or fourteen days after assessment by the Commissioners if their opinion has been required (*h*).

Stamping
after
execution.

(*g*) See title POWERS, Vol. XXIII., p. 23.

(*h*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 15 (2), as amended by the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 74 (3); and see title REVENUE, Vol. XXIV., p. 717.

SETTLING DAY.

See STOCK EXCHANGE.

SEVERANCE.

See PARTITION ; POWERS.

SEWAGE.

See PUBLIC HEALTH AND LOCAL ADMINISTRATION ; SEWERS AND
DRAINS ; WATERS AND WATERCOURSES.

SEWERS AND DRAINS.

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Waters and Watercourses - „ WATERS AND WATERCOURSES.

Part I.—Introductory.

PART I. Introductory.

1231. The expressions “sewers” and “drains” have no special technical meaning in law apart from statute. They are words in popular use of somewhat similar connotation, meaning channels by which liquid is gradually carried off, and are more particularly applied to artificial channels for draining water off land or for carrying away feculent and polluted matters from houses and buildings (*a*). In some Acts of Parliament a sharp distinction is drawn between them (*b*), in others they are used as practically synonymous (*c*). Not uncommonly the expressions mean more than the mere channel and include the whole apparatus for drawing off the water or other liquid (*d*).

Meaning of
“sewers” and
“drains.”

1232. The power to construct sewers and drains is incident to the ordinary ownership of land (*e*), but where such construction and maintenance have become necessary or important for the welfare of the community, various enactments have been passed to facilitate, regulate, and in many cases to compel such construction

Construction.

(*a*) Apart from statutory definitions, the words “drain” and “sewer” would in law mean the same, as, for example, when used in a conveyance; see *Pilbrow v. St. Leonard, Shoreditch, Vestry*, [1895] 1 Q. B. 433, C. A., *per RIGBY, L.J.*, at p. 441. In the fen districts the term “drain” is applied to wide, canal-like navigable channels; see *Oxford English Dictionary*; *Johnson's Dictionary*; and compare *Sutton v. Norwich Corporation* (1858), 27 L. J. (CH.) 739; *Coulton v. Ambler* (1844), 13 M. & W. 403.

(*b*) See, *e.g.*, Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4; Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 250; and see pp. 724, 725, *post*.

(*c*) Compare the Land Drainage Act, 1861 (24 & 25 Vict. c. 133); see title LAND IMPROVEMENT, Vol. XVIII., pp. 301 *et seq*.

(*d*) A marsh wall or embankment to protect the drained land may be part of a sewer (*Poplar District Board of Works v. Knight* (1858), E. B. & E. 408); compare title RATES AND RATING, Vol. XXIV., p. 102. Sewage disposal works are part of the sewers within the meaning of the Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 7 (*Brook v. Meltham Urban District Council*, [1909] A. C. 438). A manhole may be part of a sewer within the meaning of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4 (*Swanston v. Twickenham Local Board* (1879), 11 Ch. D. 838, C. A.).

(*e*) See title LAND IMPROVEMENT, Vol. XVIII., pp. 276, 301; Land Drainage Act, 1847 (10 & 11 Vict. c. 38); Land Drainage Act, 1861 (24 & 25 Vict. c. 133), Part III. These enactments enable owners of land to procure outfalls for their drains through the lands of adjoining owners. As to applying moneys under settlements in constructing drains and sewers, see Settled Estates Act, 1877 (40 & 41 Vict. c. 18), ss. 20–22; Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 16, 22, 25; and see titles LAND IMPROVEMENT, Vol. XVIII., pp. 283; SETTLEMENTS, pp. 644, 646, 664, *ante*.

PART I.
Introductory.

and maintenance. The principal classes of sewers and drains which have been the subject of legislation are those for the prevention of flooding, and more particularly for draining marsh or fen land, for carrying the water off highways, and for draining houses and buildings(*f*). The first of these as regards public works are commonly under the jurisdiction of bodies known as Commissioners of Sewers(*g*), the second class are primarily under the control of the highway authorities(*h*), and the third of the sanitary authorities(*i*).

Certain collegiate and other corporate bodies have express powers for constructing and diverting sewers(*j*), and in the case of undertakings authorised by Parliament provision is commonly inserted enabling the undertakers to make all necessary sewers and drains for the purposes of their works(*k*).

Statute law.

1233. The statute law governing sewers and drains for sanitary purposes is part of the public health law and is mainly contained in the Public Health Acts(*l*). In many districts there are local Acts also in operation(*m*), while in London there is a body of law distinct from but similar to that in force in the rest of the country(*n*). The City of London, except in regard to the main

(*f*) Other statutory provisions requiring drains will be found in such Acts as the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 8; Factory and Workshop Act, 1907 (7 Edw. 7, c. 39), s. 3 (see title FACTORIES AND SHOPS, Vol. XIV., pp. 452, 461); and the Alkali, etc. Works Regulation Act, 1906 (6 Edw. 7, c. 14), ss. 3, 4 (see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 408). Noxious ponds and ditches also require to be drained; see Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 48, 91—98; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (1) (*f*); Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 43; titles METROPOLIS, Vol. XX., p. 456; NUISANCE, Vol. XXI., pp. 536, 540; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 611.

(*g*) See p. 773, *post*. In London the County Council has control over both the main sewers and the flood sewers; see Metropolis Management (Thames River Prevention of Floods) Amendment Act, 1879 (42 & 43 Vict. c. cxcviii.); title METROPOLIS, Vol. XX., pp. 395, 398, 457; and see also title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 206.

(*h*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 57, 113.

(*i*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 419. As the sanitary authority and the highway authority are now in many cases the same, it is very common to find that the roadways and streets are drained into the same sewers as the houses and buildings adjoining, so that there is no clear distinction between these two classes. As to the sanitary authorities outside London, see *ibid.*, pp. 372, 373; title LOCAL GOVERNMENT, Vol. XIX., pp. 292, 293. As to London, see titles METROPOLIS, Vol. XX., pp. 395, 408, 411; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 373, 374.

(*j*) See Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 335.

(*k*) See titles ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 573 *et seq.*; GAS, Vol. XV., pp. 326 *et seq.*; RAILWAYS AND CANALS, Vol. XXIII., pp. 654, 655; WATER SUPPLY.

(*l*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 361, note (*a*).

(*m*) The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 22—24, relating to sewers and drains, may be incorporated in local Acts, but have been largely displaced by the general law.

(*n*) It is principally to be found in the various Metropolis Management Acts and in local Acts obtained at the instance of the London County

sewers, has a separate set of provisions (*o*). Sewerage, drainage and sewage disposal are also matters to be dealt with under town-planning schemes (*p*). The power to carry out large schemes for sewerage is sometimes obtained by the promotion of a private Bill (*q*).

1234. In the country generally the statutory powers conferred on urban authorities are more extensive than those of rural authorities, but the Local Government Board may by order confer upon rural district councils (*r*) all or any of the urban powers, duties and liabilities. In some cases united districts governed by a joint board have been formed by the Local Government Board (*s*) for the purpose of making a main sewer, or of carrying into effect a system of sewerage for the use of all districts or contributory places comprised in such united district, and the necessary powers for carrying on this work are conferred on these joint boards (*t*). Local authorities.

Council; see, for example, London County Council (General Powers) Act, 1894 (57 & 58 Vict. c. cxxii.).

(*o*) City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), amended by the City of London Sewers Act, 1851 (14 & 15 Vict. c. xci.). As to the execution of these Acts, see title METROPOLIS, Vol. XX., pp. 400, 458, 459.

(*p*) Housing, Town Planning, etc. Act, 1909 (9 Edw. 7, c. 44), s. 55, Sched. IV.

(*q*) For example, the main sewers of the Metropolis; see pp. 728, 729, *post*. As to the standing orders applicable, see title PARLIAMENT, Vol. XXI., pp. 729 *et seq*.

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 276; Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25 (5); and see titles LOCAL GOVERNMENT, Vol. XIX., p. 332; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 364.

(*s*) Under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 279; see title LOCAL GOVERNMENT, Vol. XIX., p. 339.

(*t*) The provisional order forming a united district must define the purposes for which such district is formed, and the powers, rights, duties, capacities and liabilities and obligations under the Public Health Act, 1875 (38 & 39 Vict. c. 55), which the joint board is authorised to exercise or perform, or to which it is made subject (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 281); see title LOCAL GOVERNMENT, Vol. XIX., p. 339. Usually the joint board is merely given jurisdiction in regard to the main sewers, so that the several local authorities in the district remain responsible for the connecting sewers. For an example of a joint board for main sewage, see *A.-G. v. Birmingham, Tame and Rea District Drainage Board*, [1912] A. C. 788. As to special drainage districts, see title LOCAL GOVERNMENT, Vol. XIX., p. 334.

Part II.—Sewers and Drains for Sanitary Purposes.

SECT. 1

Definitions.

Definition of
"drain."

SECT. 1.—Definitions.

SUB-SECT. 1.—In General.

1235. A "drain" means (a) any drain (b) of and used for the drainage of one building only or premises within the same curtilage (c) and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed. It is a question of fact in each case whether two or more houses constitute one building within this definition (d). For certain purposes of the Public Health Acts (e) a drain is defined as including a drain used for the drainage of more than one building (f).

Definition of
"sewer."

1236. The term "sewer" as defined in the Public Health Act, 1875 (g), includes sewers and drains of every description, except (1) drains to which the word "drain" applies (h), and (2) drains vested in or under the control of any authority having the management of roads and not being a local authority under that Act (i).

The term "sewer," therefore, includes all the parts of a properly made sewer (j), but not the receptacle into which the sewage is conveyed (k), nor apparatus connected with the disposal of the

(a) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4.

(b) For the general meaning of "drain," see p. 719, *ante*.

(c) The meaning of the expression "premises within the same curtilage" is not quite clear. Two blocks of buildings let out in a number of separate tenements and standing in an enclosed yard or court for the common use of the tenants may be premises within the same curtilage, so that the common drain running through the court may be a drain and not a sewer (*Pilbrow v. St. Leonard, Shoreditch, Vestry*, [1895] 1 Q. B. 33). On the other hand, separate houses abutting on or surrounding a private court or passage may not be premises within the same curtilage (*St. Martin-in-the-Fields Vestry v. Bird*, [1895] 1 Q. B. 428, C. A. (the Lowther Arcade); *Harris v. Scourfield* (1904), 68 J. P. 516).

(d) Thus, two semi-detached houses may be one building (*Hedley v. Webb*, [1901] 2 Ch. 126) or two buildings, according to their construction (*Humphery v. Young*, [1903] 1 K. B. 44).

(e) As to the Public Health Acts, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 361, note (a).

(f) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19; and see p. 759, *post*.

(g) 38 & 39 Vict. c. 55, s. 4.

(h) See the text, *supra*. The provisions in the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19, do not affect the definition of "sewer"; see *R. v. Hastings Corporation*, [1897] 1 Q. B. 46; *Hollywood Urban District Council v. Grainger*, [1913] 2 I. R. 126, 130; p. 760, *post*. As to the general meaning of "sewers" and "drains," see p. 719, *ante*.

(i) See p. 724, *post*; title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 364, note (s), 372.

(j) Such as a manhole (*Swanston v. Twickenham Local Board* (1879), 11 Ch. D. 838, C. A.).

(k) Such as a cesspool (*Meador v. West Cowes Local Board*, [1892] 3 Ch. 18, C. A.; *Button v. Tottenham Urban District Council* (1898), 78 L. T. 470;

sewage (l). It also includes channels used solely for carrying off water (m).

SECT. 1.
Definitions.

The first exception does not exclude pipes laid in a street or intended street for the purpose of taking the sewage of the houses although no building, or only one, has been connected therewith (n), nor does it exclude pipes laid in private land and taking the drainage of more than one building or premises (o), but in such a case the pipe is only a sewer from the junction of the pipe conveying the drainage of the second building or premises; above that it is a drain (p). The drainage of a second building or premises into a drain, although done illegally and surreptitiously, may convert such drain into a sewer from the point of junction (q). But the cutting off of the drainage of a pipe from a sewer, so that

Butt v. Snow (1903), 67 J. P. 454; see also *Sutton v. Norwich Corporation* (1858), 27 L. J. (CH.) 739; *Pinnock v. Waterworth* (1887), 51 J. P. 248). A cesspool which has been converted into a kind of catchpit may be part of the sewer (*Pakenham v. Ticehurst Rural District Council* (1903), 67 J. P. 448). There seems to be some doubt as to whether an overflow pipe from a sewer is a sewer; see *Leeds and District Worsted Dyers and Finishers' Association, Ltd. v. West Riding of Yorkshire Rivers Board* (1906), 70 J. P. 480.

(l) *King's College, Cambridge v. Urbridge Rural Council*, [1901] 2 Ch. 768. Such works may fall within the meaning of "sewer" as used in other statutes; see p. 719, *ante*.

(m) Thus, pipes for carrying off water from a railway (*London and North Western Rail. Co. v. Runcorn Rural Council*, [1898] 1 Ch. 561, C. A.); from a quarry (*Sykes v. Sowerby Urban Council*, [1900] 1 Q. B. 584, C. A.); from a sewage farm as an effluent (*Tottenham Local Board v. Button* (1886), 2 T. L. R. 828); from a highway to a gravel pit to water cattle (*Croysdale v. Sunbury-on-Thames Urban Council*, [1898] 2 Ch. 515); from a road into a stream (*Durrant v. Branksome Urban Council*, [1897] 2 Ch. 291, C. A.), or into a ditch (*Kinson Pottery Co. v. Pogle Corporation*, [1899] 2 Q. B. 41; *Graham v. Wroughton*, [1901] 2 Ch. 451, C. A.); or from the roofs of houses (*Holland v. Lazarus* (1897), 61 J. P. 262; *Silles v. Fulham Borough Council*, [1903] 1 K. B. 829, C. A.; *Wilkinson v. Llandaff and Dinas Powis Rural Council*, [1903] 2 Ch. 695, C. A.; and see *Ferrand v. Hallas Land and Building Co.*, [1893] 2 Q. B. 135, C. A.), are all sewers, although they may not vest in the sanitary authority; as to vesting, see pp. 726 *et seq.*, *post*.

The legal distinction between sewers and drains is uncertain and unsatisfactory. Conduits constructed as private drains are frequently asserted to be sewers for which the ratepayers at large, and not the individuals who derive benefit, are responsible. The decisions are hard to reconcile with one another or with any intelligible principle.

(n) *Turner v. Handsworth Urban Council*, [1909] 1 Ch. 381; *Beckenham Urban District Council v. Wood* (1896), 60 J. P. 490, *per* CAVE, J., at p. 491; *Acton Local Board v. Batten* (1884), 28 Ch. D. 283, *per* KAY, J., at p. 286.

(o) *Travis v. Uttley*, [1894] 1 Q. B. 233; *Kirkheaton Local Board v. Beaumont* (1888), 52 J. P. 68; and see cases cited in notes (p), (q), *infra*.

(p) *Beckenham Urban District Council v. Wood*, *supra*; *Duncan v. Fulham Vestry* (1899), *Times*, 11th February.

(q) *Kershaw v. Taylor*, [1895] 2 Q. B. 471, C. A.; *Florence v. Paddington Vestry* (1895), 12 T. L. R. 30; *Holland v. Lazarus*, *supra*; *Bethnal Green Vestry v. London School Board*, [1898] A. C. 190; and as to sewers in the Metropolis, see pp. 725, 726, *post*. As to the wrongdoers taking advantage of this in proceedings for a nuisance, see p. 757, *post*. The owner of a drain with which a connexion has been made against his will may treat the act as a trespass and claim that the drain is still one, but, if he does not do so, then, as against the local authority, it may be a sewer repairable by

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it conveys the drainage from one house only, does not thereby convert such sewer back into a drain (*r*), although the reconstruction of the system in accordance with a previous order may do so (*s*).

The second exception excludes drains vested in or under the control of a road authority at the 11th August, 1875 (*t*), although such drains may have subsequently become vested in or under the control of a sanitary authority (*u*).

**Natural
watercourse.**

1237. A natural watercourse is not a sewer, nor does the fact that it is used for the discharge of drainage or sewage make it one (*v*), but such a watercourse can be so dealt with as to be converted into a sewer. Whether it has become so or not is a question of fact in each particular case (*w*).

SUB-SECT. 2.—In the Metropolis.

**Definition of
"drain."**

1238. For the purpose of the Metropolis Management Acts (*a*), the word "drain" applies to and includes (*b*) any drain of

the authority; see *Kershaw v. Taylor*, [1895] 2 Q. B. 471, C. A.; *Florence v. Paddington Vestry* (1895), 12 T. L. R. 30; *Holland v. Lazarus* (1897), 61 J. P. 262; *Bethnal Green Vestry v. London School Board*, [1898] A. C. 190; *Pakenham v. Titchhurst Rural District Council* (1903), 67 J. P. 448; *Bateman v. Poplar District Board of Works* (No. 2) (1887), 37 Ch. D. 272; *Meador v. West Cowes Local Board*, [1892] 3 Ch. 18, C. A.

(*r*) *St Leonard, Shoreditch, Vestry v. Phelan*, [1896] 1 Q. B. 533.

(*s*) *Kershaw v. Smith & Co., Ltd.*, [1913] W. N. 107; *Roles v. St. George the Martyr Vestry* (1880), 14 Ch. D. 785.

(*t*) The date of the passing of the Public Health Act, 1875 (38 & 39 Vict. c. 55).

(*u*) *Williamson v. Durham Rural Council*, [1906] 2 K. B. 65; *Irving v. Carlisle Rural District Council* (1907), 71 J. P. 212. This point was not raised in *Wilkinson v. Llandaff and Dinas Powis Rural Council*, [1903] 2 Ch. 695, C. A., which appears to be at variance with these other cases. As to highway drains, see pp. 770 *et seq.*, *post*. As to the vesting of streets in urban authorities, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 57.

(*v*) See *R. v. Godmanchester Local Board* (1866), L. R. 1 Q. B. 328, Ex. Ch.; *Pentney v. Lynn Paving Commissioners* (1865), 12 L. T. 818; *West Riding of Yorkshire Rivers Board v. Gaunt (Reuben) & Sons., Ltd.* (1902), 67 J. P. 183; *Shepherd v. Croft*, [1911] 1 Ch. 521; *Glasgow, Yoker and Clydebank Rail. Co. v. Macindoe* (1896), 24 R. (Ct. of Sess.) 160; and see title WATERS AND WATERCOURSES.

(*w*) *Wheatcroft v. Matlock Local Board* (1885), 52 L. T. 356; *Falconar v. South Shields Corporation* (1895), 11 T. L. R. 223, C. A.; *Newcastle-upon-Tyne Corporation v. Houseman* (1898), 63 J. P. 85; *Cornwell v. Metropolitan Commissioners of Sewers* (1855), 10 Exch. 771; *West Riding of Yorkshire Rivers Board v. Preston & Sons* (1904), 69 J. P. 1; compare *Airdrie Magistrates v. Lanark County Council*, *Coatbridge Magistrates v. Lanark County Council*, [1910] A. C. 286; *Pearce v. Croydon Rural District Council* (1910), 74 J. P. 429; *A.-G. v. Lewes Corporation*, [1911] 2 Ch. 495 (an intermittent stream); and see *Hanley v. Edinburgh Corporation* (1913), 29 T. L. R. 404, H. L. The illegal discharge of sewage into a stream after the year 1861 would not of itself convert a watercourse into a sewer (*West Riding of Yorkshire Rivers Board v. Gaunt (Reuben) & Sons., Ltd.*, *supra*). For provisions against the pollution of watercourses, see titles PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 408; WATERS AND WATERCOURSES.

(*a*) See title METROPOLIS, Vol. XX., p. 462, note (*4*).

(*b*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 250, as amended by the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 112.

and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed (c), also any drain for draining any group or block of houses by a combined operation (d) under the order of any vestry or district board or metropolitan borough council (e), and also any drain for draining a group or block of houses by a combined operation laid or constructed before the 1st January, 1856, pursuant to an order or direction or with the sanction or approval of the Metropolitan Commissioners of Sewers (f).

SECT. 1.
Definitions.
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1239. The word "sewer" means and includes sewers and drains of every description except drains to which the word "drain" Definition of "sewer."

(c) The definition of a drain in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4, is practically identical with this part of the definition; see p. 722, *ante*.

(d) A "combined operation" for draining houses is only mentioned in the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 74, but that provision is limited to existing houses. Under *ibid.*, s. 76, however, in the case of new houses, the vestry or district board could order the manner and form in which the drains should be laid, and under that provision a combined operation could be ordered (*Bateman v. Poplar District Board of Works* (1886), 33 Ch. D. 360, C. A.).

(e) Vestries and district boards were constituted by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), for the purposes of that Act, but these powers have been transferred to the metropolitan borough councils; see title METROPOLIS, Vol. XX., p. 402.

(f) These bodies were constituted under the Metropolitan Sewers Act, 1848 (11 & 12 Vict. c. 112) (now repealed), and their powers were determined as from the 1st January, 1856, by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 145—148. Drains for draining a block of houses by a combined operation sanctioned by other Commissioners of Sewers which existed in London before the Metropolitan Commissioners of Sewers are not drains within the above definition, but are sewers (*Appleyard v. Lambeth Vestry* (1897), 66 L. J. (Q. B.) 347, C. A.). Combined drains sanctioned by the Commissioners before 1856, but not laid and constructed until after that date, would also appear to be sewers. The order as to a combined operation need not be a formal order, and whether such order has been made or not is a question of fact. The signature of the chairman of the board to a book belonging to the board showing that the plan for the combined drain was before the board, and had been considered and approved, would be sufficient evidence of an order (*Bateman v. Poplar District Board of Works*, *supra*); so would the plan book of the vestry showing the particular combined operation initialled by the surveyor as having been laid satisfactorily (*Geen v. Newington Vestry*, [1898] 2 Q. B. 1; *Greater London Property Co. v. Foot*, [1899] 1 Q. B. 972). The fact that the owner had asked the vestry to make the drain, followed by payment of the estimated cost thereof to the vestry, has been held to be sufficient evidence of an order (*House Property and Investment Co. v. Grice* (1911), 75 J. P. 395; compare *Cheetham v. Manchester Corporation* (1875), L. R. 10 C. P. 249). If it appears that the vestry had delegated its powers of approval to its surveyor, evidence of his approval is not sufficient (*High v. Billings* (1903), 67 J. P. 388), although he might sanction details (see *Heaver v. Fulham Borough Council*, [1904] 2 K. B. 383), and a strong presumption that it was made with the knowledge and sanction of the vestry in the absence of proof of the making of an order is not sufficient (*Bethnal Green Vestry v. London School Board*, [1898] A. C. 190); and, as to such proof, see *Stokes v. Haydon* (1901), 65 J. P. 756.

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applies (*g*). In the case of the drainage of a group or block of houses by a combined operation, the illegal and surreptitious draining of another building or other premises into the combined system converts such drain into a sewer from the point of junction (*h*), and a substantial departure from the combined operation ordered also converts the drain into a sewer (*i*).

The above definition of "sewer" includes sewers made in connexion with works for the prevention of floods (*j*).

City of
London.

1240. In the City of London the sewers and drains, other than the main sewers, are regulated by the City of London Sewers Acts, 1848 (*k*) and 1851 (*l*). These Acts contain no definitions of sewers and drains; the distinction drawn is between public sewers and drains and private sewers and drains (*m*).

SECT. 2.—*Vesting of Sewers in Local Authorities.*

SUB-SECT. 1.—*In General.*

Vesting
in local
authority.

1241. All existing and future sewers (*n*) within the district of a local authority (*o*), together with all buildings, works, and materials and things belonging thereto, with certain exceptions (*p*), vest in and are under the control of that local authority, provided that sewers within the district of a local authority, constructed by or transferred to some other local authority or a sewage board (*q*) or

(*g*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 250. This definition should be compared with that in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4; see p. 722, *ante*. It is very similar to that definition both in form and effect, but it does not contain the second exception as to highway drains; see p. 722, *ante*. As the term "drain" as used in London includes certain combined drains (see p. 725, *ante*), these are excluded from the definition of "sewer" in London under the exception of drains. Apart from these exceptions, the law is the same in regard to the interpretation of these terms, both in London and outside; see p. 722, *ante*.

(*h*) See note (*q*), p. 723, *ante*; and see *Geen v. Newington Vestry*, [1898] 2 Q. B. 1; *Florence v. Paddington Vestry* (1895), 12 T. L. R. 30; *Klett v. Camberwell Vestry* (1896), 60 J. P. 411 (a county court decision).

(*i*) *Bullock v. Reeve* (1900), 65 J. P. 164; *Harvey v. Busby* (1906), 70 J. P. 301; *Harvey v. Jaye* (1907), 71 J. P. 473. But a mere deviation in the direction of the drain does not convert it into a sewer (*Greater London Property Co. v. Foot*, [1899] 1 Q. B. 972), nor does the addition of the drainage of other premises within the same curtilage to those already drained (*Gorringe v. Shoreditch Borough Council* (1902), 66 J. P. 565).

(*j*) See p. 773, *post*; *Poplar District Board of Works v. Knight* (1858), E. B. & E. 408.

(*k*) 11 & 12 Vict. c. clxiii.

(*l*) 14 & 15 Vict. c. xci.; and see p. 729, *post*.

(*m*) See City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), ss. 52 *et seq.*

(*n*) For the definition of "sewer," see p. 722, *ante*. A single private drain within the meaning of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19 (see p. 760, *post*), remains a sewer and vests in the local authority (*Pemsel and Wilson v. Tucker*, [1907] 2 Ch. 191).

(*o*) For the definition of "local authority," see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 364, note (*a*), 372.

(*p*) See p. 727, *post*.

(*q*) A local authority or a sewage board may construct sewers outside its district or area by agreement with the local authority within whose district the work is to be done (Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 28, 285); see pp. 745, 746, *post*. As to sewage boards, see

SECT. 2.
Vesting of
Sewers in
Local
Authorities.

other authority having power by statute to construct sewers, subject to any agreement to the contrary, vest in and are under the control of the authority which constructed the same or to which the same have been transferred (*r*). The effect of such vesting is to give the local authority the property not only in the sewer, but in the space occupied by it (*s*).

The excepted sewers (*t*) which do not vest in the local authority are:—(1) Sewers made by any person for his own profit or by any company for the profit of the shareholders, the term “profit” meaning some benefit more than and independent of the mere removal of the sewage or liquid conveyed away, although it need not necessarily be of a pecuniary nature (*u*); (2) sewers made and used for the purpose of draining, preserving, or improving land under any local or private Act of Parliament or for the purpose of irrigating land (*a*); (3) sewers under the authority of any Commissioners of Sewers appointed by the Crown (*b*).

p. 721, *ante*. Sewers may be transferred to such a board or to a port sanitary authority; see title LOCAL GOVERNMENT, Vol. XIX., p. 292.

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 13.

(*s*) *Taylor v. Oldham Corporation* (1876), 4 Ch. D. 395, *per* JESSEL, M.R., at p. 411; *A.-G. v. Dorking Union Guardians* (1882) 20 Ch. D. 595, C. A., *per* JESSEL, M.R., at p. 604. Such a vesting may confer upon the local authority an interest in land within the meaning of the Lands Clauses Acts (*Birkenhead Corporation v. London and North Western Rail. Co.* (1885), 15 Q. B. D. 572, C. A., *per* BRETT, M.R., at p. 578; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 12; and compare *ibid.*, p. 33), and renders it liable to be rated (see title RATES AND RATING, Vol. XXIV., p. 16), or assessed to income tax in respect thereof (see title INCOME TAX, Vol. XVI., p. 619, note (*e*)). Such vesting may be subject to prescriptive rights of draining; see p. 728, *post*, and see the cases cited in note (*a*), p. 741, and notes (*o*), (*p*), p. 743, *post*.

(*t*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 13.

(*u*) Thus, if a person constructed a sewer for the purpose of carrying off the sewage of a number of new houses into a cesspool (*Acton Local Board v. Batten* (1884), 28 Ch. D. 283; *Pinnock v. Watworth* (1887) 51 J. P. 248), or into a river or stream (*Bonella v. Twickenham Local Board of Health, Holmes v. Twickenham Local Board of Health* (1887), 20 Q. B. D. 63, C. A.; *Ferrand v. Hallas Land and Building Co.*, [1893] 2 Q. B. 135, C. A.), for the purpose of getting rid of the sewage for sanitary purposes, such sewer would not be made by him for his own profit, nor would a pipe for carrying off superfluous water (*Russell v. Knight* (1894), *Times*, 9th May). Sewers constructed as part of the development of a building estate are not made for profit, and vest in the local authority (*Vowles v. Colmer* (1895), 64 L. J. (CH.) 414), but sewers for a whole town constructed as a speculation and paid for by a voluntary rate by the users are sewers made for profit (*Minehead Local Board v. Luttrell*, [1894] 2 Ch. 178), as are sewers made to convey water to be subsequently used, as for cattle (*Croysdale v. Sunbury-on-Thames Urban Council*, [1898] 2 Ch. 515), or to enable quarrying operations to be more economically conducted (*Sykes v. Sowerby Urban Council*, [1900] 2 Q. B. 584, C. A.).

(*a*) As under a private Inclosure Act (*R. v. Godmanchester Local Board* (1866), L. R. 1 Q. B. 328, Ex. Ch.), or by a railway company under its special Act (*London and North Western Rail. Co. v. Runcorn Rural Council*, [1898] 1 Ch. 561, C. A.), even although sewage may be conveyed thereto by third parties.

(*b*) As to these, see p. 774, *post*. Nothing in the Public Health Act, 1875 (38 & 39 Vict. c. 55), is to be construed to authorise any local authority to use, injure or interfere with any sluices, floodgates, sewers, groynes or sea defences, or other works made under the authority of such

SECT. 2.
Vesting of
Sewers in
Local
Authorities

Acquisition
 by local
 authority.
 Prior user.

1242. A local authority may also within its district acquire by purchase or otherwise from any person a sewer or any right of making or user or any other right in or respecting a sewer, with or without any buildings, works, materials or things belonging thereto. Any person may sell or grant to such authority any such sewer, right, or property belonging to him (c).

Any person who, previously to the purchase of a sewer by such authority, has acquired a right to use such sewer, is entitled to use the same, or any sewer substituted in lieu thereof, to the same extent as he would or might have done if the purchase had not been made (c).

SUB-SECT. 2.—In the Metropolis.

Main sewers.

1243. The main sewers of the Metropolis, which were in 1855 vested in the Commissioners of Sewers of the City of London (d) and in the Metropolitan Commissioners of Sewers (e) respectively (f), were, with the walls, defences, banks, outlets (g), sluices, flaps, penstocks, gullies, grates, works and things thereunto belonging, and the materials thereof, with all rights of way and passage used and enjoyed by such Commissioners over and to such sewers, works and things, and over all rights (h) concerning or incident thereto, vested in the Metropolitan Board of Works, and so were all sewers and works from time to time made by the Board (i). They were subsequently transferred to and are now vested in the London County Council (k).

Other sewers.

1244. All other sewers in the Metropolis, which were vested in the Metropolitan Commissioners of Sewers and situated in parishes for which vestries were constituted, and in districts for which

Commissioners, or any sewers or other works made and used by any body of persons or person for the purpose of draining or improving land under any local or private Act, or for the purpose of irrigating land, without the consent of such Commissioners or body of persons or person expressed in writing, and in the case of a corporation under its seal, and nothing in the Act is to prejudice or affect the rights, privileges, powers or authorities given or reserved to any person under such local or private Acts for draining, preserving or improving land (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 327).

(c) *Ibid.*, s. 14. The purchase-money is subject to the same trusts, if any, as the sewer, right or property sold was subject (*ibid.*).

(d) See City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), amended and continued by the City of London Sewers Act, 1851 (14 & 15 Vict. c. xci.).

(e) See note (f), p. 725, *ante*.

(f) These main sewers are specifically mentioned and described in the Metropolitan Management Act, 1855 (18 & 19 Vict. c. 120), Sched. D.

(g) A marsh wall to protect land from inundation and through which sewers pass to drain land at low water is a sewer and would probably vest in the borough council (*Poplar District Board of Works v. Knight* (1858), E. B. & E. 408; and see *Plumstead Board of Works v. Kent Commissioners of Sewers* (1877), 41 J. P. 388).

(h) As to a right of support, see *Metropolitan Board of Works v. Metropolitan Rail. Co.* (1868) L. R. 3 C. P. 612.

(i) Metropolitan Management Act, 1855 (18 & 19 Vict. c. 120), ss. 135, 148.

(k) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40 (8); see title METROPOLIS, Vol. XX., p. 395.

district boards were formed (*l*), were, with the like works, materials, and rights of way and other rights, vested in the vestries and district boards thereof respectively, as well as all sewers made and to be made within any such parish or district (*m*). These sewers were subsequently transferred to the metropolitan borough councils (*n*).

SECT. 2.
**Vesting of
Sewers in
Local
Authorities.**

The sewers in the City of London, other than the main sewers, remained vested in the Commissioners of Sewers of the City (*o*), but were subsequently transferred to the Mayor, Commonalty, and Citizens of the City acting through the Common Council (*p*).

Other sewers
in the City
of London.

1245. The Metropolitan Board of Works had, and the London County Council as its successor has, power by an order under its seal to declare to be main sewers any sewers in the Metropolis not vested in it which ought in its opinion to be considered as main sewers and to be under its management. Upon such order being made such sewers vest in it and come under its management (*q*).

Vesting by
order of
London
County
Council.

1246. With the previous consent in writing of the London County Council a metropolitan borough council may transfer the powers and duties vested in such borough council under the Metropolis Management Acts (*r*) in relation to sewerage and drainage to the County Council, whereupon all sewers and property vested in such borough council under those Acts for the purposes of or in connexion with such powers and duties become vested in the County Council (*s*).

Transfer by
borough
council to
London
County
Council.

(*l*) See title METROPOLIS, Vol. XX., p. 402.

(*m*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 69. These include sewers made by private owners although without the knowledge of the council, board or vestry (*Bethnal Green Vestry v. London School Board*, [1898] A. C. 190; and see the cases cited at pp. 723, 725, *ante*).

(*n*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4; see title METROPOLIS, Vol. XX., p. 402.

(*o*) City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), s. 52, which vested in the Commissioners all the sewers and public drains then existing or at any time constructed, whether at the cost of the Commissioners or otherwise. The powers and property of the Commissioners were also preserved in relation to such parts of parishes which were united into districts as were within the City (Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 242); and see p. 726, *ante*.

(*p*) City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.).

(*q*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 137. The Council may also by such order take under its jurisdiction and authority any other matters in relation to sewerage and drainage with respect to which jurisdiction or authority is by that Act vested in any vestry or district board (*ibid.*).

(*r*) See title METROPOLIS, Vol. XX., p. 462, note (*i*).

(*s*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 89. Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 28. In order that this transfer may take place, the borough council must pass a resolution to that effect by a majority at a meeting of such council specially convened for the purpose of considering the question of such transfer and of which not less than fourteen days' notice shall have been given, and not less than two-thirds of the whole council must be present at such meeting (*ibid.*). The County Council has the same powers of defraying expenses incurred by it in connexion with the

SECT. 3.
Construction and
Alteration
of Sewers
by Local
Authorities.

Duty to
construct.

Power to
alter and
improve.

SECT. 3.—*The Construction and Alteration of Sewers by Local Authorities within their Districts.*

SUB-SECT. 1.—*In General.*

1247. In addition to the sewers which may have become vested in a local authority, it is the duty of such authority to cause to be made such sewers as may be necessary for effectually draining its district for the purposes of the Public Health Acts (*t*), but these purposes do not generally include the removal of trade effluents (*u*). Moreover, this duty does not require a local authority to make sewers for the prospective development of a building estate (*a*), nor for outlying houses which may be reasonably drained into cesspools (*b*).

A local authority may also from time to time enlarge, lessen, alter the course of, cover in, or otherwise improve any sewer belonging to it. It may discontinue, close up or destroy any such sewer which has in its opinion become unnecessary, on condition of providing a sewer as effectual for the use of any person who may be so deprived of the lawful use of any sewer, provided the discontinuance, closing up, or destruction of any sewer is not so done as to create a nuisance (*c*). The cost of enlarging or altering a sewer vested in the local authority is borne by the authority and cannot in urban districts be imposed on the frontagers

execution of the powers so transferred as it has in regard to other expenses under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120) (*ibid.*, s. 89; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 28).

(*t*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 15. As to the Public Health Acts, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 361, note (*a*). As to the notice to be given by a rural district council to a parish council, see title LOCAL GOVERNMENT, Vol. XIX., p. 249.

(*u*) See the opinion of the law officers mentioned in the Third Report of the Royal Commission on Sewage Disposal, p. xi., and the recommendation of that Commission, p. xvii.; and see p. 764, *post*. A contrary opinion was expressed by CHARLES, J., in *Peebles v. Oswaldtwistle Urban District Council*, [1897] 1 Q. B. 384, but that decision was reversed on appeal, and in the House of Lords, although on different grounds, *sub nom. Pasmore v. Oswaldtwistle Urban District Council*, [1898] A. C. 387; and on this point, see *ibid.*, *per* Lord HALSBURY, L.C., at p. 396.

(*a*) *R. v. Tynemouth Rural District Council*, [1896] 2 Q. B. 451, C. A. In urban districts the local authority can in such cases require the owner to provide sewers in the new streets under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150, or under the Private Street Works Act, 1892 (55 & 56 Vict. c. 57); see p. 738, *post*; title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 215 *et seq.* In rural districts these powers do not apply unless extended to them by the Local Government Board; see title LOCAL GOVERNMENT, Vol. XIX., p. 352.

(*b*) *Kinson Pottery Co. v. Poole Corporation*, [1899] 2 Q. B. 41, *per* CHANNELL, J., at p. 49.

(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 18. An open water-course which has in fact become a sewer could therefore be covered in (*Wheatcroft v. Mallock Local Board* (1885), 52 L. T. 356; but see p. 724, *ante*). The provision of a substituted sewer appears to be a condition precedent to the discontinuance of the existing one; see *A.-G. v. Dorking Union Guardians* (1882), 20 Ch. D. 595, C. A., *per* JESSEL, M.R., at p. 604; *A.-G. v. Acton Local Board* (1882), 22 Ch. D. 221, *per* FRY, J., at p. 232. As to the costs of adapting the owner's drains to the new sewers, see the cases on the similar provision in the Metropolis, cited in note (*r*), p. 735, *post*.

as if it were a new sewer, provided the original sewer has once been accepted as satisfactory by the authority (*d*).

During the construction or repair of sewers the local authority must take proper precautions against accident, and cause any sewer or drain during the construction or repair thereof by it to be lighted and guarded during the night so as to prevent accidents (*e*).

1248. A local authority may (*f*) carry any sewer through, across, or under any turnpike road or any street or place laid out as or intended for a street (*g*), or under any cellar or vault which may be under the pavement or carriage-way of any street, and, after giving reasonable notice in writing to the owner or occupier (*h*), into, through, or under any lands (*i*) whatsoever within its district (*k*), if on the report of its surveyor it appears necessary for the efficient discharge of the duty in the way most beneficial to the public (*l*) to do so. The local authority must pay full compensation to

SECT. 3.
Construction and Alteration of Sewers by Local Authorities.

Power of carrying sewer through or under streets or cellars.

(*d*) *Bonella v. Twickenham Local Board of Health*, *Holmes v. Twickenham Local Board of Health* (1887), 20 Q. B. D. 63, C. A.; *Walthamstow Local Board v. Staines*, [1891] 2 Ch. 606, C. A.

(*e*) Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 79, incorporated in the Public Health Act, 1875 (38 & 39 Vict. c. 55), by *ibid.*, s. 160. As to the precautions to be observed, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 253.

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 16.

(*g*) For definition of "street," see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 16. It includes a private road (*Taylor v. Oldham Corporation* (1876), 4 Ch. D. 395; *Hill v. Wallasey Local Board*, [1894] 1 Ch. 133, C. A.). As to turnpike roads, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 15.

(*h*) The notice need not be accompanied by a map provided the point of entry on the land and the direction is indicated (*Cleckheaton Industrial Self-Help Society v. Jackson* (1866), 14 W. R. 950). The court does not grant an injunction for insufficiency of notice if the owner is not prejudiced (*Hutchings v. Seaford Urban District Council* (1898), *Times*, 11th November; (1899), *Times*, 6th November; compare *New River Co. v. Ware Union Rural Sanitary Authority* (1883), 18 L. J. N. C. 20; *Cleckheaton Urban District Council v. Firth* (1898), 62 J. P. 536). For the definition of "owner," see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 427, note (*o*).

(*i*) For definition of "lands," see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 427, note (*o*); it includes land covered with water, so that sewers may be laid into, through or under a stream (*Durrant v. Branksome Urban Council*, [1897] 2 Ch. 291, C. A., per LINDLEY, L.J., at p. 301; compare *Montgomerie & Co., Ltd. v. Haddington (Provost etc.)*, [1909] A. C. 170); but this would be subject to no nuisance being caused (*Lamacraft v. St. Thomas Sanitary Authority* (1880), 44 J. P. 441); and see pp. 736, 737, *post*. The sewer may be laid partly above ground (*Roderick v. Aston Local Board* (1877), 5 Ch. D. 328, C. A.).

(*k*) This is qualified by the saving clauses in the Public Health Act, 1875 (38 & 39 Vict. c. 55); see *ibid.*, ss. 327—336; *Thames Conservators v. Walton-upon-Thames Urban District Council* (1907), 71 J. P. 202; title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 365, 366. As to laying sewers outside an authority's district, see pp. 745, 746, *post*.

(*l*) *Lewis v. Weston-super-Mare Local Board* (1888), 40 Ch. D. 55; *Derby (Earl) v. Bury Improvement Commissioners*, (1868), L. R. 3 Exch. 121; reversed (1869), L. R. 4 Exch. 222, Ex. Ch. If the surveyor comes to a decision in good faith the court does not interfere therewith, but the person who must decide must be the properly appointed surveyor of the local authority (*ibid.*; compare *Kendal v. Lewisham Borough Council* (1903), 67 J. P. 236; *Brown v. Kirkcudbright Magistrates* (1905), 8 F. (Ct. of Sess.) 77).

SECT. 3.
Construc-
tion and
Alteration
of Sewers
by Local
Authorities.

Provision
of map of
sewerage
system.

Default of
local
authority.

any person who sustains damage by reason of the laying of such sewers (*m*), but such compensation need not be paid before the work is done, nor is it necessary for the local authority to purchase the land (*n*). In carrying out this work the authority has also, in certain cases, power to alter the position of gas and water pipes (*o*).

1249. A local authority may, if it thinks fit, provide a map exhibiting a system of sewerage for effectually draining its district, and any such map must be left at its office and be open at all reasonable times to the inspection of the ratepayers of its district (*p*).

1250. Any person aggrieved by the default of a local authority to provide its district with sufficient sewers has no remedy at law by action or otherwise (*q*); the proper procedure is by complaint to the Local Government Board (*r*). Where a district council makes default in supplying a parish with sufficient sewers, the parish council may make a complaint to the county council (*s*).

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 308. This may include damage by reason of blocking the access to premises (*Livingé v. Christ Church Corporation*, [1912] 3 K. B. 595, C. A., distinguishing *Herring v. Metropolitan Board of Works* (1865), 19 C. B. (N. s.) 510); and see titles LOCAL GOVERNMENT, Vol. XIX., pp. 271, 272; COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 65, 66, 163. As to the removal of old materials by the local authority, see Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 28; and, as to the application of that Act, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 364, 365. The notice to make the sewer may be withdrawn and the owner is entitled to recover compensation for any loss he may suffer thereby (*Davis v. Witney Urban District Council* (1899), 63 J. P. 279, C. A.). The negligent laying of a sewer gives rise to a claim for damages, and the local authority is liable for the acts of its servants and contractors (*Hardaker v. Idle District Council*, [1896] 1 Q. B. 335, C. A.; *Penny v. Wimbledon Urban Council*, [1899] 2 Q. B. 72, C. A.); and see titles MASTER AND SERVANT, Vol. XX., p. 264; NEGLIGENCE, Vol. XXI., pp. 473, 474; PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 340.

(*n*) *Roderick v. Aston Local Board* (1877), 5 Ch. D. 329, C. A.; *Thornton v. Nutter* (1867), 31 J. P. 419; *Swanston v. Twickenham Local Board* (1879), 11 Ch. D. 838, C. A. (where it was held that a manhole was part of the sewer); compare *North London Rail. Co. v. Metropolitan Board of Works* (1859), 23 J. P. 515; *Hughes v. Metropolitan Board of Works* (1861), 25 J. P. 675; *Caledonian Rail. Co. v. Perth District Committee* (1901), 3 F. (Ct. of Sess.) 1029.

(*o*) See title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 212.

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 20. Such a map is necessary in mining districts where the rights as to support for sewers and other sanitary works are governed by the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883 (46 & 47 Vict. c. 37); see p. 748, *post*; titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 50; MINES, MINERALS, AND QUARRIES, Vol. XX., p. 578.

(*q*) *Pasmore v. Oswaldtwistle Urban District Council*, [1898] A. C. 387; *Glossop v. Heston and Isleworth Local Board* (1879), 12 Ch. D. 102, C. A.; see *Robinson v. Workington Corporation*, [1897] 1 Q. B. 619, C. A.; *Harrington (Earl) v. Derby Corporation*, [1905] 1 Ch. 205; *Brown v. Dunstable Corporation*, [1899] 2 Ch. 378; and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 378, note (*f*).

(*r*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 377, 378.

(*s*) See titles LOCAL GOVERNMENT, Vol. XIX., p. 375; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 377, 378.

1251. The Towns Improvement Clauses Act, 1847 (*t*), contains clauses (*u*) giving Commissioners very similar powers of making and maintaining sewers to those above mentioned, which apply when incorporated in local Acts.

SECT. 3.
Construction and Alteration of Sewers by Local Authorities.

SUB-SECT. 2.—In the Metropolis.

1252. In addition to the sewers already vested in the London County Council, that Council must make all such other sewers and works, and such diversions or alterations of any existing sewers or works vested in it under the Metropolis Management Acts (*a*), as it may from time to time think necessary for the effectual sewerage and drainage of the Metropolis (*b*). This is an absolute obligation imposed upon the Council when the necessity is clear, and the court will enforce it by mandamus, but the method in which the duty may be carried out is in the Council's discretion (*c*). The Council must also discontinue, close up, or destroy such of the sewers for the time being so vested in it as it deems unnecessary (*d*).

Towns Improvement Clauses Act, 1847.

London County Council.

1253. The borough councils, in addition to the sewers already vested in them, must cause to be made such sewers and works, or such diversions or alterations of sewers and works, as may be necessary for effectually draining their boroughs (*e*). They have, however, a discretion as to the time and manner in which this duty shall be exercised (*f*). No new sewer may be made without the

Metropolitan borough councils.

(*t*) 10 & 11 Vict. c. 34.

(*u*) *Ibid.*, ss. 22—34; and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 250. These clauses are not incorporated in the Public Health Act, 1875 (38 & 39 Vict. c. 55).

(*a*) See title METROPOLIS, Vol. XX., p. 462, note (*i*).

(*b*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 135; see title METROPOLIS, Vol. XX., p. 395; see also the Metropolis Management Amendment Act, 1858 (21 & 22 Vict. c. 104), requiring the necessary sewers to be completed as soon as possible for the improvement of the main drainage of the Metropolis and for preventing as far as practicable the sewage from passing into the Thames. As to purchasing land for sewage works, see Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 152; title METROPOLIS, Vol. XX., pp. 456, 457.

(*c*) *R. v. London County Council* (1899), 64 J. P. 20, C. A., also reported *sub nom. Lee District Board v. London County Council*, 82 L. T. 306. The London County Council is not bound to make a sewer to take the sewage of every house which drains directly into the Thames, if such sewage can be carried into the main sewer by a district sewer (*Westminster Corporation v. London County Council*, [1906] 2 K. B. 379). As to discretion, see also note (*f*), *infra*.

(*d*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 135.

(*e*) *Ibid.*, s. 69. As to their duty to drain ditches and pools of water, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 612, and, as to drains to protect from floods, see Metropolis Management (Thames River Prevention of Floods) Act Amendment Act, 1879 (42 & 43 Vict. c. cxcviii.); p. 773, *post*.

(*f*) *R. v. St. Luke's, Chelsea, Vestry* (1862), 1 B. & S. 903. From that decision it appears that in a proper case the court would grant a mandamus to compel the council to make the sewer; see also *R. v. St. Mary, Islington* (1898), *Times*, 3rd August; *R. v. London County Council* (1899), 64 J. P. 20, C. A.; and see note (*c*), *supra*. The procedure should be by action and not by motion for a prerogative writ (*R. v. St. Giles, Camberwell, Vestry* (1897), 66 L. J. (Q. B.) 337); and see title CROWN PRACTICE, Vol. X., p. 105.

SECT. 3.
**Construc-
tion and
Alteration
of Sewers
by Local
Authorities.**

Powers of
London
County
Council and
Metropolitan
borough
councils.

previous approval of the London County Council (*g*). The necessary communication of any sewer or drain with a main sewer must be made by the borough council to the satisfaction of the London County Council, and three clear days' previous notice in writing to the latter Council must be given by the borough council (*h*).

1254. For the purposes of such works the London County Council and the borough councils have full power and authority (*i*) to carry any such sewers or works through or across or under any turnpike road (*k*) or any street (*l*) or place laid out as or intended for a street, as well beyond as within the limits of the Metropolis, or through or under any cellar or vault under the carriageway or pavement of any street, and into, through, or under any lands whatsoever within or beyond the said limits, making compensation for any damage done (*m*); and the London County Council may, subject to certain consents intended to preserve the navigation of the river, construct any work through, along, over or under the bed and soil of the river Thames, making compensation to all persons having any interest in any wharves, jetties, or other property damaged by such works (*n*).

(*g*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 69. As to the submission of plans by the borough council to the London County Council and the approval thereof in writing, and, as to alteration in plan and necessity of new approval after twelve months, see Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), ss. 45, 50, 51. Private owners may also construct sewers at their own expense, subject to the sanction of the borough council and the approval of the London County Council thereto to be obtained by the borough council (*ibid.*, ss. 44, 45). A sewer constructed without such sanction and approval nevertheless remains a sewer and vested in the borough council (*Bethnal Green Vestry v. London School Board*, [1898] A. C. 190); and see p. 729, *ante*.

(*h*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 46. As to persons branching drains into main sewers, see *ibid.*, s. 49; and, as to notice to the London County Council before interfering with gullies and ventilating shafts to main sewers, see *ibid.*, s. 27.

(*i*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 69 (borough councils), 135 (London County Council); see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 206.

(*k*) As to the roads formerly turnpike roads, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 15, 16.

(*l*) For definition of "street," see Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 250; as amended by the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 112; and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 20.

(*m*) As to compensation, see Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 225; title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 172, 173. As to sewers affecting railways and canals, and the notice required to be given to the owners thereof, see Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 34. As to the duty to repair a sewer under a local Act, see *Hart v. St. Marylebone Borough Council* (1912), 76 J. P. 257.

(*n*) Metropolis Management Act, 1858 (21 & 22 Vict. c. 104), s. 2. In the case of works below high-water mark the consent of the Admiralty is required (*ibid.*, s. 27), and in the case of works upon the banks, bed or shore, the approval of the Port of London Authority (see title WATERS AND WATERCOURSES), as successors of the Thames Conservancy, to the plans is required (Metropolis Management Act, 1858 (21 & 22 Vict. c. 104), ss. 28, 29). Injuries caused to ships by sewers laid without such consent or approval entitles the owners to recover from the council

The councils may enter and do any of the above works before the compensation is paid (o). The London County Council may also make and maintain any bridges, arches, culverts, passages, or roads over, under, or by the sides of or leading to or from any sewerage works constructed or to be constructed by it which it may deem necessary and convenient for preserving the communications between lands through which the said work may have been or may be made or carried; but the Council may agree with the occupiers and owners of land to pay compensation in lieu of such bridges or other works (p).

SECT. 3.
Construction and
Alteration
of Sewers
by Local
Authorities.

1255. A borough council may also from time to time enlarge, contract, raise, lower, arch over, or otherwise improve or alter all or any of the sewers or works which shall be from time to time vested in it or subject to its order and control. It may also from time to time discontinue, close up, or destroy such of them as it may deem to have become unnecessary, provided it shall be so done as not to cause a nuisance (q), and if any person is thereby deprived of the lawful use of any covered sewer the council must provide some other sewer or a drain as effectual for his use as the sewer of which he is deprived (r).

Alteration
and closing
of sewers.

1256. A borough council may close any street within its borough during the execution by it of sewerage works and keep the same closed for such time as shall be necessary (a).

Closing
streets.

1257. The London County Council must also from time to time, in order to secure the efficient maintenance of the main and

General
control of
London
County
Council.

(*Brownlow v. Metropolitan Board of Works* (1863), 13 C. B. (N. S.) 768; affirmed (1864), 16 C. B. (N. S.) 546, Ex. Ch.).

(o) *North London Rail. Co. v. Metropolitan Board of Works, Winter v. Metropolitan Board of Works* (1859), John. 405; *Hughes v. Metropolitan Board of Works* (1861), 9 W. R. 517; and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 173.

(p) *Metropolis Management Amendment Act, 1862* (25 & 26 Vict. c. 102), s. 25. Bridges, culverts, arches or passages constructed by the London County Council in connexion with any sewers or works must be maintained by it (*ibid.* s. 24).

(q) As to nuisances generally, see title NUISANCE, Vol. XXI., pp. 503 *et seq.*

(r) *Metropolis Management Act, 1855* (18 & 19 Vict. c. 120), s. 69, which also provides that where the council alters a sewer or provides a new sewer in substitution for one discontinued, it may alter the private drains communicating with the altered or discontinued drain, or may close them up or destroy them, and provide new drains in lieu thereof, as the circumstances may require, so that the altered or substituted drain is as effectual for the use of the person entitled thereto as the drain previously used. This must be done at the expense of the council, which cannot use the provisions of *ibid.*, s. 73, to throw the expense on the owners (*St. Marglebone Vestry v. Viret* (1865), 19 C. B. (N. S.) 424; *St. Martin-in-the-Fields Vestry v. Ward* (1896), [1897] 1 Q. B. 40, C. A.). In cases of sewers which other persons are liable to maintain, by prescription, tenure or otherwise, there is provision authorising the council to alter and improve them and to throw part of the expenses on the person so liable; see *Metropolis Management Act, 1855* (18 & 19 Vict. c. 120), s. 70.

(a) *Metropolis Management Amendment Act, 1862* (25 & 26 Vict. c. 102), s. 84, as amended by the *London Government Act, 1899* (62 & 63 Vict. c. 14), Sched. III.

**SECT. 3.
Construction and
Alteration
of Sewers
by Local
Authorities.**

general sewerage of the Metropolis, make such general or special order as to it may seem proper for the guidance, direction, and control of the borough councils in the levels, construction, alteration, and maintenance, and cleansing of sewers in their respective areas, and for securing the proper connexion and intercommunication of the sewers of the several areas, and their communications with the main sewers vested in the London County Council, and generally for the guidance, direction, and control of the borough councils in the exercise of their powers and duties in relation to sewage; and all such orders are binding on the borough councils (b).

SECT. 4.—Maintenance and Repair of Sewers.

SUB-SECT. 1.—In General.

**Duty to
repair.**

1258. Every local authority must keep in repair all sewers belonging to it (c), and cause them to be so constructed, covered, ventilated and kept as not to be a nuisance or injurious to health, and to be properly cleansed and emptied (d). For the purpose of such repair the local authority has such right of access thereto as is reasonably necessary to do the work; but this does not prevent the owner of the land from using or altering his land so as to make the access more difficult (e).

Default.

1259. Failure to maintain the existing sewers does not give rise to a cause of action against the local authority (f), the remedy of those aggrieved being by complaint, as in the case of failure to construct sufficient sewers (g); but negligence in carrying out the repairs or improper exercise of its powers of maintenance gives a ground of

(b) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 138. This does not empower the London County Council to take the initiative by ordering specific new works of sewerage. It merely gives it control over the construction and arrangement of new local sewers. The initiative is left to the borough council (*R. v. St. George, Hanover Square, Vestry*, [1895] 2 Q. B. 275). The London County Council is also authorised from time to time to make, alter, and repeal bye-laws for all of the above purposes, except that in the City of London the power is limited to the main sewers (Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 83).

(c) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 15. In the case of sewers which are "single private drains" within the meaning of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19, the local authority can in appropriate cases recover the costs of the repair, but is still generally liable in respect of the non-repair (*R. v. Hastings Corporation*, [1897] 1 Q. B. 46, *per* WRIGHT, J., at p. 49); and see p. 759, *post*. As to protection of houses and streets during repair of sewers, see Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 79, which is incorporated in the Public Health Act, 1875 (38 & 39 Vict. c. 55), by *ibid.*, s. 160.

(d) *Ibid.*, s. 19.

(e) *Birkenhead Corporation v. London and North Western Rail. Co.* (1885), 15 Q. B. D. 572, C. A.; *Sandgate Local Board v. Leney* (1883), 25 Ch. D. 183, n.

(f) *Pasmore v. Oswaldtwistle Urban Council*, [1898] A. C. 387; *Jones v. Barking Urban District Council* (1898), *Times*, 9th December; and see the cases cited in note (g), p. 732, *ante*.

(g) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 377, 378.

action to the person thereby damaged (*h*). Improper construction (*i*) or ventilation (*k*) and neglect to cleanse and empty the sewers also affords a ground of action to such persons (*l*); but, in the absence of negligence on the part of the local authority, mere omission to cleanse or to repair a sewer does not entitle a person who has suffered damage by reason of such omission to recover such damages from the authority (*m*).

SECT. 4.
Maintenance and Repair of Sewers.

SUB-SECT. 2.—*In the Metropolis.*

1260. The London County Council and the metropolitan borough councils must from time to time repair and maintain the sewers vested in them, or such of them as may not be discontinued, closed up, or destroyed under the powers above mentioned (*n*). They must also cause the sewers vested in them to be constructed, covered and kept, so as not to be a nuisance (*o*) or injurious to health, and to be properly cleared, cleansed, and emptied (*p*). For the purpose of clearing, cleansing, and emptying such sewers they may construct and place either above or under ground such reservoirs, sluices, engines, and other works as may be necessary (*q*).

Duty to repair.

(*h*) *Dent v. Bournemouth Corporation* (1897), 66 L. J. (Q. B.) 395; *Whitfield v. Bishop Auckland Urban District Council* (1897), *Times*, 22nd November; and see *Hawthorn Corporation v. Kannuluik*, [1906] A. C. 105, P. C.

(*i*) *A.-G. v. Hackney Local Board* (1875), L. R. 20 Eq. 626; and see *Southampton and Itchin Floating Bridge and Roads Co. v. Southampton Local Board* (1858), 8 E. & B. 801; *Touzeau v. Slough Urban District Council* (1896), *Times*, 6th February.

(*k*) *Smith v. King's Norton Rural District Council* (1896), 60 J. P. 520; *Brown v. Whickham Urban District Council* (1898), *Times*, 14th July.

(*l*) *Baron v. Portslade Urban Council*, [1900] 2 Q. B. 588, C. A.; *Fergusson v. Malvern Urban District Council* (1909), 73 J. P. 361, H. L.

(*m*) *Hammond v. St. Pancras Vestry* (1874), L. R. 9 C. P. 316; *Bateman v. Poplar District Board of Works* (No. 2) (1887), 37 Ch. D. 272 (cases under the Metropolitan Acts (see note (*p*), *infra*)); *Stretton's Derby Brewery Co. v. Derby Corporation*, [1894] 1 Ch. 431. The subsidence of a highway by reason of a defective sewer, the defect not being known to the authority and of which it had no warning, affords no cause of action (*Lambert v. Lowestoft Corporation*, [1901] 1 K. B. 590; compare *Bathurst Borough v. Macpherson* (1879), 4 App. Cas. 256, P. C.; *Sydney Municipal Council v. Bourke*, [1895] A. C. 433, P. C.). See, further, titles NEGLIGENCE, Vol. XXI., pp. 376—378, 422; NUISANCE, Vol. XXI., pp. 516—518.

(*n*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 69 (borough councils), 135 (London County Council); see pp. 733, 735, *ante*.

(*o*) As to nuisances generally, see title NUISANCE, Vol. XXI., pp. 503 *et seq.*

(*p*) Damages for injuries from non-repair are not recoverable unless the local authority has been guilty of negligence (*Hammond v. St. Pancras Vestry*, *supra*; *Bateman v. Poplar District Board of Works*, *supra*; see *Meek v. Whitechapel Board of Works* (1860), 2 F. & F. 144; *Brown v. Sargent* (1858), 1 F. & F. 112); and see note (*m*), *supra*; title NEGLIGENCE, Vol. XXI., pp. 376, 422.

(*q*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 72 (borough councils), s. 135 (London County Council). Sewers and works constructed under the Metropolis Management Amendment Act, 1858 (21 & 22 Vict. c. 104), must be so constructed and kept as not to be a nuisance (*ibid.*, s. 24). Borough councils must also, by providing proper traps or other coverings, or by ventilation, or by such other ways and means as shall be practicable for that purpose, prevent the effluvia of

SECT. 5.
Sewering of
Streets not
Repairable
by
Inhabitants
at Large.

Liability of
 adjoining
 owners and
 occupiers.

SECT. 5.—Sewering of Streets not Repairable by Inhabitants at Large.

SUB-SECT. 1.—In General.

1261. In urban districts, and in those rural districts to which these urban powers have been extended (*r*), local authorities may require the owners and occupiers of the premises fronting, adjoining, or abutting on part of any such street as is not a highway repairable by the inhabitants at large to sewer, level, pave, flag, channel, or make good or provide means for lighting the same, when such works are required (*s*).

SUB-SECT. 2.—In the Metropolis.

Liability of
 metropolitan
 owners and
 occupiers.

1262. Where any sewer is constructed by any metropolitan borough council in and for the drainage of any new street (*t*), or of any house or houses in the borough (*a*), the expense of constructing such sewer and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersections of streets, and other incidental charges and expenses, are borne and defrayed by the owners (*b*) of such street or houses and of the land bounding or abutting on such street respectively (*c*). Such expenses are apportioned by the council in such proportion as

sewers from exhaling through gully holes, gratings, or other openings of sewers in any of the streets or other places within their area (Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 71). It is also their duty to keep street gratings and gullies cleansed (London County Council (General Powers) Act, 1894 (57 & 58 Vict. c. cxxii.), s. 16). The County Council has also power to make orders and bye-laws as to the cleansing of sewers by borough councils (Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 138; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 83); and see p. 735, *ante*.

(*r*) See title LOCAL GOVERNMENT, Vol. XIX., p. 332.

(*s*) This requisition is made under the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150 *et seq.*, but, where the Private Streets Works Act, 1892 (55 & 56 Vict. c. 57), is adopted, under that Act; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 215 *et seq.*, pp. 227 *et seq.*; and see *Denman v. Finchley Urban District Council* (1912), 76 J. P. (Journal) 316.

(*t*) For the definition of "new street," see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 20. As to a street of which one side has been built, see *Olerkenwell Vestry v. Edmondson & Son*, [1902] 1 K. B. 336, C. A.; title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 21.

(*a*) These are houses built after the 1st January, 1856. In respect of sewers made in streets by private persons before that date into which drains of houses were branched, the owners of such houses may be ordered to contribute to the cost (Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 80). This provision was extended to main sewers and sewers built after the 1st January, 1856, at the cost of private parties (Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 59).

(*b*) "Owner" is defined in the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 259, and, except for a provision as to serving certain notices, means the person for the time being receiving the rack-rent of the lands or premises in connexion with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would receive the same, if such lands or premises were let at a rack-rent.

(*c*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 52. This, however, does not authorise a council to charge the owners with the cost of substituting a new sewer in a new street in place of one

it deems just (*d*). The amount charged upon or payable in respect of each house or premises is payable either before the works are commenced, during their progress, or after their completion, as the council in each case determines, and either in one sum or by instalments, within such period, not exceeding twenty years, as the council directs (*d*). The amount may be recovered from the present or any future owner of the house or premises by action or before a court of summary jurisdiction (*e*).

SECT. 5.
Sewering of
Streets not
Repairable
by
Inhabitants
at Large.

1263. Provision is also made for constructing sewers in any streets in which there have previously been either no sewers or open sewers, but on which rates in respect of sewers have been levied. In such cases part of the expense is apportioned among the owners and part paid by the borough council. The amount is recoverable by action or summarily (*f*).

Streets with
no sewers,
where sewers
rate levied.

1264. In making the apportionments under either of the above provisions, the council, should it deem it expedient, may charge the owners of land in less proportion than the owners of house property (*g*), and may itself defray part of the expense out of the rates (*h*). When the amount is paid before the work is completed, the council must repay the difference if the actual cost is less, and can recover the deficiency from the owners if it is more (*i*).

Apportion-
ment.

1265. Any person aggrieved by any order or resolution of the council as to the expenses of constructing the works referred to

Appeal.

already laid by an owner with the consent of the authority (*Fulham Board v. Goodwin* (1876), 1 Ex. D. 400; see *Bonella v. Twickenham Local Board of Health*, *Holmes v. Twickenham Local Board of Health* (1887), 20 Q. B. D. 63, C. A.). Owners and occupiers of land may with the consent of the council lay sewers at their own expense, and the council may contribute out of the rates to the cost of the construction (Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 44). As to other persons contributing to the cost of such sewers, see *ibid.*, s. 59. Land abutting on a street includes the soil of private roads (*Pound v. Plumstead Board of Works* (1871), L. R. 7 Q. B. 183), and land at the end of a street (*Sheffield v. Fulham Board* (1876), 1 Ex. D. 395); and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 201.

(*d*) As to apportionment, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 202, 203, and cases cited in the notes thereto. There is no limit of time within which the apportionment must be made (*Bradley v. Greenwich Board of Works* (1878), 3 Q. B. D. 384).

(*e*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 52. As to recovering from future owners, see *Plumstead Board of Works v. Ingoldby* (1872), L. R. 8 Exch. 63; *Wortley v. St. Mary, Islington, Vestry* (1887), 51 J. P. 166.

(*f*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 53. As to the apportionment, see *St. John, Hampstead, Vestry v. Cotton* (1886), 12 App. Cas. 1, approving *St. Giles, Camberwell, Vestry v. Weller* (1869), L. R. 6 Q. B. 168, n., and overruling *Sawyer v. Paddington Vestry* (1870), L. R. 6 Q. B. 164; see also *Sheffield v. Fulham Board* (1876), 1 Ex. D. 395.

(*g*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 54.

(*h*) *Ibid.*, s. 56, as amended by London Government Act, 1899 (62 & 63 Vict. c. 14), Sched. III.

(*i*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 55. The deficiency is recoverable by action or summarily (*ibid.*).

SECT. 5. in the preceding paragraphs (*j*) may appeal to the London County Council (*k*).

Sewering of
Streets not
Repairable
by
Inhabitants
at Large.

Register of
contributions.

1266. In all cases in which time is given by the London County Council, borough council, or other body for the payment of any contribution ordered to be made (*l*) towards the cost of a sewer, the County Council must keep a register of all such orders for contribution (*l*). The register must contain the description of the premises, the amounts payable, the periods for payment, and other necessary particulars (*l*). It must be open to inspection by interested parties during office hours and without charge (*l*). Borough councils and other bodies giving time for payment of any such contribution must forthwith transmit to the County Council a copy of such order or resolution with all necessary particulars (*l*).

SECT. 6.—*Sewage Disposal.*

SUB-SECT. 1.—*In General.*

Discharge of
sewage into
lake, stream,
etc.

1267. A local authority may not make or use any sewer or drain or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal, pond or lake, until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter, such as would affect or deteriorate the purity and quality of the water in such stream or watercourse, or in such canal, pond or lake (*m*). If, however, sewage or filthy water is so far freed from such matter as not to deteriorate the water in the stream or watercourse, canal, pond or lake, the local authority may convey it thereinto (*n*).

Discharge
into sea.

1268. There is no right at common law to discharge sewage into the sea, and if a local authority by so doing causes a nuisance it may be liable to be restrained by injunction and to pay damages for injury caused (*o*).

(*j*) See pp. 738, 739, *ante*.

(*k*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 57.

(*l*) *Ibid.*, s. 60. There is power to order contributions to be made by owners of houses drained into main sewers constructed by bodies other than the public authorities (Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 80), and into all sewers built since the 1st January, 1856, by persons other than the public authorities (Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 59); and to accept payment by instalments (*ibid.*; and see Metropolis Management Act, 1855 (18 & 19 Vict. c. 130), s. 80).

(*m*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 17; and see also titles PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 366; WATERS AND WATERCOURSES.

(*n*) *Durrant v. Branksome Urban Council*, [1897] 2 Ch. 291, C. A. (where the water complained of was surface water containing only silt and sand; but the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 332, does not appear to have been considered); *A.-G. v. Birmingham, Tame and Rea District Drainage Board*, [1910] 1 Ch. 48, C. A.; on appeal, [1912] A. C. 788 (where the sewage effluent was shown to be purer than the water in the stream, although not wholly freed from excrementitious and other foul and noxious matter).

(*o*) *Hobart v. Southend-on-Sea Corporation* (1906), 75 L. J. (K. B.) 305 (settled on appeal, 22 T. L. R. 530, C. A.); *Foster v. Warblington Urban Council*, [1906] 1 K. B. 648, C. A.; see *ibid.*, per VAUGHAN WILLIAMS, L.J.,

1269. Local authorities are not expressly required to provide any works or means for the disposal of sewage, and the Local Government Board cannot require them to do so (*p*); but, as the absence of such works may lead to a nuisance rendering a local authority liable to be restrained at the instance of the Attorney-General or of a private individual whose property has been injured (*q*), and also to the payment of damages (*r*), or to proceedings under the Rivers Pollution Prevention Acts (*s*), the authority may indirectly be forced to provide adequate means for the disposal of the sewage of its district. The Local Government Board may also make the provision of such works a condition of the sanctioning of a loan or the making of an order for other purposes (*t*). A local authority is not, however, liable to be restrained in respect of a nuisance arising from the pollution of a watercourse by sewage escaping from sewers vested in it by statute, if such pollution has not been caused or increased by its own acts, even although it has neglected to provide a proper system of sewage disposal (*a*).

**SECT. 4.
Sewage
Disposal:**

Liability of authority to provide for disposal of sewage.

1270. Any local authority may (*b*), for the purpose of receiving, storing, disinfecting, distributing, or otherwise disposing of sewage, construct any works within, and subject to certain restrictions (*c*) without, its district, and may contract for the use of, purchase, or

Construction of works and acquisition of land.

at pp. 665, 670; and see title NUISANCE, Vol. XXI., p. 522. As to the rights of the Crown, see title CONSTITUTIONAL LAW, Vol. VII., pp. 205, 206.

(*p*) The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 299, relating to complaints as to sewers, does not extend to sewage disposal, and there is no other provision.

(*q*) *A.-G. v. Cockermouth Local Board* (1874), L. R. 18 Eq. 172; *A.-G. v. Dorchester Corporation* (1906), 70 J. P. 281, C. A.; *A.-G. v. Birmingham, Tame and Rea District Drainage Board*, [1912] A. C. 788; see the cases cited in note (*a*), *infra*; and see title WATERS AND WATERCOURSES.

(*r*) *Harrington (Earl) v. Derby Corporation*, [1905] 1 Ch. 205.

(*s*) Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), and Rivers Pollution Prevention Act, 1893 (56 & 57 Vict. c. 31); see the cases cited in note (*q*), *supra*.

(*t*) See *A.-G. v. Dorchester Corporation*, *supra*. The fact that the works have been ordered under a duly confirmed provisional order and sanctioned by the Local Government Board affords no defence to proceedings for an injunction if they are in fact a nuisance; see title NUISANCE, Vol. XXI., p. 522.

(*a*) *Glossop v. Heston and Isleworth Local Board* (1879), 12 Ch. D. 102, C. A.; *A.-G. v. Dorking Union Guardians* (1882), 20 Ch. D. 595, C. A.; *Ogilvie v. Blything Union Rural Sanitary Authority* (1892), 67 L. T. 18, C. A.; *A.-G. v. Olerkenwell Vestry*, [1891] 3 Ch. 527; *Brown v. Dunstable Corporation*, [1899] 2 Ch. 378; *E. v. Staines Local Board* (1888), 60 L. T. 261; *Harrington (Earl) v. Derby Corporation*, *supra*; *Thames Conservators v. Gravesend Corporation*, [1910] 1 K. B. 442; and see *A.-G. v. Acton Local Board* (1882), 22 Ch. D. 221; *Charles v. Finchley Local Board* (1883), 23 Ch. D. 767; *Foster v. Warblington Urban Council*, [1906] 1 K. B. 648, C. A.; *Waltham Holy Cross Urban District Council v. Lea Conservancy Board* (1910), 74 J. P. 253; *Titterton v. Kingsbury Collieries, Ltd.* (1911), 75 J. P. 295; *Dent v. Bournemouth Corporation* (1897), 66 L. J. (Q. B.) 395; *Hawthorn Corporation v. Kannuluik*, [1906] A. C. 105, P. C.; *Jones v. Llanrwst Urban Council*, [1911] 1 Ch. 393; titles NEGLIGENCE, Vol. XXI., pp. 376, 377; NUISANCE, Vol. XXI., pp. 518, 522, 523; WATERS AND WATERCOURSES.

(*b*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 27.

(*c*) *Ibid.*, ss. 32—34; and see pp. 745, 746, *post*.

SECT. 6.
Sewage
Disposal.

take on lease, any land, buildings, engines, materials, or apparatus, either within or without its district (*d*), and may contract (*e*) to supply any person with sewage for any period not exceeding twenty-five years, and as to the execution and cost of works, either within or without its district, for the purposes of such supply, provided no nuisance is created in the exercise of any of these powers (*f*). An authority cannot erect pumps and engines and like works without first acquiring the land or obtaining the consent of the owner (*g*).

Power to
deal with
land.

1271. A local authority may deal with any lands held by it for the purpose of receiving, storing, disinfecting, or distributing sewage in such manner as it deems most profitable, either by leasing them for not exceeding twenty-one years for agricultural purposes, or by contracting with some person to take the whole or a part of the produce of such land, or by farming such land and disposing of the produce thereof (*h*).

In dealing with land for any of the above purposes provision must be made for effectually disposing of all the sewage brought to such land without creating a nuisance (*i*).

Expenses.

1272. Where any local authority agrees with any person as to the supply of sewage and as to works to be made for the purpose of such supply, it may contribute to the expense of carrying into execution by such person all or any of the purposes of such agreement (*j*).

(*d*) As to the purchase of land, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 163. An authority is not bound to sell forthwith land no longer required for sewage purposes; see *A.-G. v. Teddington Urban Council*, [1898] 1 Ch 66; title OPEN SPACES AND RECREATION GROUNDS, Vol. XXI., pp. 588, 589. When land is acquired for purposes of sewage disposal, the depreciation of other land of the same owner adjoining forms a proper subject of compensation (*Cowper Essex v. Acton Local Board* (1889), 14 App. Cas. 163); and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 41. As to the power to borrow on mortgage of property held for the purpose of sewage disposal, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 386.

(*e*) As to contracts, see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174; title LOCAL GOVERNMENT, Vol. XIX., pp. 268 *et seq.* As to the interpretation of such contracts, see *Nuneaton Local Board v. General Sewage Co.* (1875), L. R. 20 Eq. 127; *Witham Local Board v. Oliver* (1884), 1 T. L. R. 60.

(*f*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 27; and see the cases cited in note (*o*), p. 740, notes (*g*), (*a*), p. 741, *ante*.

(*g*) Such works are not sewers, and do not fall within the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 16 (see p. 731, *ante*) (*King's College, Cambridge v. Uxbridge Rural Council*, [1901] 2 Ch. 768; and see *Sutton v. Norwich Corporation* (1858), 27 L. J. (CH.) 739; *A.-G. v. Metropolitan Board of Works* (1863), 1 Hem. & M. 298).

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 29.

(*i*) *Ibid.*

(*j*) *Ibid.*, s. 30. The making of works of distribution and service for the supply of sewage to lands for agricultural purposes is deemed an "improvement of land" authorised by the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), and the provisions of that Act apply accordingly (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 31); see title LAND IMPROVEMENT, Vol. XVIII., p. 280. The Sewage Utilization Acts, 1865 (28 & 29 Vict. c. 75) and 1867 (30 & 31 Vict. c. 113) were repealed by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 343; but

SECT. 6.
Sewage
Disposal.Combination
of authorities.

1273. Local authorities may also combine for the purpose of executing and maintaining works for sewage disposal (*k*). Several districts may be united for the same purpose (*l*). A local authority may dispose of its sewage, by causing its sewers to empty into those of an adjoining authority, if such authority agrees. A local authority of any district may, by agreement with the local authority of any adjoining district other than one in the Metropolis (*m*) and with the sanction of the Local Government Board (*n*), cause its sewers to communicate with the sewers of such neighbouring authority in such manner, and on such terms, and subject to such conditions as may be agreed on between the local authorities or, in case of dispute, as may be settled by the Local Government Board: but, so far as practicable, storm waters must be prevented from flowing from the sewers of the former local authority into the sewers of the latter local authority, and the sewage of other districts or places must not be permitted by the former authority to pass into its sewers so as to be discharged into the sewers of the latter authority without the latter's consent (*o*). In some cases a prescriptive right has been acquired by one authority to discharge sewage into the sewers of another, but the burden of receiving such sewage must not be increased without the consent of the latter authority (*p*).

1274. For the purpose of outfall or distribution of sewage, a local authority may, subject to certain provisos (*q*), exercise outside its district the same powers of carrying sewers through public and private land as it may exercise inside its district (*r*).

Exercise of
powers out-
side district.

as to collegiate sewers, see Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 335. A local authority may also become a shareholder in any company with which any agreement in relation to the matters mentioned in the text has been or may be entered into by such local authority, or to or in which the benefits and obligations of such agreement may have been or may be transferred or vested (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 30).

(*k*) *Ibid.*, s. 285; and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 373.

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 279; and see p. 721, *ante*; title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 373. This also may be done by local Act; as to the interpretation of such an Act where a borough is extended, see *Brighton Intercepting and Outfall Sewers Board v. Hove Corporation* (1904), 68 J. P. 565, H. L.

(*m*) *Islington Vestry v. Hgrynsey Urban Council*, [1900] 1 Ch. 695, C. A.; *London County Council v. Acton Urban District Council* (1902), 18 T. L. R. 689, C. A.

(*n*) A preliminary agreement should be entered into between the authorities before application is made to the Local Government Board. A local inquiry (see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 375, 376) is usually held before the Board grants its sanction.

(*o*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 28. This latter provision may not be applicable if an owner outside the first district has a statutory right to drain into the sewers of that district (*Newington Local Board v. Cottenham Local Board* (1879), 12 Ch. D. 725; compare *New Windsor Corporation v. Stovell* (1884), 27 Ch. D. 665). As to the right of an owner or occupier to connect sewers or drains with the sewers of a neighbouring local authority, see p. 765, *post*.

(*p*) *A.-G. v. Acton Local Board* (1882) 22 Ch. D. 221.

(*q*) See pp. 745, 746, *post*.

(*r*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 16; and, as to these powers, see pp. 731, 732, *ante*.

SECT. 6.

SUB-SECT. 2.—*In the Metropolis.*Sewage
Disposal.Disposal by
London
County
Council.

1275. The London County Council may cause the sewage and refuse from its sewers to be sold or disposed of as it sees fit, but so as not to create a nuisance(s). The existing system of sewers was created in pursuance of a provision requiring the predecessors of the London County Council to construct the necessary sewers for preventing as far as practicable the sewage of the Metropolis from passing into the Thames within the Metropolis (a). To pass the sewage into the Thames outside the Metropolis was not forbidden, provided no nuisance was created (b). The works executed by the County Council must be kept so as not to be a nuisance, and in deodorizing or in disposing of any sewage the County Council must act in such manner as not to create a nuisance (c). If the County Council causes a nuisance, the court will grant an injunction to restrain it, at the instance of an owner whose property is injured (d). Complaint may also be made to a Secretary of State, who may at his discretion cause inquiry to be made into the matter and direct such prosecution or prosecutions, or take such other proceedings, as he may think fit, in order to ensure the prevention or abatement of the nuisance (e).

Disposal
by borough
councils.

1276. Metropolitan borough councils dispose of their sewage either by discharging it directly into the main sewers of the London County Council or indirectly through the sewers of other councils pursuant to orders made by the County Council (f). Whenever the County Council orders the sewers of any borough council for the purpose of outfall or otherwise to be connected with any sewer or sewers vested in the council of another borough, the council for the drainage of whose borough such connexion is required and at whose instance the order is made may execute all

(s) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 135.

(a) Metropolis Management Amendment Act, 1858 (21 & 22 Vict. c. 104), s. 1.

(b) See the judgments in *Price's Patent Candle Co., Ltd. v. London County Council*, [1908] 2 Ch. 526, C. A.; affirmed upon terms (1911), 75 J. P. 329, H. L.; *A.-G. v. Metropolitan Board of Works* (1863), 9 L. T. 139. Under the present system the sewage is carried a long distance down the Thames beyond the limits of the Metropolis. The outfalls of the Council are protected from interference under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 336, the Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 18, and the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), by *ibid.*, s. 224 (3), now applicable to the Port of London Authority (Port of London Act, 1908 (8 Edw. 7, c. 68), s. 7); see also Thames Navigation Act, 1870 (33 & 34 Vict. c. cxlix.); and see title WATERS AND WATERCOURSES.

(c) Metropolis Management Amendment Act, 1858 (21 & 22 Vict. c. 104), s. 24; and see *ibid.*, s. 23. In that Act the expression "deodorize" includes any process whereby the solid suspended matters in sewage may be precipitated or separated from the liquid before the discharge thereof, or whereby the noxious or offensive properties of sewage may be neutralized, and the expression "sewage" means and includes the contents of the sewers before the employment of such process (*ibid.*, s. 32).

(d) See the cases cited in note (b), *supra*.

(e) Metropolis Management Amendment Act, 1858 (21 & 22 Vict. c. 104), s. 31.

(f) See pp. 735, 736, *ante*.

necessary works as well within its own borough as within any other borough specified in the order (g). Every communication to be made by any borough council with any sewer outside its own borough must be made subject to the supervision and to the satisfaction of the council having control over such last-mentioned part; and where it appears to the County Council to be equitable and just, under the circumstances of the case, that any borough council so connecting its sewers with the sewers vested in another council should pay such council any compensation or remuneration, either in one sum or by yearly or other payments, for the use of the latter's sewer, the County Council may order such payment accordingly, and the council to which any such payment is directed to be made may recover the same from the council directed to make it, either by action or before a court of summary jurisdiction (g).

A borough council, even with the consent of the County Council, cannot enter into a binding agreement to receive sewage from a district outside the Metropolis (h).

SECT. 7.—*Sewage Works Outside District.*

SUB-SECT. 1.—*In General.*

1277. For certain purposes of sewage disposal a local authority has power to do works outside its district (i). It can only do so subject to the following conditions:—

Necessary
conditions.

(1) Three months at least before commencing the construction or extension of any sewer or other work for sewage purposes (k) without its district it must give notice by advertisement in one or more of the local newspapers circulated within the district where the work is to be done (l), whether the work is to be done with the consent of the local authority (m) or of the owner or not (n).

(2) A copy of such notice must also be served at the like interval

(g) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 32.

(h) *Islington Vestry v. Hornsey Urban Council*, [1900] 1 Ch. 635, C. A. An appeal to the House of Lords in this case was adjourned; the final arrangement between the parties was confirmed by the London County Council (General Powers) Act, 1906 (6 Edw. 7, c. cl.); see also *London County Council v. Acton Urban District Council* (1902), 18 T. L. R. 689, C. A.

(i) See pp. 741, 743, *ante*; Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 16, 27.

(k) Concreting the bottom of a pool into which a sewage effluent has been discharged for some years is such a work (*Wimbledon Local Board v. Croydon Rural Sanitary Authority* (1886), 32 Ch. D. 421, C. A.).

(l) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 32. The notice must describe the nature of the intended work, and state the intended termini thereof, and the names of the parishes and the streets and other lands, if any, through, across, under, or on which the work is to be made, and must also name a place where a plan of the intended work is open for inspection at all reasonable hours (*ibid.*).

(m) *Jones v. Conway and Colwyn Bay Joint Water Supply Board*, [1893], 2 Ch. 693, C. A.

(n) *Wimbledon Local Board v. Croydon Rural Sanitary Authority*, *supra*.

**SECT. 7.
Sewage
Works
Outside
District.**

of time (o) on the owners or reputed owners, lessees or reputed lessees, and occupiers of the lands (p) affected, and on the overseers of the parishes affected (q), and on the borough or district councils as surveyors of highways, or other persons having the care of such roads and streets (q).

(8) If any such person or council, or any other owner, lessee, or occupier who would be affected by the intended work, objects to such work and serves on the local authority notice in writing of such objection at any time within the said three months, such work must not be commenced without the sanction of the Local Government Board, unless the objection is withdrawn (r).

Inquiry.

1278. The Local Government Board may, on the application of the local authority, appoint an inspector to make inquiry on the spot into the propriety of the intended work and into the objections thereto and to report to the Board thereon, and on receiving such report the Board may make an order disallowing the intended work or allowing it with any necessary modifications (s).

SUB-SECT. 2.—In the Metropolis.

**Power of
metropolitan
authorities
to do works
outside
Metropolis.**

1279. Whenever it is found necessary for any metropolitan borough council, for the purpose of making, altering, maintaining, or discontinuing any of its sewers (a), to carry any sewer or works beyond the limits of the Metropolis, the council may execute works beyond such limits, and cleanse, repair, and maintain such works as it may from time to time deem necessary, but no work may be performed or commenced by any council beyond these limits except for the purpose of continuing or forming part of a work commenced or executed within its borough, nor without the previous consent of the London County Council and of the borough council or authority of the parish or place through which the work may pass (b). If any such borough council or authority refuses such consent, a Secretary of State may decide whether such consent ought to be withheld, and he may make such order as he thinks just (b).

**Powers of
London
County
Council
as to new
sewers.**

1280. No sewer, either within or beyond the limits of the Metropolis, may be made by any borough council or body having

(o) The time of serving the copy of the notice is not specifically mentioned, but is implied from the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 33.

(p) The expression "lands" includes easements, such as the flow of water in a goit, and the owner thereof should be served with notice (*Cleckheaton Urban District Council v. Firth* (1898), 62 J. P. 536). As to the lands affected, see note (l), p. 746, *ante*.

(q) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 32, as amended by the Statute Law Revision Act, 1898 (61 & 62 Vict. c. 22). As to the parishes affected, see note (l), p. 746, *ante*.

(r) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 33, as amended by the Statute Law Revision Act, 1898 (61 & 62 Vict. c. 22).

(s) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 34. As to local inquiries, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 375.

(a) See pp. 733, 734, *ante*.

(b) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 58.

control over sewers within the Metropolis without the previous approval of the London County Council (c).

The power of the London County Council to lay sewers is not limited to the Metropolis (d).

SECT. 7.
Sewage
Works
Outside
District.

SECT. 8.—*Expenses of Sewers and Sewage Works.*

SUB-SECT. 1.—*In General.*

1281. Expenses incurred by urban authorities in connexion with sewers and sewage are payable as part of the general expenses, but if on the 11th August, 1875, they were payable out of the borough fund or rate they continue so payable (e). Urban authorities.

1282. In rural districts the expenses of the construction, maintenance, and cleansing of sewers in any contributory place within a district are payable as special expenses (f). Where the district council makes any sewers for the common benefit of two or more contributory places within its district, it may apportion the expense of constructing and maintaining the work, in such proportions as it thinks just, between such contributory places; and such expenses are deemed to be special expenses incurred in respect of such contributory places (g). Rural districts.

SUB-SECT. 2.—*In the Metropolis.*

1283. The expenses of the London County Council in connexion with the main drainage are payable out of the county rate and county fund (h). The cost of the construction of the main drains has been met by loans raised under local Acts (i). Expenses of London County Council.

1284. The expenses of metropolitan borough councils are payable out of the general rate (j). The amount levied in respect of sewers may be levied upon the part or parts of a borough in proportion to the benefit received by such part (k). Expenses of borough councils.

(c) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 58. "Body" presumably includes the Common Council of the City.

(d) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 135.

(e) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 207; and see titles LOCAL GOVERNMENT, Vol. XIX., p. 280, note (e); PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 380 *et seq.*

(f) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 381, 382. As to "contributory places," see *ibid.*, p. 381; and see title LOCAL GOVERNMENT, Vol. XIX., p. 335.

(g) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 229; and, as to expenses, see, generally, titles LOCAL GOVERNMENT, Vol. XIX., pp. 335 *et seq.*; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 380 *et seq.* As to the creation of special drainage districts, see title LOCAL GOVERNMENT, Vol. XIX., p. 334.

(h) Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102); Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 3 (1), 40 (9), 68; and see title METROPOLIS, Vol. XX., p. 438; RATES AND RATING, Vol. XXIV., pp. 126 *et seq.*

(i) See, for example, the Acts mentioned in the First Schedule to the Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102).

(j) London Government Act, 1899 (62 & 63 Vict. c. 14), ss. 10, 11; and see also title RATES AND RATING, Vol. XXIV., p. 131. As to the costs of sewers in new streets, see pp. 738, 739, *ante*.

(k) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 159;

SECT. 9.

Support of
Works of
Sewerage
and
Drainage.Right of
authorities
to subjacent
and adjacent
support.

SECT. 9.—Support of Works of Sewerage and Drainage.

1285. The power given to local authorities (*l*) to lay sewers impliedly gives them a right of subjacent support for such sewers, and probably also a right of adjacent support (*m*). Where sanitary authorities purchase the land for the purpose of constructing sewage works, they would, apart from statutory provisions (*n*), acquire from the owner the right of subjacent support for such works as are reasonably within the contemplation of the parties, and also of adjacent support so far as the lands of such owner are concerned (*o*). They can also acquire a right of support, both subjacent and adjacent, by prescription (*p*). If a statute giving power to construct sewers gives no right of compensation to owners of land adjoining the land in which a sewer is laid, it is presumed that the burden of supporting such sewer is not imposed on such owners (*q*).

Support
from mines.

1286. In order to provide for the support from mines to sewage works and certain other undertakings of a local authority and to provide for the payment of compensation, certain statutory provisions relating to the support of waterworks by mines (*r*) have, with certain modifications (*s*), been extended to sanitary works (*t*) outside the Metropolis (*t*). These provisions are substituted for any

Applied
provisions.

see *R. v. Fitch* (1860), 24 J. P. 163; *R. v. London and Brighton Rail. Co.* (1879), 5 Q. B. D. 89, C. A.; *Howell v. London Dock Co.* (1858), 8 E. & B. 212; *West Middlesex Water Co. v. Wandsworth District Board* (1858), 22 J. P. 336.

(*l*) *I.e.*, by the Public Health Act, 1875 (38 & 39 Vict. c. 55).

(*m*) *Re Dudley Corporation* (1881), 8 Q. B. D. 86, C. A. This is implied because the owner is entitled to compensation for the burden put upon him; see Public Health Act, 1875 (38 & 39 Vict. c. 55) s. 308; see also *Normanton Gas Co. v. Pope and Pearson, Ltd.* (1883), 49 L. T. 798, C. A. As to the nature of these rights, see, generally, titles EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 319, 321; MINES, MINERALS, AND QUARRIES, Vol. XX., pp. 570 *et seq.*

(*n*) As to these provisions, see the text, *infra*.

(*o*) *Jary v. Barnsley Corporation*, [1907] 2 Ch. 600.

(*p*) *Ibid.*; and see, generally, title EASEMENTS AND PROFITS À PRENDRE, Vol. XI., pp. 322, 323.

(*q*) *Metropolitan Board of Works v. Metropolitan Rail. Co.* (1869), L. R. 4 C. P. 192, Ex. Ch.; and see *London and North Western Rail. Co. v. Evans*, [1893] 1 Ch. 16, C. A.

(*r*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 18—27; and see titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 50; MINES, MINERALS AND QUARRIES, Vol. XX., p. 577; WATER SUPPLY.

(*s*) See p. 749, *post*.

(*t*) Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (46 & 47 Vict. c. 37), construed (*ibid.*, s. 1) as one with the Public Health Act, 1875 (38 & 39 Vict. c. 55). "Sanitary work" is any building or work existing on the 25th August, 1883, or erected or constructed after that date, constructed by or vested in or under the control of a local authority under the powers or for the purposes of so much of the Public Health Act, 1875 (38 & 39 Vict. c. 55), or of any general or local Act or provisional order (referred to as the "Sanitary Act" (Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (46 & 47 Vict. c. 37), s. 2)), as relates to the construction or maintenance of any works of sewerage, drainage, sewage disposal, lighting, or water supply, and includes any fixtures, pipes, fittings, or apparatus connected with any such work and belonging to or used by the local authority (*ibid.*). "Support" includes vertical and lateral support (*ibid.*).

powers and liabilities existing only by reason of anything in the "Sanitary Act" (u).

These provisions apply to every sanitary work (v), whether the land on, in, over or under which such work is situate is or is not vested in or occupied by the local authority, and is or is not partially dedicated (w) to the public as a street, highway, or public place (a). They do not apply to or affect any right of support acquired previously to the 25th August, 1883, by a local authority in respect of any sanitary work; and no compensation is recoverable in respect of such right, and the provisions do not operate to deprive the local authority of such right or entitle any person to compensation in respect thereof (b).

The modifications of the applied provisions (c) may be summarised as follows:—The expression "undertakers" means (a) the local authority, and the "special Act" means (a) the "Sanitary Act" (d), and the Act extending these provisions to sanitary works (e). The local authority may, by or with any notice of willingness to treat or of intention to prevent or interfere with the working of any mines, specify the nature and extent of support which it requires to be left, and such notice may extend to minerals beyond the distance of forty yards (f). The map of the affected district must, as regards works existing on the 25th August, 1883, have been made within twelve months thereof (g). The compensation and the costs of and incident to settling the same must be paid and charged (h) as the expenses of the construction and maintenance of the work as provided in the "Sanitary Act" (d). A local authority may make agreements compromising claims in respect of things done or omitted before the 25th August, 1883, or otherwise for carrying into effect these provisions in relation to the past and future working of mines (i).

SECT. 9.
Support of
Works of
Sewerage
and
Drainage.

Application
of applied
provisions.

Modifications
of applied
provisions.

(u) Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (46 & 47 Vict. c. 37), s. 4. As to the meaning of "Sanitary Act," see note (t), p. 748, *ante*. Express enactments with respect to rights of support and agreements, actions, arbitrations, or other legal proceedings pending or concluded on the 25th August, 1883, were protected (Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (46 & 47 Vict. c. 37), s. 5).

(v) As to the meaning of "sanitary work," see note (t), p. 748, *ante*.

(w) As to dedication to the public, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 33 *et seq*.

(a) Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (46 & 47 Vict. c. 37), s. 3.

(b) *Ibid.*, s. 5. As to how rights may have been previously acquired, see p. 748, *ante*; *Jary v. Barnsley Corporation*, [1907] 2 Ch. 600.

(c) See p. 748, *ante*.

(d) As to the meaning of "Sanitary Act," see note (t), p. 748, *ante*.

(e) As to the terms "undertakers" and "special Act," see titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 49 *et seq*.; WATER SUPPLY.

(f) Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (46 & 47 Vict. c. 37), s. 3 (2); see Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 22.

(g) Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (46 & 47 Vict. c. 37), s. 3 (3); see Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 19.

(h) Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883 (46 & 47 Vict. c. 37), s. 3 (4).

(i) *Ibid.*, s. 3 (5).

SECT. 10.

The
Provision
of Drains.Duty to see
to provision
of drains.Notice to
drain.SECT. 10.—*The Provision of Drains.*SUB-SECT. 1.—*In General.*

1287. It is the duty of a local authority to see that the houses (*j*) in its district are provided with proper drains (*k*) and that all drains within its district are constructed and kept so as not to be a nuisance or injurious to health (*l*).

Where any house (*j*) within the district of a local authority is without a drain sufficient for effectual drainage (*m*), the local authority must (*n*) by written notice require the owner (*o*) or occupier of such house within a reasonable time therein specified, to make a covered drain or drains emptying into any sewer which the authority is entitled to use, and which is not more than 100 feet

(*j*) The term "house" includes schools, factories, and other buildings in which persons are employed; see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 401, note (*g*).

(*k*) See Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 23—25. For definition of "drain," see *ibid.*, s. 4; p. 722, *ante*. As to the duties of local authorities in respect of drainage in factories, and in respect of sanitary accommodation, see titles FACTORIES AND SHOPS, Vol. XIV., pp. 452 *et seq.*; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 408, 596 *et seq.* Additional power to require the provision of sinks and drains to any building irrespective of when it was built may be conferred on a local authority by order of the Local Government Board (Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 49). As to the powers of local authorities to regulate drainage matters by bye-laws, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 416 *et seq.* These bye-laws do not extend to certain houses erected before certain dates, but, if the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), Part III., is adopted, then by *ibid.*, s. 23, the bye-laws relating to the matters mentioned in the text may be made so as to affect buildings erected before such dates. The bye-laws generally require the deposit of plans showing the drains. Certain school buildings are exempted from these bye-laws by the Education (Administrative Provisions) Act, 1911 (1 & 2 Geo. 5, c. 32), s. 3.

(*l*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 40; and see also Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), s. 7. As to complaint to the Local Government Board on default of a local authority to enforce provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), see *ibid.*, s. 299; title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 377, 378; and see *ibid.*, p. 508.

(*m*) This evidently means the effectual drainage of the house, and, if the system is sufficient for the house, the fact that it does not suit the sewer system of the district, or that a nuisance is caused outside the drain is immaterial, and the provision set out in the text appears not to be applicable; see *Molloy v. Gray* (1889), 24 L. R. Ir. 258; and the cases cited at pp. 752, 754, *post*.

(*n*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 23.

(*o*) For definition of "owner," see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 427, note (*o*). Where an owner is prevented by an occupier from obeying or carrying out any provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), he may apply to a justice, who, in a proper case, must in writing order the occupier to permit the execution of the work; non-compliance for twenty-four hours is punishable with a daily penalty not exceeding £5 (*ibid.*, s. 306). Refusal or wilful misstatement by an occupier of the name of the owner of premises is punishable, unless reasonable, with a penalty not exceeding £5 (*ibid.*).

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from the site of such house (*p*), or if no such means of drainage are within that distance, then emptying into such covered cesspool or other place not being under any house as the local authority directs. The local authority may require any such drain or drains to be of such materials and size (*q*), and to be laid at such level, and with such fall as on the report of its surveyor appears to it to be necessary (*r*).

If such notice is not complied with within the specified time, the local authority may do the work by agreement with the owner (*s*), or may do the work required, and recover the expenses incurred by it in so doing from the owner summarily (*t*), or may by order declare them to be private improvement expenses (*u*).

Power to
act on default
of owner.

1288. If in the opinion of the local authority greater expense would be incurred in causing the drains of two or more houses to empty into an existing sewer than in constructing a new sewer and causing such drains to empty therein, the local authority may construct such new sewer and require the owners or occupiers of such houses to cause their drains to empty therein, and may apportion as it deems just the expenses of the construction of such sewer among the owners of the several houses, and may recover the sums apportioned from such owners in a summary manner (*t*), or may declare them to be private improvement expenses (*u*).

Provision of
new sewer.

(*p*) The "site" of a house includes the ground on which the house and outhouses occupied in connection therewith actually stands, and may include outbuildings requiring to be drained (*Meyrick v. Pembroke Corporation* (1912), 76 J. P. 365; *Wright v. Wallasey Local Board* (1887), 18 Q. B. D. 783). An owner cannot usually be required to carry his drain through the land of another person, even although the sewer is within 100 feet; compare *Wood v. Ealing Tenants, Ltd.*, [1907] 2 K. B. 390; *Scarborough Corporation v. Scarborough Rural Sanitary Authority* (1876), 1 Ex. D. 344. Where he is the freeholder of the adjoining land which is in the occupation of another person, the burden of proof lies on him to show that he cannot connect with the sewer in that land (*Meyrick v. Pembroke Corporation, supra*). If the owner does not raise the objection and allows the authority to do the work, he may be ordered to pay the expenses (*ibid.*). For form of notice requiring construction of drain, see *Encyclopædia of Forms and Precedents*, Vol. X., p. 530.

(*q*) See *Woodward v. Cotton* (1834), 1 Cr. M. & R. 44; and see p. 753, *post*.

(*r*) If the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 37, has been put in force in any district by order of the Local Government Board, no water pipe, stack pipe or down-spout, in existence at the date this provision is put in force (*ibid.*, s. 13), used for conveying surface water from any premises, may be used or be permitted to serve or to act as a ventilating shaft to any drain. The penalty is a sum not exceeding 40s., and there is a daily penalty of 20s., but the person offending is not liable until after fourteen days from the service upon him of notice of such offence.

(*s*) See *Hall v. Bailey Corporation* (1877), 47 L. J. (q. b.) 148. Where the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), Part III. (see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 363), has been adopted, the local authority may agree with the owner of any premises that any sewer or drain which such owner is required or desires to make, alter or enlarge, or any part of such sewer or drain, shall be made, altered or enlarged by the local authority (Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 18).

(*t*) See title MAGISTRATES, Vol. XIX., pp. 609, 610.

(*u*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 23. As to

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of Drains.Alteration or
adaptation
of drains.

1289. Local authorities have also the power of adapting existing drains to alterations made by them to the sewers. Where any house within the district of a local authority has a drain communicating with any sewer, which drain, though sufficient for the effectual drainage of the house, is not adapted to the general sewerage system of the district, or is in the opinion of the local authority otherwise objectionable, the local authority may, on condition of providing a drain or drains as effectual for the drainage of the house and communicating with such other sewer as it thinks fit, close such first-mentioned drain and do any works necessary for that purpose. The expenses of those works and of the construction of any drain or drains so provided by the authority are payable by it, and are deemed to be expenses properly incurred in the execution of the Act (*a*).

New or
newly-built
houses.

1290. It is unlawful (*b*) in an urban district newly to erect any house (*c*), or to rebuild any house which has been pulled down to or below the ground floor, or to occupy any such house, unless and until a covered drain or drains is constructed, of such size and materials and at such level and with such fall as on the report of the council's surveyor (*d*) may appear to be necessary for the effectual drainage of such house (*e*). The drains so to be constructed must empty into any sewer which the urban authority is entitled to use within 100 feet of the site of the house to be built or rebuilt (*f*). If no such means of drainage are within that distance the drains must empty into such covered cesspool or other place, not being under any house, as the authority directs.

In the absence of other provision, the local authority cannot

private improvement expenses, see titles LOCAL GOVERNMENT, Vol. XIX., p. 281; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 381. As to drains used in common by adjoining owners, see *Finlinson v. Porter* (1875), L. R. 10 Q. B. 188; *Watson v. Troughton* (1882), 47 J. P. 518.

(*a*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 24; and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 380 *et seq.* A local authority cannot rid itself of this liability by requiring the owner to do the work under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 23; compare *St. Martin-in-the-Fields Vestry v. Ward*, [1897] 1 Q. B. 40, C. A.; and see pp. 758 *et seq.*, *post.* For form of notice by local authority of intention to alter drainage, see *Encyclopædia of Forms and Precedents*, Vol. X., p. 514.

(*b*) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 25. The penalty is a sum not exceeding £50 (*ibid.*). The bye-laws may provide for the removal or alteration of work done in contravention of the statute (*ibid.*, s. 157).

(*c*) For the definition of "house," see note (*j*), p. 750, *ante*.

(*d*) As to the surveyor being the council's surveyor, see *Lewis v. Weston-super-Mare Local Board* (1888), 40 Ch. D. 55; compare *Kendal v. Lewisham Borough Council* (1903), 67 J. P. 236.

(*e*) As to the power of the council to require separate drains for connected houses, see *Woodford Urban District Council v. Stark* (1902), 18 T. L. R. 439. A bye-law prohibiting the occupation of a house until the drainage has been certified as complete and the house fit for habitation is valid (*Horsell v. Swindon Local Board* (1888), 52 J. P. 597; and see *Goven v. Sedgwick* (1904), 68 J. P. 484).

(*f*) As to the right to connect with sewers, see p. 762, *post.* As to the authority agreeing with the owner to construct the drains, see note (*a*), p. 751, *ante*.

require the house to be provided with separate drains for sewage and for surface water connected with separate sewers (g).

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SUB-SECT. 2.—*In the Metropolis.*

1291. The provisions in the Metropolis as to draining houses into sewers are of a similar nature to but different in form from those in the rest of the country (h).

Drainage
in the
metropolis.

Powers of
metropolitan
borough
councils.

If any house or building situate within the area of a borough council is found not to be drained by a sufficient drain communicating and emptying into some sewer, to the satisfaction of the borough council, and if a sewer of sufficient size be within 100 feet of any part of such house or building and on a lower level, the council may, at its discretion by notice in writing (i), require the owner of such house or building, forthwith or within such reasonable time as may be appointed by the council, to construct and make from such house or building into any such sewer a covered drain, and such branches thereto, of such materials and size, at such level and with such fall as shall be adequate for the drainage of such house or building and the various parts thereof (k). Provision must be made for carrying surface water to the drains, and for a water supply for scouring the inlets and outlets to the drains, and all other such fit and proper works and arrangements as may appear to the council or to its officers requisite to secure the safe and proper working of each drain, for inspection and alteration of the works required while in progress (k), and also for enabling the council to do the work in default of the owner and recovering the expenses from him (l).

(g) *Matthews v. Strachan*, [1901] 2 K. B. 540. As to whether bye-laws could require this, see *ibid.*, per RIDLEY, J., at p. 548. The Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 36, contains an additional provision which may be made operative in any district by order of the Local Government Board. It provides that no pipe used for the carrying off of rainwater from any roof may be used for the purpose of carrying off the soil or drainage from any privy or water-closet. The penalty for so doing is a sum not exceeding £5, and there is a daily penalty of not exceeding 40s.

(h) These provisions are contained in the Metropolis Management Acts and in the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76). As to the provisions outside the Metropolis, see pp. 750 *et seq.*, *ante*.

(i) A notice delivered by an officer without the council's authority is invalid (*St. Leonard, Shoreditch, Vestry v. Holmes* (1885), 50 J. P. 132).

(k) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 73. The council may require the owner to provide fit and proper paved or impermeable sloped surfaces for conveying surface water thereto, and fit and proper sinks, and fit and proper syphoned or otherwise trapped inlets and outlets for hindering stench therefrom, and fit and proper water-supply and water-supplying pipes, cisterns and apparatus for scouring the same (*ibid.*). The council may prescribe the make of pipe to be used (*Austin v. St. Mary, Lambeth (Parish)* (1858), 4 Jur. (N. S.) 1032), and require the insertion of a ventilating pipe (*Lorden v. Westminster Corporation* (1909), 73 J. P. 126). As to bye-laws regulating these matters, see p. 756, *post*. Owners of courts and passages which are not public thoroughfares may be required by the council to drain them (Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 100; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 81).

(l) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 73. The council can do the work if the owner neglects or refuses for twenty-eight days after service of the notice to commence the works and to carry on and complete them with all reasonable dispatch (*ibid.*). The owner is

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Provision
of Drains.

Combined
operation
by order of
metropolitan
borough
council.

Drainage
into cesspools.

New or
newly-built
houses.

The council cannot, however, even when the drain is defective, recover its expenses, if it decides to construct a new sewer into which new drains must be taken (*m*).

1292. If it appears to a borough council that a group or block of contiguous houses, or of adjacent detached or semi-detached houses, may be drained and improved more economically or advantageously in combination than separately, and a sewer of sufficient size already exists or is about to be constructed within 100 feet of any such group or block of houses, whether contiguous, detached or semi-detached, the council may order such group or block to be drained and improved by a combined operation (*n*).

1293. A borough council may also require any house or building to drain into a cesspool where such house or building is without sufficient drainage and there is no proper sewer within 200 feet of any part of such house or building. The council has the like powers of enforcing this provision as in the case of drains leading into a sewer (*a*).

1294. It is unlawful to erect any house or building in any metropolitan borough, or to rebuild any house or building therein which has been pulled down to or below the floor commonly called the ground floor, or to occupy any house or building so newly built or rebuilt, unless a drain and such branches thereto and other necessary connected works and apparatus and water-supply are constructed and provided to the satisfaction of the borough council's surveyor, of such materials and of such size and at such level and with such fall as the council directs, so that the same may be available for the drainage of the whole house or building and offices, if any (*b*). The drain must lead from such house or building or the intended site thereof to such sewer, already made or intended to be constructed near thereto, as the council directs, or if there is no such sewer existing or intended to be constructed within 100 feet of any part of the intended site, then to such covered cesspool or other place, not being under any dwelling-house, as the council directs (*b*).

also liable to a penalty for such neglect and default (Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 64).

(*m*) Such construction being covered by the provisions of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 69 (*St. Martin-in-the-Fields Vestry v. Ward*, [1897] 1 Q. B. 40, C. A.; *Marylebone Vestry v. Viret* (1865), 19 C. B. (N. S.) 424); and see p. 735, *ante*.

(*n*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 74. Questions frequently arise as to whether or not a pipe conveying sewage is a combined drain or a sewer, and the answer depends upon whether or not the council or its predecessors have ordered drainage by a combined operation; see p. 726, *ante*. The Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 73, 74, relate to houses in existence; *ibid.*, ss. 75, 76, to houses about to be built or rebuilt; see *Bateman v. Poplar District Board of Works* (1886), 33 Ch. D. 360, C. A.

(*a*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 66.

(*b*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 75; and see note (*n*), *supra*. When a house or building is rebuilt, the level of the lowest floor must be raised sufficiently to allow of the construction of such a drain, works and apparatus, and for that purpose the levels must

SECT. 10.
The
Provision
of Drains.

Requirements
as to founda-
tions and
rebuilding.

1295. Before beginning to lay or dig out the foundation of any new house or building (c) within any metropolitan borough, or to rebuild any house or building therein, and also before making any drain for the purpose of draining directly or indirectly into any sewer under the jurisdiction of the council of such borough, seven days' notice in writing must be given to the borough council by the person intending to build or rebuild such house or building, or to make such drain. Every such foundation must be laid at such level as will permit the drainage of such house or building in accordance with the statutory requirements and as the council orders, and every such drain must be made in such direction, manner, and form, and of such materials and workmanship (d), and with such branches thereto and other connected works, apparatus, and water supply, as before mentioned (e), and as the council orders (f), which order the council must make. Such order may require drainage by a combined operation (g), but not the construction of a sewer (h). The order may be wholly or in part in the form of general regulations provided the council exercises its discretion in the particular case (i). The making of every such drain must be under the survey and control of the council, which must cause the order to be notified to the person from whom the notice was received (j). When the notice is received the surveyor of the council may, if he deems it necessary and proper to do so, within three days after the receipt of the notice by the council, by writing under his hand, directed to and served upon the person giving the notice, require that the buildings or works referred to therein shall not be proceeded with until after the then next meeting of the council or until the directions in reference thereto shall be notified to such person, but the order of the council must be made and notified to such person within fifteen days after the receipt of such notice by the council. If any person begins to lay any such foundation or to make any such drain without giving such notice, or proceeds with any building or works contrary to this provision, he is liable to a penalty not exceeding £5, and a further daily penalty of 40s. (k). If the

Control of
metropolitan
borough
council over
work.

be taken and determined under the direction of the council (Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 75). A building to be used for volunteer purposes was not exempt from this provision (*Westminster Vestry v. Hoskins*, [1899] 2 Q. B. 474). As to the construction of sewers in new streets, see p. 738, *ante*.

(c) This would include a house without a dug-out foundation (*Poplar District Board of Works v. Knight* (1858), E. B. & E. 408).

(d) Thus, the description of pipe to be used may be ordered (*Austin v. St. Mary, Lambeth, Vestry* (1858), 4 Jur. (N. S.) 1032; *Marylebone Borough Council v. White* (1912), 76 J. P. 382; compare *Woodward v. Cotton* (1834), 1 Cr. M. & R. 44).

(e) *I.e.*, in the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 73, 74; see pp. 753, note (n), 754, *ante*.

(f) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 76.

(g) *Bateman v. Poplar District Board of Works* (1886), 33 Ch. D. 360, C. A.; and see *Lorden v. Westminster Corporation* (1909), 73 J. P. 126.

(h) *Clarke v. Paddington Vestry* (1859), 5 Jur. (N. S.) 138.

(i) *Frost v. Fulham Vestry* (1900), 64 J. P. 629; *London School Board v. Fulham Borough Council* (1903), 68 J. P. 117.

(j) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 76.

(k) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), ss. 63, 88. The penalty under *ibid.*, s. 63, may be recovered by action or

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house, building, or drain or branches thereto or other connected works or apparatus are begun, erected, made or provided in any respect contrary to any order of the council made and notified as aforesaid, or to the other provisions before mentioned, the council may, after giving the owner an opportunity of being heard (*l*), cause such house or building to be demolished or altered, and cause such drain and other works to be relaid, amended, or re-made, or, in the event of omission, added, as the case may require, and may recover the expenses from the owner thereof (*m*). The penalty for default or non-compliance with the order of the council is a fine not exceeding £5, and a further daily penalty during default not exceeding 40s., recoverable by action or summarily at the option of the council (*n*). The council may instead of proceeding for the recovery of the penalty, at its discretion, do the works and recover the costs and expenses thereof from the owner by action or summarily; but no person is liable for both the penalty and the costs and expenses of the works (*n*).

London
County
Council
bye-laws.

1296. The London County Council may also from time to time make, alter, and repeal bye-laws for regulating the dimensions, form and mode of construction, and the keeping, cleansing, and repairing of the pipes, drains, and other means of communication with sewers, and the traps and apparatus connected therewith (*o*), and also for requiring the deposit with the sanitary authority of the district of plans, sections and particulars of any proposed construction, reconstruction, and alteration (*p*).

summarily at the option of the council (Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 63). An order may be made by the subsequent confirmation of a direction given by the surveyor; but this confirmation should be communicated to the person laying the drain (*Stokes v. Haydon* (1901), 85 J. P. 756).

(*l*) *Cooper v. Wandsworth District Board of Works* (1863), 14 C. B. (N. S.) 180.

(*m*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 76.

(*n*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), ss. 64, 88, relating to offences under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 73, 74, 76, 85. The penalties in the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), are extended to persons causing the commission of the offences or by whose order or direction any such offence has been committed (Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 65).

(*o*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 202; see, generally, title METROPOLIS, ol. XX., pp. 460 *et seq.* As to such bye-laws, see *Kingsland v. Haben* (1904), 68 J. P. 159; *Agar v. Nokes* (1905), 69 J. P. 374; *Kershaw v. Brooks*, [1909] 2 K. B. 265; since this decision the bye-law has been amended; see *Marylebone Borough Council v. White* (1912), 76 J. P. 382. A borough council can require works in addition to those in the bye-laws and relating to like matters (*Lorden v. Westminster Corporation* (1909), 73 J. P. 126). In regard to the non-application of bye-laws to certain schools, see Education (Administrative Provisions) Act, 1911 (1 & 2 Geo. 5, c. 32), s. 3).

(*p*) Metropolis Management Acts Amendment (Bye-laws) Act, 1899 (62 & 63 Vict. c. 15), s. 2. The bye-laws cannot require the deposit of any plan or section in the case of any repair which does not involve the alteration or the entire reconstruction of any such pipe, drain, or other means of communication with sewers, or the traps and apparatus connected therewith (*ibid.*). As to the distinction between a repair and a reconstruction, see *Agar v. Nokes*, *supra*. As to metropolitan bye-laws, see title METROPOLIS, Vol. XX., pp. 460 *et seq.* As to the regulation by

1297. Underground rooms may not be let or occupied as dwellings unless certain conditions are complied with, one of which is the effectual drainage of the soil immediately below the room, and of the area in front thereof (*q*). Any drain passing under such room must be properly constructed of a gas-tight pipe (*r*).

SECT. 10.
The
Provision
of Drains.

Underground
rooms.

SECT. 11.—Supervision of Drains.

SUB-SECT. 1.—In General.

1298. Every local authority must cause its district to be inspected with a view to ascertain what nuisances exist calling for abatement (*s*), and also whether any dwelling-house is in a state so dangerous or injurious to health as to be unfit for human habitation (*t*). The officer making such inspection of a dwelling-house must examine into the drainage of the house and of any yard or outhouse belonging thereto (*a*).

Inspection
by inspectors
of nuisances.

Where a drain is so kept as to be a nuisance or injurious to health, summary proceedings may be taken against the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, against the owner or occupier of the premises on which the nuisance arises, the owner being the proper person to proceed against where the nuisance arises from the want or defective construction of any structural convenience or where there is no occupier (*b*).

Proceedings.

It is generally an answer to such proceedings to show that the pipe in question is a sewer and not a drain (*c*); unless the nuisance has arisen by reason of a wrongful act of the defendant (*d*). If a drain has been illegally and surreptitiously converted into a sewer, the wrongdoer and those claiming under him, other than purchasers

Defence.

the London County Council of building on low-lying land, see *London Building Act, 1894* (57 & 58 Vict. c. cexiii.), s. 122; title *METROPOLIS*, Vol. XX., p. 493.

(*q*) *Public Health (London) Act, 1891* (54 & 55 Vict. c. 76), s. 96; and see *Housing, Town Planning, etc. Act, 1909* (9 Edw. 7, c. 44), s. 17 (*7*); title *PUBLIC HEALTH AND LOCAL ADMINISTRATION*, Vol. XXIII., p. 506.

(*r*) *Public Health (London) Act, 1891* (54 & 55 Vict. c. 76), s. 96 (*1*) (*f*).

(*s*) *Public Health Act, 1875* (38 & 39 Vict. c. 55), s. 92; *Housing of the Working Classes Act, 1885* (48 & 49 Vict. c. 72), s. 7; *Public Health (London) Act, 1891* (54 & 55 Vict. c. 76), s. 1; and see title *NUISANCE*, Vol. XXI., p. 537.

(*t*) *Housing, Town Planning, etc. Act, 1909* (9 Edw. 7, c. 44), s. 17; and see title *PUBLIC HEALTH AND LOCAL ADMINISTRATION*, Vol. XXIII., pp. 527 *et seq.*, 545 *et seq.*

(*a*) *Housing (Inspection of District) Regulations, 1910*, issued by the Local Government Board on the 2nd September, 1910, under the *Housing, Town Planning, etc. Act, 1909* (9 Edw. 7, c. 44).

(*b*) *Public Health Act, 1875* (38 & 39 Vict. c. 55), ss. 91—111. A drain so foul or in such a state as to be a nuisance or injurious to health is deemed to be a nuisance liable to be dealt with summarily under the Act (*ibid.*, s. 91); see title *NUISANCE*, Vol. XXI., pp. 537, 538, 566, where the matter is fully dealt with; see also *Public Health Acts Amendment Act, 1907* (7 Edw. 7, c. 53), s. 35.

(*c*) See, for example, *Kirkheaton Local Board v. Beaumont* (1888), 52 J. P. 68; and see the definitions of "sewer" and "drain," p. 722, *ante*, and the cases there cited; and, as to "single private drains" under the *Public Health Acts Amendment Act, 1890* (53 & 54 Vict. c. 59), see pp. 759, 760, *post*.

(*d*) *Kinson Pottery Co. v. Poole Corporation*, [1899] 2 Q. B. 41.

SECT. 11.
Supervision
of Drains.

Recovery of
expenses
wrongfully
required.

Right of
entry and
examination.

for value without notice, may be estopped from setting up that fact in answer to such proceedings (e).

1299. If any owner or occupier is required under legal compulsion (f) by a local authority to remedy a defective pipe which afterwards proves to be a sewer vested in the local authority, he can recover the expenses from the local authority (g). If an occupier of a house is similarly required to remedy a defect which it is the duty of an owner to remedy, he can recover the expenses from the owner (h).

1300. On the written application to a local authority of any person, including the surveyor or inspector of nuisances of the authority (i), stating that any drain (j) on or belonging to any premises within its district is a nuisance or injurious to health, but not otherwise (k), the local authority may by writing empower its surveyor or inspector of nuisances, after twenty-four hours' written notice to the occupier of such premises, or, in case of emergency, without notice, to enter such premises with or without assistants, and cause the ground to be opened and examine such drain (l). If the drain is found to be in a proper condition, he must cause the ground to be closed and any damage done to be made

(e) *Hedley v. Webb*, [1901] 2 Ch. 126; *Heaver v. Fulham Borough Council*, [1904] 2 K. B. 383; *Wilson's Music and General Printing Co. v. Finsbury Borough Council*, [1908] 1 K. B. 563; compare *Pakenham v. Ticehurst Rural District Council* (1903), 67 J. P. 448; *Meador v. West Cowes Local Board*, [1892] 3 Ch. 18, C. A., and the cases cited in note (g), p. 723, *ante*.

(f) As to the meaning of "legal compulsion," see title NUISANCE, Vol. XXI., p. 566, note (i); *Silles v. Fulham Borough Council*, [1903] 1 K. B. 829, C. A.

(g) *North v. Walthamstow Urban District Council* (1898), 67 L. J. (Q. B.) 972; *Haedicke v. Friern Barnet Urban Council*, [1904] 2 K. B. 807; reversed on another ground, [1905] 1 K. B. 110, C. A.; *Ellis v. Bromley Rural District Council* (1899), 63 J. P. 711; see also the following cases decided under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 3—5, 11:—*Andrew v. St. Olave's Board of Works*, [1898] 1 Q. B. 775; *Wilson's Music and General Printing Co. v. Finsbury Borough Council*, *supra*.

(h) *Gebhardt v. Saunders*, [1892] 2 Q. B. 452; *Thompson and Norris Manufacturing Co. v. Hawes* (1895), 59 J. P. 580, C. A.; compare *Reeve v. Sadler* (1903), 67 J. P. 63; *Howe v. Bolwood*, [1913] W. N. 118.

(i) *Wood Green Urban District Council v. Joseph* (1905), 69 J. P. 464; affirmed, [1907] 1 K. B. 182, C. A., and in the House of Lords, [1908] A. C. 419 (but the point as to the person giving the notice was not pressed on appeal; see *ibid.*, at p. 425).

(j) The provision also applies to any water-closet, earth-closet, privy, ashpit or cesspool; as to its extension to certain sewers, see Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19; pp. 759, 760, *post*.

(k) If the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 34, is put in force in any district by order of the Local Government Board, the words "but not otherwise" are to be deemed omitted, and the following words substituted:—"or where on the report in writing of their surveyor or inspector of nuisances the local authority have reason to suspect that any such drain, water-closet, earth-closet, privy, ashpit or cesspool is a nuisance or injurious to health" (*ibid.*).

(l) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 41. The giving of this notice to the occupier is not a condition precedent to recovering the expenses from the owner (*Bromley Borough Council v. Cheshire* (1907),

good as soon as can be, and the expenses of the works must be defrayed by the local authority. If, however, the drain appears to be in bad condition or to require in consequence alteration or amendment, whether of a structural nature or not (*m*), the local authority must forthwith cause notice in writing to be given to the owner or occupier requiring him forthwith, or within a reasonable time therein specified, to do the necessary works (*n*). If such notice is not complied with, the person to whom it is given is liable to a penalty not exceeding 10s. for each day during which he continues to make default (*o*), and the local authority may, if it thinks fit, execute such works and recover from the owner the expenses incurred in so doing, or may by order declare the same to be private improvement expenses (*p*).

SECT. 11. Supervision of Drains.

Order for
execution of
work.

1301. Application may in certain cases (*q*) be made to the local authority under the provisions set out in the last paragraph in cases where two or more houses belonging to different owners but not to the same owner are connected with a public sewer by a single private drain (*r*), the expression "drain" here meaning (*s*) such a drain or drains as the local authority could

Application
under Public
Health Acts
Amendment
Act, 1890,
Part III.

72 J. P. 34). If the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 45, is in force in the district, the medical officer, surveyor or inspector of nuisances may be authorised by the local authority, with the consent of the owner, to test the drains with the smoke or coloured water test or other similar test, but not by water under pressure. If the drains are found defective by the test, the local authority may require the owner to make good the defect or do so itself at his expense.

(*m*) *Southwold Corporation v. Crowdy* (1903), 67 J. P. 278. The provision is not applicable to cases of defective construction in the first instance, irrespective of nuisance (*ibid.*, compare *Fulham Vestry v. Solomon*, [1896] 1 Q. B. 198).

(*n*) If the time is not reasonable, the notice may be invalid and the authority unable to recover the expenses (*Hornsey Corporation v. Kershaw* (1909), 73 J. P. 335). It is enough if the notice requires the owner to do what is necessary to abate the nuisance (*Walthamstow Urban District Council v. Henwood* (1896), 61 J. P. 23). For the meaning of "owner" see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 427, note (*o*).

(*o*) As to the power of the owner to enter as against the occupier, see note (*o*), p. 750, *ante*.

(*p*) Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 41, 213. The authority may obtain a declaration of charge on the premises (*Walthamstow Urban District Council v. Henwood*, *supra*); and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 381, 604.

(*q*) *I.e.*, where the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), Part III., has been adopted by the local authority. It may be adopted by either urban or rural councils, but only certain provisions, including the one mentioned in the text, apply to rural districts (*ibid.*, ss. 3, 50; and see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 363).

(*r*) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19. The position of houses belonging to the same owner and drained by a common pipe are unaltered, and the joint pipe is a sewer (*ibid.*, s. 11 (3)); see *Wood Green Urban Council v. Joseph*, [1908] A. C. 419, 428, 429; and compare *Holywood Urban District Council v. Grainger*, [1913] 2 I. R. 126.

(*s*) *Wood Green Urban Council v. Joseph*, *supra*. The earlier decisions on the meaning of this term are:—*Self v. Hove Commissioners*, [1895] 1 Q. B. 685; *Hill v. Hair*, [1895] 1 Q. B. 906; *Bradford v. Eastbourne Corporation*, [1896] 2 Q. B. 205; *Seal v. Merthyr Tydfil Urban Council*, [1897] 2 Q. B. 543; *Thompson v. Eccles Corporation*, [1904] 2 K. B. 1; reversed,

SECT. 11.
Supervision
of Drains.

Powers of
local
authority.

require to be provided in respect of the houses in its district by the owner or occupier thereof (a), or in respect of houses newly erected or rebuilt (b), and including a drain used for the drainage of more than one building (c). The authority may recover, either summarily (d) or as private improvement expenses, any expenses incurred by it in executing any works under the powers conferred by the above provisions from the owners of the houses, in such shares and proportions as are settled by its surveyor or, in case of dispute, by a court of summary jurisdiction (e). If, however, the nuisance in such a single private drain exists solely on the premises of one owner, it is unnecessary to serve notices on the other owners or to make any apportionment (f). A notice is not invalid because it requires each owner to do work which would necessitate his entering on the property of another (g).

SUB-SECT. 2.—In the Metropolis.

Inspection by
metropolitan
borough
council or
its officer.

1302. Any borough council or its surveyor, inspector, or other appointed person may inspect any drain or other works connected therewith within its borough, and for that purpose may at all reasonable times in the daytime enter by itself and workmen upon any premises, and cause the ground to be opened in any place it thinks fit, doing as little damage as may be. Before entry it must give twenty-four hours' notice in writing to the occupier of the premises to which the drain and works are attached, or leave such notice upon the premises, except in cases of emergency, when it may enter without notice (h). If such drain or works are found to be made to the satisfaction of the council and in proper order

[1905] 1 K. B. 110, C. A.; *Haedicke v. Friern Barnet Urban Council*, [1905] 1 K. B. 110, C. A.; *Jackson v. Wimbledon Urban Council*, [1905] 2 K. B. 27, C. A.; but they are to a large extent displaced by the decision of the House of Lords in *Wood Green Urban Council v. Joseph*, [1908] A. C. 419.

(a) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 23; and see p. 750, *ante*.

(b) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 25; and see p. 752, *ante*.

(c) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19 (3). Such a drain remains vested in the local authority, although the owner may be required to repair it (*Pemsel and Wilson v. Tucker*, [1907] 2 Ch. 191).

(d) An appeal lies from a court of summary jurisdiction to the court of quarter sessions (Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 7; *Hornsey Corporation v. Kershaw* (1909), 73 J. P. 335 (quarter sessions)).

(e) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19 (1), (2).

(f) *Thompson v. Eccles Corporation*, [1904] 2 K. B. 1; *Haedicke v. Friern Barnet Urban Council*, [1905] 1 K. B. 110, C. A.

(g) *Lancaster v. Barnes District Council*, [1898] 1 Q. B. 855, decided on the ground that no penalty is imposed for non-compliance with the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19.

(h) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 82; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 142, Sched. IV. Under *ibid.*, s. 40, a borough council has the same power of entry and inspection in order to examine any water- or earth- closet, ashpit or cesspool and converted works, or for the purpose of ascertaining the course of a drain, with the further proviso that, if the premises are unoccupied, the notice is to be served on the owner. As to the meaning of "owner," compare title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 427, note (c); note (b), p. 738, *ante*.

and condition, the council must cause them to be reinstated and made good as soon as may be, and must defray all the expense connected with the examination, reinstating, and making good, and pay full compensation for all damages or injuries occasioned (i).

If such drain and works are found not to have been made according to the directions and regulations of the council or contrary to the statutory provisions, or if, without the consent of the council or contrary to its order, any sewer or drain has been constructed, rebuilt, or unstopped, or any sewer has been broken into, the person offending is liable to a penalty not exceeding £10; and, if he does not within fourteen days, after notice in writing by the council, cause his fault to be remedied, the council may cause the work to be done and recover the expenses from him (k).

1303. If any such drain appears to be in bad order and condition, or to require cleansing, alteration, or amendment, or to be filled up, the council must cause notice in writing to be given to the owner or occupier of the premises, which notice must be a notice of an order which has been made by the council (l), requiring him forthwith or within such reasonable time as is specified in such notice to do the necessary works (m). If the notice is not complied with by the person to whom it is given, the council may, if it thinks fit, execute the works and recover the expenses from the occupier or owner of the premises, or proceed for and recover a penalty not exceeding £5, and a further sum not exceeding 40s. for every day during which such offence continues (m).

SECT. 11.
Supervision
of Drains.

Notice to
cleanse, alter,
or amend.

1304. If a drain is so constructed or repaired as to be a nuisance or injurious or dangerous to health, the person who undertook or executed such construction or repair is liable to a fine not exceeding £20, unless he shows that it was not due to any wilful act, default, or neglect (n).

Drains being
a nuisance
or injurious
or dangerous
to health.

If a person causes any drain to be a nuisance or injurious

(i) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 84; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 142, Sched. IV.; and see the like provision in *ibid.*, s. 40 (2), in respect of the matters mentioned in note (h), p. 760, *ante*.

(k) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 83; Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 142, Sched. IV.; and see the like provision in *ibid.*, ss. 40 (2), 41.

(l) *Swinbourn v. Hammersmith Borough Council* (1903), 67 J. P. 258.

(m) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 85; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 64. As to the necessity for the council to follow the procedure prescribed, see *R. v. Paddington Vestry* (1891), 55 J. P. 52; *A.-G. v. Olerkenwell Vestry*, [1891] 3 Ch. 527.

(n) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 42. Where a person is charged under this provision he is entitled, upon information laid by him, to have any other person, being his agent, servant or workman whom he charges as being the actual offender, brought before the court at the time appointed for hearing the charge, and if he proves that he had used due diligence to prevent the commission of the offence and that such other person committed it without his knowledge, consent or connivance, he is exempt from any fine, and such other person may be summarily convicted (*ibid.*). The workman who actually did the work is within this provision and may be prosecuted in the first instance (*Young v. Foster* (1893), 58 J. P. 8).

SECT. 11.
Supervision
of Drains.

or dangerous to health by wilfully destroying or damaging the same or any work connected therewith, or by wilfully stopping up or interfering with or improperly using such drain or work, he is liable to a fine not exceeding £5 (o).

A drain so foul or in such a state as to be a nuisance or injurious or dangerous to health is a nuisance liable to be dealt with summarily (p).

SECT. 12.—Connexion of Drains with Sewers.

SUB-SECT. 1.—In General.

Right to
empty drains
into sewers.

1305. The owner or occupier of any premises within the district of a local authority is entitled to cause his drains to empty into the sewers of that authority (q). This right can, however, only be exercised under certain conditions, and in the case of manufacturing and trade effluents it is considerably qualified by statutory restrictions (r). Although the right as regards domestic sewage is absolute (s), it does not confer upon such owner or occupier the right to connect his drain with any particular sewer, but merely gives him a right to be connected with the sewers (t); nor is he or the local authority entitled in making the connexion to trespass upon private land (u). The general conditions upon which a connexion may be made are that the person should give such notice as may be required by the local authority of his intention to cause his drains to empty into the sewers, that he should comply with the regulations of that authority in respect of the mode in which the communications between such drains and sewers are to be made, and that the communication should be carried out subject to the control of the person appointed by that authority to superintend the making of such communications (a). Any person causing a drain to empty into a sewer of a local authority without complying with these conditions is liable

Conditions
affecting
exercise of
right.

(o) Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 15.

(p) *Ibid.*, s. 2; and see title NUISANCE, Vol. XXI., pp. 536 *et seq.* A drain which is merely defective may not be a nuisance; see *Farmer v. Long* (1907), 72 J. P. 91.

(q) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 21. As to emptying sewers and drains into the sewers of a neighbouring local authority, see p. 765, *post*.

(r) See p. 764, *post*.

(s) Thus, the fact that the sewer empties direct into a stream does not prevent the connexion or authorise the authority to cut it off (*Ainley v. Kirkheaton Local Board* (1891), 55 J. P. 230; *Brown v. Dunstable Corporation*, [1899] 2 Ch. 378).

(t) *Wilkinson v. Llandaff and Dinas Powis Rural Council*, [1903] 2 Ch. 695, *per* ROMER and STIRLING, L.JJ., at pp. 702, 703, C. A.; *Graham v. Wroughton*, [1901] 2 Ch. 451, C. A., *per* BYRNE, J., at p. 457; affirmed on appeal on another point; *Kinson Pottery Co. v. Poole Corporation*, [1899] 2 Q. B. 41; and see *Charles v. Finchley Local Board* (1883), 23 Ch. D. 767.

(u) *Wood v. Ealing Tenants, Ltd.*, [1907] 2 K. B. 390; *Russell v. Knight* (1894), 16 Municipal Corporations Chronicle, 249. As to the case of an owner who owns the fee but is not in occupation, see *Meyrick v. Pembroke Corporation* (1912), 76 J. P. 365. An owner may break up a street in order to make the connexion, but may not subsequently construct an inspection chamber in the street (*A.-G. v. Ashby* (1907), 71 J. P. 387).

(a) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 21. For form of notice of intention to drain into sewer, see *Encyclopædia of Forms and Precedents*, Vol. X., p. 514.

to a penalty not exceeding £20, and the local authority may close any communication between a drain and sewer made in contravention thereof, and may recover summarily from the offender (b) any expenses incurred by it in so doing. He is also liable to persons who are injured by nuisance due to the sewer discharging the sewage from his drain, and may be restrained by injunction (c). If, however, the communication has been made with the sanction or acquiescence of the local authority, or if the right to discharge into the sewer has been acquired by prescription, the connexion cannot be cut off by the authority until some new arrangement is made, even although the discharge from the sewer may be causing a nuisance (d).

**SECT. 12.
Connexion
of Drains
with
Sewers.**

When
connexion
may be
cut off.

1306. When the Public Health Acts Amendment Act, 1890 (e), Part III., has been adopted in any district, and where the owner or occupier of any premises in that district is entitled to cause any sewer or drain from those premises to communicate with any sewer of the local authority, the local authority must, if so required by him, upon being paid the cost thereof in advance, make the communication and execute all necessary works (f). Such cost is to be estimated by the surveyor of the authority, but, in case the owner or occupier of the premises, as the case may be, is dissatisfied with such estimate, he may, if the estimate is under £50, apply to a court of summary jurisdiction to fix the amount to be paid, and, if over £50, may have the same determined by arbitration (g).

Connexion
under the
Public Health
Acts Amend-
ment Act,
1890, Part III.

1307. In any district where the Public Health Acts Amendment Act, 1907 (h), s. 38, is in force (i), the local authority may, before

Under the
Public Health
Acts Amend-
ment Act,
1907, s. 38.

(b) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 21.

(c) *Graham v. Wroughton*, [1901] 2 Ch. 451, C. A. The local authority may also be responsible for nuisance (*Wilkinson v. Llandaff and Dinas Powis Rural Council*, [1903] 2 Ch. 695, C. A.).

(d) *Brown v. Dunstable Corporation*, [1899] 2 Ch. 378; *A.-G. v. Clerkenwell Vestry*, [1891] 3 Ch. 527; *East Barnet Valley Urban Council v. Stallard*, [1909] 2 Ch. 555, C. A.; *Harrington (Earl) v. Derby Corporation*, [1905] 1 Ch. 205; *A.-G. v. Dorking Union Guardians* (1882), 20 Ch. D. 595, C. A.; *Thames Conservators v. Gravesend Corporation*, [1910] 1 K. B. 442; *A.-G. v. Acton Local Board* (1882), 22 Ch. D. 221; *Ogilvie v. Blything Union Rural Sanitary Authority* (1892), 67 L. T. 18, C. A.; *Olegg v. Castleford Local Board*, [1874] W. N. 229. As to cutting off a trade effluent, see *Eastwood Brothers, Ltd. v. Henley Urban Council*, [1901] 1 Ch. 645, C. A.; *Peebles v. Oswaldtwistle Urban District Council*, [1897] 1 Q. B. 384, per CHARLES, J.; reversed on another point, [1897] 1 Q. B. 625, C. A.; and by the House of Lords, *sub nom. Pasmore v. Oswaldtwistle Urban Council*, [1898] A. C. 387; and see p. 764, post.

(e) 53 & 54 Vict. c. 59.

(f) *Ibid.*, s. 18 (1). As to such adoption, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 363, 364. The local authority cannot enter upon the private land of some other person to make the communication (*Wood v. Ealing Tenants, Ltd.*, [1907] 2 K. B. 390).

(g) The cost includes all costs incidental thereto. The arbitration is as prescribed in the Public Health Acts (Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 18 (2); and see titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 163; LOCAL GOVERNMENT, Vol. XIX., p. 271; PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., p. 367).

(h) 7 Edw. 7, c. 53.

(i) By order of the Local Government Board (*ibid.*, s. 3); see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 364, 365.

SECT. 12.
Connexion
of Drains
with
Sewers.

any drain, existing at the time when that provision is put in force (*j*), and not at that time communicating with any sewer of the local authority, is made to communicate with such a sewer, require the same to be laid open for examination by the surveyor, and no such communication may be made until the surveyor certifies that it may be properly made (*k*).

Drainage
from
factories.

1308. Sanitary or other authorities (*l*) having sewers under their control are required (*l*) to give facilities for enabling manufacturers within their districts to carry the liquids (*m*) proceeding from their factories or manufacturing processes into such sewers; but such sanitary or other authorities are not compelled to admit into their sewers any liquid which would prejudicially affect such sewers, or the disposal by sale, application to land or otherwise of the sewage matter conveyed along such sewers, or which would from its temperature or otherwise be injurious from a sanitary point of view (*n*); nor is a sanitary authority required to give such facilities where the sewage system (*o*) of such authority is only sufficient for the requirements of its district, or where such facilities would interfere with any order of any court of competent jurisdiction respecting the sewage of such authority (*l*). Where the liquids from factories have been allowed to be carried into sewers, the connexion cannot be cut off unless it is shown that the above provisions have been contravened (*p*).

(*j*) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 13.

(*k*) *Ibid.*, s. 38.

(*l*) Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 7. The other authorities referred to probably mean Commissioners of Sewers.

(*m*) "Liquids" are not defined in the Act, but is used in contradistinction to "solid matter," which is defined as not including particles of matters in suspension in water (*ibid.*, s. 20).

(*n*) In districts where the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), Part III., has been adopted, there is a further provision in *ibid.*, s. 16, against turning chemical refuse and heated water into the sewers so as to cause a nuisance; see p. 767, *post*. As to the meaning of "prejudicially affect" and "application to land," see the Scottish cases of *Cowie & Son v. Dufftown Commissioners* (1901), 3 F. (Ct. of Sess.) 257; *Guthrie, Craig, Peter & Co. v. Brechin Magistrates* (1888), 15 R. (Ct. of Sess.) 385; and see also *A.-G. v. Whitmore* (1901), *Times*, 2nd May; *St. Helens Chemical Works v. St. Helens Corporation* (1876), 1 Ex. D. 196. Manufacturers may also commit an offence under the Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 4, if they send a polluting liquid into a sewer which flows into a stream (*Butterworth v. West Riding of Yorkshire Rivers Board*, [1909] A. C. 45; *Kirkheaton District Local Board v. Ainley, Sons & Co.*, [1892] 2 Q. B. 274, C. A.; compare *Garfield v. Yorkshire Laundries, Ltd.* (1905), 69 J. P. 411; and see title WATERS AND WATERCOURSES). As to the pollution of fisheries, see title FISHERIES, Vol. XIV., pp. 618, 619. As to the draining of alkali works and the duty of the local authority in relation thereto, see title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 408, 409.

(*o*) Including the purification works (*Brook v. Meltham Urban Council*, [1909] A. C. 438; see *Guthrie, Craig, Peter & Co. v. Brechin Magistrates*, *supra*).

(*p*) *Eastwood Brothers, Ltd. v. Honley Urban Council*, [1901] 1 Ch. 645, C. A.; *Peebles v. Oswaldtwistle Urban District Council*, [1897] 1 Q. B. 384, *per* CHARLES, J.; reversed on appeal on another point, *sub nom. Pasmore v. Oswaldtwistle Urban Council*, [1898] A. C. 387. As to rights of draining existing in 1876, see Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 16; and, as to exemptions under a local

1309. The owner or occupier of any premises without the district of a local authority may cause any sewer or drain from such premises to communicate with any sewer of the local authority, on such terms and conditions as may be agreed on between such owner or occupier and such local authority, or as, in case of dispute, may be settled, at the option of the owner or occupier, by a court of summary jurisdiction or by arbitration (*q*). The court will not make a declaration of the owner's right to such connexion in respect to a sewer not yet constructed (*r*). If the local authority allows a connexion without imposing terms, it cannot afterwards impose terms for the continuance of that connexion, even although the owner of the premises may cause slight alterations in the internal arrangements (*s*).

SECT. 12.
Connexion
of Drains
with
Sewers.

Drainage
into sewers
of neighbour-
ing authority.

SUB-SECT. 2.—In the Metropolis.

1310. No person may make or branch any sewer or drain or make any opening into any sewer vested in the London County Council or in any metropolitan borough council without the previous consent of such council (*t*). With such consent, any owner or occupier of premises in the Metropolis (*a*) may at his own expense drain into any sewer vested in such council or authorised to be made by it,

Sewers or
drains in the
Metropolis.

Consent
required.

Act, see *Woolcombers, Ltd. v. Bradford Corporation* (1906), 70 J. P. 434; title **WATERS AND WATERCOURSES**.

(*q*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 22. This provision does not extend to metropolitan sewers; see note (*a*), *infra*. As to the sewers of one authority being joined with that of another, see p. 743, *ante*. Yearly payments due at the time of the passing of the Public Health Act, 1875 (38 & 39 Vict. c. 55), 11th August, 1875, in pursuance of the Local Government Act, 1858, Amendment Act, 1861 (24 & 25 Vict. c. 61) (repealed), to any local authority in respect of any premises without its district which have a drain communicating with a sewer within its district are expressly protected, but if the connexion ceases the payment ceases, but if re-established the yearly sum again becomes payable, and so on from time to time (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 337). For form of notice of intention to drain into a sewer, see *Encyclopædia of Forms and Precedents*, Vol. X., p. 514. For form of agreement, see *ibid.*, p. 517.

(*r*) *Faber v. Gosforth Urban District Council* (1903), 67 J. P. 197. Such a declaration might hamper the tribunal which is to settle the terms.

(*s*) *East Barnet Valley Urban Council v. Stallard*, [1909] 2 Ch. 555, C. A.

(*t*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 61. The consent (of the London County Council or metropolitan borough council, as the case may be) must be in writing and in the case of the branching of any sewer or drain into a sewer vested in the County Council it must be in accordance with a plan and section approved by the County Council (Metropolis Management Amendment Act, 1890 (53 & 54 Vict. c. 66), ss. 4, 5). A council cannot require the costs of supervision to be paid as a condition of its consent (*E. v. Greenwich Board of Works* (1894), Cab. & El. 236).

(*a*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 61, which says "any person," but this means persons entitled to connect; see *Metropolitan Board of Works v. London and North Western Rail. Co.* (1880), 14 Ch. D. 521; affirmed (1881), 17 Ch. D. 246, C. A. Persons outside the Metropolis have no rights in regard to the metropolitan sewers (*ibid.*; *Islington Vestry v. Hornsey Urban Council*, [1900] 1 Ch. 695, C. A.; *London County Council v. Acton Urban District Council* (1900), *Times*, 15th December). When a connexion is properly made it cannot be cut off; see *A.-G. v. Olerkenwell Vestry*, [1891] 3 Ch. 527, and the cases cited in note (*p*), p. 764, *ante*.

SECT. 12.
Connexion
of Drains
with
Sewers.

Penalty for
connexion
without
consent.

in such manner as the council directs or appoints (*b*). If any person makes any connexion with such a sewer without such consent, or connects a drain otherwise than of the authorised description or in the authorised manner, he is liable to a penalty not exceeding £50, and the council may cut off the connexion, or may by notice in writing require the owner or owners of the premises or land to carry out the work in the required manner, or in default may execute the necessary works for making the drain conformable to its regulations and directions, and recover the expense summarily from the person making the drain or causing it to be made or from the owner or owners of the premises or land (*c*). These expenses must be apportioned if more than one owner is responsible (*c*). An owner who pays such expenses may recover them summarily from the person who made the connexion (*c*).

Private
drains under
streets.

1311. Whenever it is necessary to open any part of the pavement of any street or public place for the purpose of connecting a private drain with the sewers or drains of either the London County Council or a borough council, such council may, if it thinks fit, make so much of such private drain and construct so much of the necessary work as shall be under or in any street or public place, and recover the expenses incurred thereby from the owner of the house, building, or ground to which such private drain belongs (*d*). The council may also contract with the owners or occupiers of any houses, buildings, or ground, that any drains required to be made, altered or enlarged by such owners shall be done by the council, the cost price as certified by the surveyor of the council to be repaid by such owner or occupier (*e*).

SECT. 13.—Protection of Sewers and Drains.

SUB SECT. 1.—In General.

Building
over sewers.

1312. In addition to the general protection afforded to property (*f*)

(*b*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 61. Where any contribution to the cost of a sewer is payable, the communication must not be made except in conformity with the council's direction as to such contribution (*ibid.*). As to such contribution, see note (*l*), p. 740, *ante*.

(*c*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 61, amended and extended by the Metropolis Management Amendment Act, 1890 (53 & 54 Vict. c. 66), ss. 4, 5. The provisions in this latter Act apply to the City of London as regards sewers vested in the County Council (*ibid.*, s. 8). The penalty for each day of default in complying with the requisition is a sum not exceeding £5; see *ibid.*, ss. 4, 9. A penalty is also imposed and remedial powers are also conferred by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 83.

(*d*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 78. The term "street" includes a new street, and the expression "pavement" includes a roadway defined if not wholly made up (*ibid.*, s. 250; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 112; *Hampstead Vestry v. Hoopel* (1835), 15 Q. B. D. 652).

(*e*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 79. As to the liability of the council for defective work, see *Devonshire (Duke) v. St. Mary, Islington, Vestry* (1895), 59 J. P. 745; *Hall v. Bailey Corporation* (1877), 47 L. J. (Q. B.) 148.

(*f*) As, for example, by the Malicious Damage Act, 1861 (24 & 25 Vict.

by the law there are special statutory provisions for the protection of sewers and drains (*g*).

Any person who in an urban district, without the written consent of the urban authority, causes any building to be newly erected over any of its sewers is liable to forfeit to the authority the sum of £5 and a further sum of 40s. for every day during which the offence is continued after written notice in this behalf from the authority (*h*). The authority may cause any building erected in contravention of this provision to be altered, pulled down, or otherwise dealt with as it thinks fit, and may recover summarily from the offender any expenses incurred by it in so doing (*h*).

SECT. 13.
Protection
of Sewers
and Drains.

Erection of
building over
sewers.

1313. In places where the Public Health Acts Amendment Act, 1890 (*a*), Part III., has been adopted (*b*) it is unlawful for any person to throw or suffer to be thrown or to pass into any sewer of a local authority, or any drain communicating therewith, any matter or substance by which the free flow of the sewage or surface or storm water may be interfered with, or by which any such sewer or drain may be injured. A person so offending is liable to a

Under the
Public
Health Acts
Amendment
Act, 1890,
Part III.
Obstruction
of sewers and
drains.

c. 97), ss. 51, 52; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 791. Persons who wilfully damage any works or property of a local authority are, where no other penalty is provided by the Public Health Act, 1875 (38 & 39 Vict. c. 55), liable under that Act to a penalty not exceeding £5 (*ibid.*, s. 307). Persons damaging sewers by using excessively heavy engines on the highway may also be liable for the damage caused (*Gas Light and Coke Co. v. St. Mary Abbott's, Kensington, Vestry* (1885), 15 Q. B. D. 1, C. A.; *Chichester Corporation v. Foster*, [1906] 1 K. B. 167); and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 137.

(*g*) Persons authorised by statute to navigate on or use any river, canal, dock, harbour or basin, or to demand any tolls or dues in respect of such navigation or use, may, for the purpose of their undertaking, interfere with sewers and drains; they may take up, divert, or alter the level of any sewers, drains, culverts or pipes constructed by any local authority and passing under or interfering with such rivers, canals, docks, harbours, or basins or the towing paths thereof; but the substituted works must be certified by the surveyor to the local authority (Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 331). Disputes as to whether the substituted works are equally effectual must be settled by arbitration (*ibid.*, s. 333). As to powers of other statutory undertakers, see also titles ELECTRIC LIGHTING AND POWER, Vol. XII., pp. 577 *et seq.*; GAS, Vol. XV., pp. 326 *et seq.*; 378 *et seq.*; TRAMWAYS AND LIGHT RAILWAYS; WATER SUPPLY; and see title WATERS AND WATERCOURSES. The authority controlling the sewerage under a road has the same powers with regard to the laying of telegraphs under a road as has the authority controlling the road (Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 10; see title TELEGRAPHS AND TELEPHONES).

(*h*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 26. The construction of vaults, arches, and cellars under the carriageway of streets without the written consent of the council is also prohibited (*ibid.*); and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 250. As to the effect of this on a sale of land where the existence of a sewer is not disclosed, see *Re Brewer and Hankins's Contract* (1899), 80 L. T. 127, C. A.; *Re Puckett and Smith's Contract*, [1902] 2 Ch. 258, C. A.; *Pemsel and Wilson v. Tucker*, [1907] 2 Ch. 191; title SALE OF LAND, pp. 329, 330, 332, 403, 405, *ante*.

(*a*) 53 & 54 Vict. c. 59.

(*b*) See title PUBLIC HEALTH AND LOCAL ADMINISTRATION, Vol. XXIII., pp. 363, 364.

SECT. 13.
Protection
of Sewers
and Drains.

Permitting
waste liquid
to enter
sewer.

penalty not exceeding £10 and to a daily penalty not exceeding 20s. (c).

Every person is liable to a penalty not exceeding £10 and to a daily penalty not exceeding £5 who turns or permits to enter into any sewer of a local authority, or into any drain communicating therewith; (1) any chemical refuse, or (2) any waste steam, condensing water, heated water, or other liquid (such water or liquid being of a higher temperature than 110 degrees Fahrenheit), which either alone or in combination with the sewage causes a nuisance or is dangerous or injurious to health (d); but such person is not liable to a penalty until the local authority has given him notice of this provision, nor for an offence committed before the expiration of seven days from the service of such notice. The local authority, however, is not required to give the same person notice more than once (e).

SUB-SECT. 2.—In the Metropolis.

Damage to or
interference
with sewers.

1314. No building may be erected in, over, or under any sewer (f) vested in the London County Council or in a metropolitan borough council without the council's previous consent in writing. If any such building is erected, the council in whom the sewer is vested may demolish the building, the expenses incurred thereby being payable by the person erecting such building (g), and the person knowingly erecting such building is liable to a penalty (h). Any person who obstructs, fills in, or diverts any sewer or drain under the jurisdiction, survey, or control of the County Council or borough council without the consent in writing of the council in which the same is vested is liable to a penalty in addition to any other proceeding, and to pay the costs of removing the obstruction or reinstating the

(c) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 16.

(d) *Ibid.*, s. 17 (1). Such an act may also be an offence under the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 91—96; see *St. Helens Chemical Co. v. St. Helens Corporation* (1876), 1 Ex. D. 196; title NUISANCE, Vol. XXI., p. 558. As to the duties of local authorities to receive factory refuse into their sewers in certain cases, see p. 764, *ante*.

(e) Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 17 (3). *Ibid.*, s. 17 (2), empowers a local authority to authorise generally or specially in writing any of its officers to enter any premises to examine as to whether any such offences are being committed: if such entry is refused, any justice, on complaint on oath by such officer, and after reasonable notice in writing of such complaint has been given to the person having custody of the premises, may by order require such person to admit the officer, and the order continues in force until any offence which may be discovered has ceased or until the work necessary to prevent its recurrence has been executed.

(f) A marsh wall or embankment for excluding the river Thames is a sewer within the meaning of this provision (*Poplar District Board of Works v. Knight* (1858), E. B. & E. 408).

(g) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 204.

(h) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 68. The penalty imposed by this provision also extends to persons knowingly erecting or placing any wall, bridge, fence, obstruction, annoyance, or encroachment in, upon, over or under any such sewer. The penalty is a sum not exceeding £20, and in case of a continuing offence, not exceeding £5 a day after notice from the council, and is recoverable summarily. These provisions do not prevent the maintenance, repair or renewal of buildings or works under which a sewer or drain has been constructed, provided they do not injure or obstruct the sewer or drain (*ibid.*).

sewer or drain (*i*). A penalty is also imposed upon any person who takes up, removes, or otherwise interferes with any sewer or part of a sewer vested in the County Council or in a borough council without the previous permission of such council, and upon any person who wilfully damages any sewer, bank, defence, wall, penstock, grating, gully, side entrance, tide valve, flap, work, or thing vested in the County Council or in a borough council, or who does any act by which the drainage of the Metropolis, or any part thereof, may be obstructed or injured (*j*).

SECT. 13.
Protection
of Sewers
and Drains.

1315. No gully or ventilating shaft immediately connected with or appertaining to any sewer vested in the London County Council may be trapped, covered, or closed up without previous notice in writing being given to the County Council, nor if the County Council or its engineer within one week after the giving of such notice expresses in writing its or his objection to the same (*k*).

Obstruction of
gullies and
ventilating
shafts.

1316. Vaults, arches, and cellars under streets must be made so as not to communicate or interfere with sewers and drains under the control of the London County Council and borough councils without their previous consent (*l*).

Construction
of vaults and
cellars.

1317. Scavengers and other persons are liable to a penalty not exceeding £5 if they sweep, rake, or place any soil, rubbish, or filth, or any other thing into or in any sewer or drain, or over any grate communicating with any sewer or drain, or into any dock or inlet communicating with the mouth of any sewer or drain, or into which any drain may discharge its contents, or into the river Thames contiguous thereto (*m*).

Obstruction
by
scavengers.

(*i*) See note (*h*), p. 768, *ante*.

(*j*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 69. The penalty is a sum not exceeding £20, and the person is also liable to pay the expenses of repairing or making good the damage, the amount to be recovered by action or summarily (*ibid.*). Persons or companies intending to execute improvements under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), which will interfere with sewers or drains of the London County Council or borough councils must give fourteen days' notice and must comply with the council's requirements as to protection, alteration, or efficient substitutes (*ibid.*, s. 45); and see, generally, title LAND IMPROVEMENT, Vol. XVIII., pp. 280 *et seq.* A general protection is afforded to all the property of the London County Council and borough councils by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 206, 207.

(*k*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 27.

(*l*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 101.

(*m*) *Ibid.*, s. 205. Forcing mud of the consistency of butter into the sewers is an offence under this provision (*Metropolitan Board of Works v. Eaton* (1884), 48 J. P. 611). A somewhat similar provision to that set out in the text is to be found in the Metropolitan Paving Act, 1817 (57 Geo. 3, c. xxix.) (Michael Angelo Taylor's Act), and the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 60, imposes a penalty upon persons who throw or cause to fall into any sewer, pipe or drain any dirt, litter or ashes, or any carrion, fish, offal or rubbish; see also Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 92, amended by the Port of London Act, 1908 (8 Edw. 7 c. 68); and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 206.

**SECT. 13.
Protection
of Sewers
and Drains.**

Obstruction
by solid
matter other
than house
sewage.

Obstruction
by trade
refuse.

Wrongful
entry into
a sewer.

1318. Persons are also rendered liable to a penalty who (1) place or throw, or cause to be placed or thrown or to fall, or (2) knowingly permit to be placed or to fall or to be carried, or (3) knowingly permit to be placed in such a position as to be liable to fall or to be carried, in or into any sewer of the London County Council, or in or into any sewer or drain, dock or inlet communicating with any such sewer, or over any grate communicating with any such sewer or drain, any solid matter, mud, or refuse, except such as is contained in ordinary house sewage (*n*).

1319. A penalty is also imposed upon any person who causes or permits to fall, flow, enter, or to be carried into any sewer of the London County Council, or into any sewer or drain communicating therewith, any chemical or manufacturing or trade or other refuse (not being solid matter or refuse to which the provision above set out applies), or any waste steam, condensing water, heated water, or other liquid (such water or liquid being above 110 degrees Fahrenheit), which either alone or in combination with other matter or liquid in a sewer may cause a nuisance or involve danger or risk of injury to the health of persons entering the sewers, or be injurious to the structure or materials and works of the Council (*a*).

1320. Persons are liable to a penalty for wrongfully entering or attempting to enter the sewers of the London County Council (*b*) or borough councils (*c*).

Part III.—Highway Drains.

Common
law duty.

1321. Under the law before the Highway Act, 1835 (*d*), the occupier of land adjoining a highway was required to make and cleanse the ditches, drains and the like necessary for draining such highway (*e*). It is still at common law the duty of the

(*n*) London County Council (General Powers) Act, 1894 (57 & 58 Vict. c. cxxii.), s. 8. The penalty is a sum not exceeding £20 and £5 daily for a continuing offence, and is only recoverable by the County Council. There is also a proviso protecting the City and borough councils from penalties for washing by flushing with water the mud and sewage off the streets into the sewers, provided the street has been previously properly swept and cleaned so far as reasonably practicable to remove solid matter, mud and refuse (*ibid.*).

(*a*) *Ibid.*, s. 9. The penalty is the same as in *ibid.*, s. 8 (see note (*n*), *supra*), and can only be recovered by the County Council, subject to certain conditions precedent (London County Council (General Powers) Act, 1894 (57 & 58 Vict. c. cxxii.), s. 9). There are saving clauses, as regards certain railways and common breweries, and as regards borough councils in respect of snow (*ibid.*, ss. 11—15). The County Council may also prohibit by order the matters referred to in the text, *supra*, being sent into the sewer, from which order an appeal lies to a referee to be appointed by the Local Government Board (*ibid.*, s. 10).

(*b*) London County Council (General Powers) Act, 1890 (53 & 54 Vict. c. cxxliii.), s. 39. The penalty is one not exceeding £2, or in default imprisonment for not exceeding one month (*ibid.*).

(*c*) London County Council (General Powers) Act, 1893 (56 & 57 Vict. c. cxxi.), s. 23. The penalty is a like amount (*ibid.*).

(*d*) 5 & 6 Will. 4, c. 50; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 247.

(*e*) Stat. (1773) 13 Geo. 3, c. 78, s. 8; Year Book 8 Hen. 7, 5; 13 Co.

occupier or owner of land adjoining a highway to cleanse and scour his own ditches so as to prevent nuisances or obstruction to passengers on the highway (*f*), but not to provide or keep ditches or other means of draining the road.

1322. Highway authorities (*g*) have now power to make, scour, cleanse, and keep open all ditches, gutters, drains, or water-courses (*h*), and to make and lay such trunks, tunnels, flats, or bridges as they think necessary in or through any lands or grounds adjoining or lying near to any highway (*i*), upon paying the owner or occupier of such lands or grounds, provided they are not waste or common, for the damages which he thereby sustains (*k*). It is not necessary to tender satisfaction for such damages before entry on such lands or grounds (*l*). If any owner, occupier, or other person alters, obstructs, or interferes with any of the above works after they have been made by or taken under the charge of the highway authority and without its consent, he becomes liable to reimburse all charges and expenses occasioned by reinstating and making good the work, and to forfeit a sum not exceeding three times the amount of such charges and expenses (*m*).

Powers of
highway
authorities.

Rep. 33; *Woodward v. Cotton* (1834), 1 Cr. M. & R. 44. When highways were not fenced so that persons could deviate on to the adjoining land, the duty to repair lay upon the inhabitants, but, if a person enclosed the highway, it became his duty to prevent it from being foundrous; see 1 Roll. Abr., fol. 390; title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 91.

(*f*) See 1 Hawk. P. C., c. 76, s. 5; title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 113.

(*g*) As to such authorities, see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 24 *et seq.*; and, as to their powers and duties generally, see *ibid.*, pp. 101 *et seq.*

(*h*) A dumbwell or cesspool into which the water from a highway has been led by pipes is not a drain or watercourse, but a receptacle, and cannot be cleansed or used by the highway authority under this provision (*Croft v. Rickmansworth Highway Board* (1888), 39 Ch. D. 272, C. A.). Similarly, an authority has no right under the above provision to discharge the contents of a ditch into a pond of an adjoining owner (*Croysdale v. Sunbury-on-Thames Urban Council*, [1898] 2 Ch. 515). If pipes from the highway discharge the water on to the adjoining land, although there is no drain or ditch there, a legal origin will be presumed after long user (*A.-G. v. Copeland*, [1902] 1 K. B. 690, C. A.; compare *King's County County Council v. Kennedy*, [1910] 2 I. R. 544; title EASEMENTS AND PROFITS A PRENDRE, Vol. XI., p. 315; and see, generally, *ibid.*, pp. 256 *et seq.*).

(*i*) The necessity for making the sewer being ascertained as a matter of fact, it is for the authority to exercise its judgment as to the direction in which it should be made through the adjoining land, and so long as the authority exercises an honest discretion, without misconduct or negligence, it is not liable to have its judgment overruled in a court of law (*Derby (Earl) v. Bury Improvement Commissioners* (1869), L. R. 4 Exch. 222, Ex. Ch.; and see *ibid.*, at p. 225).

(*k*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 67. The damages are settled and paid in such manner as the damages for getting materials in enclosed lands or grounds are directed by *ibid.*, s. 54, to be settled and paid, that is, by justices; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 109 *et seq.*

(*l*) *Peters v. Otarson* (1844), 7 Man. & G. 548; *Lister v. Lobley* (1837), 7 Ad. & El. 124; compare *Boyfield v. Porter* (1811), 13 East, 200.

(*m*) Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 68. The amount is recoverable under *ibid.*, s. 103, before justices; see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 170; compare *Rhodes v. Thomas*

PART III.

**Highway
Drains.**

Street drains
in urban
districts.

Highway
drains in rural
districts.

Main road
drains.

Highway
drain
becoming a
nuisance.

1323. The streets in urban districts, which were or have become repairable by the inhabitants at large, and all things provided for the purposes thereof, including the street drains and sewers, are vested in the urban authorities by the Public Health Act, 1875 (*n*).

Ordinary highways in rural districts were at the date of the passing of that Act under the control of highway authorities, and the highway drains and sewers remained vested in them. By virtue of the Local Government Act, 1894 (*o*), rural district councils became the successors of the highway authorities with control of the highways, and the powers of highway authorities were transferred to them, but highway drains did not by reason of such transfer become sewers for sanitary purposes (*p*).

Main roads are under the control of the county councils (*q*). Where a main road vests in a county council, all drains belonging thereto vest in the council, and, where any sewer or other drain is used for any purpose in connexion with the drainage of any main road, the county council has the right of using such sewer or drain for such purpose (*r*).

1324. Where a nuisance arises from sewage being negligently allowed to remain in a highway drain, the sanitary authority is not liable in respect thereof, unless such drain has become vested in the authority as a sewer under the Public Health Act, 1875 (*s*).

(1867), 31 J. P. 117 (a case under the Turnpike Roads Act, 1822 (3 Geo. 4, c. 126), s. 118). If a surveyor in removing an obstruction under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 69, injures the property of the adjoining owner, he cannot be convicted of causing wilful and malicious injury under the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 52, so long as he acts *bonâ fide* (*Denny v. Thwaites* (1876), 2 Ex. D. 21).

(*n*) 38 & 39 Vict. c. 55, ss. 4, 13, 149; and see the definition of "sewer," p. 722, *ante*.

(*o*) 56 & 57 Vict. c. 73, s. 25.

(*p*) *Williamson v. Durham Rural District Council*, [1906] 2 K. B. 65, as reported 70 J. P. 352; *Irving v. Carlisle Rural District Council* (1907), 71 J. P. 212; and see p. 722, *ante*.

(*q*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (1); and see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., pp. 24, 57.

(*r*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (6); see title HIGHWAYS, STREETS, AND BRIDGES, Vol. XVI., p. 57. Differences between a county council and a sanitary authority with regard to the authority in which a drain is vested, or to the use of any sewer or drain, may be referred to arbitration, if either council or authority so requires, in manner provided for in the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (6); and, as to arbitration, see *ibid.*, s. 62 (2), (3); see title LOCAL GOVERNMENT, Vol. XIX., p. 357. "Belonging to" a main road probably means appurtenant to or an appendage of a main road (*Rickarby v. New Forest Rural District Council* (1910), 74 J. P. 441, *per* WARRINGTON, J., at p. 443).

(*s*) 38 & 39 Vict. c. 55. See *Williamson v. Durham Rural District Council*, *supra*; *Irving v. Carlisle Rural District Council*, *supra*; *Rickarby v. New Forest Rural District Council*, *supra*; *Wilkinson v. Llandaff and Dinas Powis Rural Council*, [1903] 2 Ch. 605, C. A. (where the point as to the vesting of the drain was not taken); *Kirkheaton Local Board v. Beaumont* (1888), 52 J. P. 68; *Boome v. Bromley Rural District Council* (1905), 27 Municipal Corporations Chronicle, 481; and see Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (1) (f); title LOCAL GOVERNMENT, Vol. XIX., p. 248. An owner causing a nuisance in a highway drain may be liable to cleanse the same whether it has become a sewer or not (*Wincanton Rural Council v. Parsons*, [1905] 2 K. B. 34).

Part IV.—Sewers under Commissioners of Sewers.

SECT. 1.—*Introductory.*

SECT. 1.

Introductory.

1325. For the purpose of draining the land, protecting low-lying lands from the sea, repairing embankments, and removing obstructions, commissions were issued from very early times under the prerogative of the Crown and under various Acts of Parliament (*t*). In the reign of Henry VIII. a general Act (*a*) was passed, which is the basis of the present law relating to Commissioners of Sewers. The scope of this Act has been extended and its provisions amended by various subsequent Acts (*b*), the last and most important of which is the Land Drainage Act, 1861 (*c*). In a large number of cases, however, districts have been placed under the authority of special bodies under private and local Acts, and these Acts are not affected by the general Acts (*d*). The more modern Acts do not affect the Metropolis (*e*).

General legislation; not affecting the Metropolis.

1326. Various bodies of Commissioners of Sewers existed in what is now the Metropolis. A general commission for the Metropolis was issued on the 1st January, 1849 (*f*). The powers of these Commissioners were determined by statute (*g*), and the boards and vestries thereby constituted became the general sewer authorities (*h*). In 1879, however, it became necessary to make special provisions for the protection of lands from inundations of the river Thames and for the maintenance of the embankments, and a local Act was passed (*i*). The powers of administering this Act are vested in the London County Council, which can require the Common Council of the City, the metropolitan borough councils, and owners of premises to execute and maintain the necessary works (*k*).

Legislation affecting the Metropolis.

(*t*) The early history of sewers under Commissioners of Sewers may be found in Callis, Reading upon the Statute of Sewers.

(*a*) Stat. (1531) 23 Hen. 8, c. 5; compare title RATES AND RATING, Vol. XXIV., p. 102.

(*b*) See p. 774, *post*.

(*c*) 24 & 25 Vict. c. 133. For the provisions of the Land Drainage Act, 1845 (8 & 9 Vict. c. 56), see title LAND IMPROVEMENT, Vol. XVIII., pp. 301 *et seq*.

(*d*) See pp. 788, 789, *post*. On the interpretation of such an Act, see *Galloworthy v. Selby Dam Drainage Commissioners*, [1892] 1 Q. B. 348, C. A.

(*e*) See Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 62; Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 2.

(*f*) Under the Metropolitan Sewers Act, 1848 (11 & 12 Vict. c. 112) (now repealed).

(*g*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 145—148; see note (*f*), p. 725, *ante*.

(*h*) A sewer as defined (see p. 725, *ante*) includes an embankment; see note (*g*), p. 728, *ante*.

(*i*) Metropolis Management (Thames River Prevention of Floods) Amendment Act, 1879 (42 & 43 Vict. c. cxcviii.).

(*k*) *Ibid.*, s. 6. The rights of various Commissioners of Sewers and of the London County Council are expressly exempted from interference by the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxviii.),

SECT. 2.

Issue of
Commission.

Issue of
Commission
and juris-
diction.

SECT. 2.—*Issue of Commission.*

1327. Commissions of Sewers may be issued by the Sovereign in virtue of the prerogative (*l*), or under the provisions of the statutes relating to sewers and land drainage (*m*). Under the Land Drainage Act, 1861 (*n*), and subsequent legislation (*o*), the King, on the recommendation of the Board of Agriculture and Fisheries (*p*), can direct Commissions of Sewers into all parts of England and assign the jurisdiction of such Commissions. The limits of a Commission may include an area to which a Commission may not have been previously assigned, or any area either wholly or partially within the limits of an existing Commission. But no alteration affecting the jurisdiction of any Commissioners of Sewers may be made without the consent of a special meeting of such Commissioners (*q*).

Procedure.

1328. The procedure to be followed for the purpose of obtaining the recommendation of the Board of Agriculture and Fisheries to the grant of a Commission of Sewers may be summarised thus:—
(1) A petition must be presented, signed by the proprietors (*r*) of

ss. 220—224. That Act now applies to the Port of London Authority within the limits of the Port (Port of London Act, 1908 (8 Edw. 7, c. 68), s. 7; see title **WATERS AND WATERCOURSES**. See also title **PUBLIC HEALTH AND LOCAL ADMINISTRATION**, Vol. XXIII., pp. 365, 366.

(*l*) Callis, Reading upon the Statute of Sewers, pp. 24, 25.

(*m*) Drainage Boards may now be constituted for districts instead of Commissions being issued; see pp. 788, 789, *post*. The Acts at present in force relating to Commissions of Sewers are stats. (1531) 23 Hen. 8, c. 5; (1533—4) 25 Hen. 8, c. 10; (1549—50) 3 & 4 Edw. 6, c. 8; (1571) 13 Eliz. c. 9; Commissions of Sewers Act, 1708 (7 Anne, c. 33); Criminal Law Act, 1826 (7 Geo. 4, c. 64); Sewers Act, 1833 (3 & 4 Will. 4, c. 22); Sewers Act, 1841 (4 & 5 Vict. c. 45); Sewers Act, 1849 (12 & 13 Vict. c. 50); Land Drainage Act, 1861 (24 & 25 Vict. c. 133). These statutes do not interfere with districts subject to the control of special bodies under local and private Acts or by custom, nor do they affect the Metropolis; see p. 773, *ante*. Instances of such special exemptions are Romney Marsh, Bedford Level (see stat. (1663) 15 Car. 2, c. 17), Nene Outfall, Sandwich Haven (see stat. (1776) 16 Geo. 3, c. 62; Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 20). For instances of a local Act, see Somersetshire Drainage Act, 1877 (40 Vict. c. xxxvi.); see also *R. v. Bradford Navigation Co.* (1865), 6 B. & S. 631; *A.-G. v. Bradford Canal (Proprietors)* (1866), L. R. 2 Eq. 71; *Goodden v. Coles* (1888), 59 L. T. 309; *Re Brighton Sewers Act* (1882), 9 Q. B. D. 723. The form of Commission contained in stat. (1531) 23 Hen. 8, c. 5, is the basis of the present writ of *potestatem dedimus*, under which Commissions are now issued; compare title **RATES AND RATING**, Vol. XXIV., p. 102.

(*n*) 24 & 25 Vict. c. 133.

(*o*) *Ibid.*, s. 4. This Act does not extend to Scotland or Ireland, or to any part of the Metropolis as defined by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120). It applies to Commissions existing prior to its passage into law (Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 2).

(*p*) Formerly the Inclosure Commissioners; see title **AGRICULTURE**, Vol. I., p. 297.

(*q*) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 4; see, further, title **COURTS**, Vol. IX., pp. 220, 221; and see note (*r*), p. 778, *post*.

(*r*) For the definition of "proprietors," see Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 6; as to infant, lunatic or married women proprietors, see *ibid.*, s. 7; as to the case where the proprietor is a corporation or company, see *ibid.*, s. 8; and, as to joint proprietors, see *ibid.*, s. 9.

SECT. 2.
Issue of
Commission.

one-tenth part of the land within the proposed boundaries of the area to be comprised within the limits of the Commission. The petition must state the proposed boundaries of the area to be comprised within the limits of the Commission, and it must be supported by such evidence as the Board may require (s). The petitioners must give security for costs (t).

(2) The Board may, if it thinks fit, send an inspector to hold an inquiry (u).

(3) If the proprietors of one-third of the land within the proposed boundaries express their dissent in writing, the petition must be dismissed (a).

The issue of a Commission of Sewers for any area is conclusive evidence that the requirements of the Act with respect to the issue of such Commission have been complied with (b).

Effect of
issue.

SECT. 3.—Qualification and Oath of Commissioners.

1329. To be qualified or capable of becoming or acting as Commissioner in the execution of any Commission of Sewers, a person must be (c) either:—(1) In his own right or in right of his wife in the actual possession or receipt for life or for a larger estate of the rents and profits of lands situated in the county in which he shall act as a Commissioner or in any adjoining county. The land may be of freehold or copyhold tenure, or held for a term of not less than sixty years, absolute or determinable with a life or lives, provided it is of the clear yearly value of £100; or it may be held for a term of years originally granted for not less than twenty-one years, and of which ten years at the least shall then be unexpired, provided it is of the clear yearly value of £200; or (2) the heir apparent of a person possessed of freehold or copyhold lands situated in such county as aforesaid, or in any adjoining county, of the clear yearly value of £200; or (3) the duly appointed agent (d) of a body politic or corporate, or of a person not being present and acting as a Commissioner, provided such body or person, in his own right or in right of his wife, is in possession of lands of freehold or copyhold tenure actually taxed under the Commission and of the clear yearly value of £300. Such agent, before he acts,

Qualification
of Commis-
sioners.

(s) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 5.

(t) As to the costs etc. of the petition and inquiry, see *ibid.*, s. 12.

(u) *Ibid.*, s. 5 (3). Before commencing such inquiry, the inspector must give the prescribed notice to proprietors and must fix a time within which dissenting proprietors must signify their dissent (*ibid.*, s. 5 (4)). For the powers of inspectors, see *ibid.*, s. 11.

(a) *Ibid.*, s. 5 (5). Where any portion of land comprised within the boundaries referred to in any petition appears to have no proprietor within the meaning of the Act or the proprietor cannot be found, the land so circumstanced must be excluded from the computation that may be made of the proportion borne by the dissenting proprietors of any area of land to the aggregate number of proprietors of such land (*ibid.*, s. 10).

(b) *Ibid.*, s. 13.

(c) Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 1.

(d) The agent of a body politic or corporate must be appointed by writing under the seal of such body. The agent of any other person must be appointed in writing. An agent is only qualified so long as he remains agent (*ibid.*).

SECT. 3.
Qualifica-
tion and
Oath of
Commis-
sioners.

Commis-
sioners
ex officio.

must deliver his written appointment to the clerk to the Commission or his deputy to be filed. If the Commission runs into more than one county, the qualification may be situated either partly in each or wholly in either county (*e*). A woman or an infant may be a Commissioner (*f*).

A mayor, bailiff, or other officer appointed or authorised to act as a Commissioner under any Commission of Sewers *ex officio* may, so long as he holds such office, act as a Commissioner without being so qualified (*g*). Such *ex officio* Commissioner must, however, before he acts, deliver a certificate under the hand of the town clerk or other legal officer of his corporation to the clerk to the Commission, certifying that he is thus authorised to act (*g*).

Oath of
Commis-
sioners.

1330. Before acting, Commissioners must take the two prescribed oaths or affirmations (*h*), but *ex officio* Commissioners need not be sworn (*g*).

Penalty for
acting while
unqualified.

Any person other than an *ex officio* Commissioner acting as a Commissioner without being qualified or after ceasing to be qualified is liable to a penalty of £100 for each time he wilfully so offends (*i*); but any act done by a person acting as a Commissioner without being qualified is as valid as if he had been qualified (*j*).

Vacancies in
Commission.

1331. The King may, by writing under the Sign Manual, fill up any vacancies arising in the Commissioners of any Commission (*k*); but no person can be compelled to act as a Commissioner unless he lives within the county whereof he is appointed Commissioner (*l*).

SECT. 4.—Meetings of Commissioners and Courts of Sewers.

Meetings
of Commis-

1332. The meetings of Commissioners are courts of record (*m*), called courts of sewers (*n*). The Commissioners can meet at such times and places within their jurisdiction or not more than ten miles

(*e*) Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 1.

(*f*) Callis, Reading upon the Statute of Sewers, p. 253.

(*g*) Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 5. As to the qualifications required of Commissioners, see pp. 775, *ante*.

(*h*) Stat. (1531) 23 Hen. 8, c. 5, s. 2; Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 3; for the form of oath, see *ibid*. The oaths must be taken before the Lord Chancellor or the person named in the writ of *potestatem dedimus*. An affirmation may now be made by those objecting to be sworn (Oaths Act, 1888 (51 & 52 Vict. c. 46), s. 1).

(*i*) Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 4, which practically supercedes the penalties in stat. (1533—4) 23 Hen. 8, c. 5, s. 7; see title COURTS, Vol. IX., p. 220. Any person may sue for the penalty in the High Court. The burden of showing he is qualified and has taken the oath is placed on the person who has acted as Commissioner (Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 4).

(*j*) *Ibid*.

(*k*) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 14.

(*l*) Stat. (1533—4) 25 Hen. 8, c. 10, s. 1.

(*m*) Callis, Reading upon the Statute of Sewers, pp. 164—166; see title COURTS, Vol. IX., p. 221.

(*n*) A Court of Sewers is defined for the purpose of the Sewers Act, 1833 (3 & 4 Will. 4, c. 22), as every court, session, assemblage or meeting of any six or more Commissioners of Sewers (three whereof being of the quorum) named in any Commission of Sewers and acting in the execution thereof (*ibid*, s. 60). Three Commissioners now form a quorum; see p. 777, *post*. The term "Court of Sewers" is used to denote a meeting of Commissioners in the earlier Acts, but is not defined.

from some part of their district (o) as they may appoint. They may adjourn to meet at any such place and at such time as the majority of those present at any meeting appoints (p). If an insufficient number of Commissioners meets, or if a meeting is not duly adjourned, one or more of the Commissioners may by writing fix a time and place for the holding of the meeting by giving ten days' notice by advertisement in the local newspapers (p).

Special meetings may on emergencies be convened on short notice, provided the statutory requirements are carried out (q).

SECT. 4.
Meetings
of Commis-
sioners and
Courts of
Sewers.

1333. Three Commissioners constitute a quorum at any meeting or court of Commissioners of Sewers, except when improvements in existing works or the construction of new works are in question, in which case a quorum of six is necessary (r). Quorum.

A chairman must in the first place be appointed at every meeting (s). If any difference arises upon the choice of a chairman, he is chosen by a majority of the Commissioners present. If there is an equality of votes the Commissioner proposed whose name stands first in the Commission is chairman (a). The chairman has a casting vote in addition to his own vote (b). Chairman.

SECT. 5.—*Laws and Decrees of Courts of Sewers.*

1334. Any laws and decrees made by Commissioners remain in force, notwithstanding the expiration of the Commission (c). An order to be valid must be made by the majority of Commissioners present at a Court of Sewers, and a quorum must be present (d). If one of the Commissioners is personally interested in the making of an order, the order is invalid (e). The validity of a law, decree, or order made by a Court of Sewers may be called in question by proceedings for a writ of *certiorari* (f). Effect and
validity of
laws and
decrees.

SECT. 6.—*Officers of the Commissioners.*

1335. Commissioners of Sewers may appoint officers to carry out Appointment.

(o) Sewers Act, 1841 (4 & 5 Vict. c. 45), s. 11; see also Sewers Act, 1833 (3 & 4 Will. 4, c. 22), ss. 8, 45.

(p) Sewers Act, 1841 (4 & 5 Vict. c. 45), s. 12.

(q) Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 9.

(r) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 15; Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 8.

(s) Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 8.

(a) Sewers Act, 1841 (4 & 5 Vict. c. 45), s. 10.

(b) *Ibid.*

(c) Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 7. As to the powers of Commissioners to make laws, see title COURTS, Vol. IX., p. 221.

(d) See the text, *supra*; see also Sewers Act, 1841 (4 & 5 Vict. c. 45), s. 12. As to the effect of a Commissioner acting when not qualified, see p. 776, *ante*.

(e) *Fobbing Sewers Commissioners v. R.* (1886), 11 App. Cas. 449.

(f) *R. v. Inhabitants in Glamorganshire* (1700), 1 Ld. Raym. 580; see *Arthur v. Yorkshire Sewers Commissioners* (1724), 8 Mod. Rep. 331; *R. v. Sheffield Corporation* (1871), L. R. 6 Q. B. 652; *R. v. Tower Hamlets Sewers Commissioners* (1843), 5 Q. B. 357; *R. v. South Holland Drainage Committee Men* (1838), 8 Ad. & El. 429; *Birley v. Othorlton-upon-Medlock (Constables etc.)* (1841), 3 Beav. 499; and, as to *certiorari* generally, see title CROWN PRACTICE, Vol. X., pp. 155 *et seq.*

SECT. 6.
Officers of
the Commis-
sioners.

their various duties, and they may appoint officers for every separate and distinct level (*g*). The officers include clerks, surveyors, collectors, treasurers, expeditors and dykereeves (*h*). The clerk or treasurer, or the partner or clerk of either of them respectively, may not be appointed treasurer or clerk respectively, or deputy of either such treasurer or clerk respectively (*i*). The officials may be required to give security (*k*). The officials may be paid, as may also witnesses before courts of sewers, for their expenses, loss of time, and cost of preparing plans (*l*).

Duties of
officers.

1336. The clerk, treasurer, and other officers must render proper accounts when required (*m*). If an officer is discharged (*n*) he must deliver up any property belonging to the Commissioners of which he has possession (*o*). Constables and other peace officers within the limits of the jurisdiction of Commissioners must carry out the orders of the Commissioners (*p*).

SECT. 7.—*Works.*

SUB-SECT. 1.—*Works under the Jurisdiction of Commissioners.*

Execution
of works.

1337. The powers of Commissioners (*q*) acting within their jurisdiction (*r*) include the maintenance (*s*) and the improvement of

(*g*) Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 14; see also stat. (1531) 23 Hen. 8, c. 5.

(*h*) As to dykereeves and their qualifications, see Sewers Act, 1849 (12 & 13 Vict. c. 50), ss. 3—6. There is no prescribed mode of appointment or qualification for the other officials.

(*i*) Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 51. Any person acting both as clerk and treasurer or in any other way infringing this provision is liable to a penalty of £100 (*ibid.*).

(*k*) Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 50. The security is by bond to the clerk to the Commissioners. In case of forfeiture the Commissioners may sue on the bond in the name of the clerk indemnifying him against liability for costs (*ibid.*).

(*l*) Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 16. Gratuities to officers may not, however, be paid out of rates (*Ex parte Mellish* (1863), 8 L. T. 47; see also stat. (1531) 23 Hen. 8, c. 5, s. 8).

(*m*) Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 48. The accounts must be rendered within fourteen days after notice to do so, otherwise the officer is liable to distress. Under certain circumstances the officer may be committed by the Court of Sewers; see *ibid.*

(*n*) As to discharge of officers, see *Ex parte Richards* (1878), 3 Q. B. D. 368.

(*o*) Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 49. So must also the family of a deceased officer: If they fail to vacate it they can be ejected (*ibid.*).

(*p*) *Ibid.*, s. 52. As to the duties of constables generally, see title POLICE, Vol. XXII., pp. 461 *et seq.*

(*q*) Drainage Boards may exercise all the powers of Commissioners (Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 67); see p. 789, *post*.

(*r*) As to the jurisdiction of Commissioners, see titles COURTS, Vol. IX., p. 221; RATES AND RATING, Vol. XXIV., pp. 104 *et seq.* Commissioners having jurisdiction within a given area may, with the consent of Commissioners having jurisdiction in any adjoining area, execute works in such adjoining area on terms to be agreed (Land Drainage Act, 1861 (24 & 25 Vict. c. 133) s. 59); and see p. 774, *ante*.

(*s*) *I.e.*, the cleansing, repairing, or otherwise maintaining in a due state of efficiency any existing watercourse or outfall for water, or any existing wall or other defence against water (Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 16). "Watercourse" is defined by *ibid.*, s. 3, as including

SECT. 7.
Works.

existing works (a) and the construction of new works (b). Their statutory powers, however, do not enable them to compel any person to execute at his own expense any works which he would not otherwise have been compelled to execute (c); and full compensation must be made for all injury sustained by any person (d) by reason of the exercise by the Commissioners of the above powers (e). No work is a new work if it is in substitution for an old work so out of repair or inefficient as to make it expedient to construct a new work in its place (f).

The Commissioners cannot without the owner's (g) consent remove or otherwise interfere with any mill dam, weir, or other like obstruction, whereby the level of the water is raised for any milling or other purpose of profit, so as injuriously to affect the supply of water, until (1) their right to do so has been determined as provided by statute (h), and (2) compensation for the injury caused has been made to all parties entitled (i).

When owner's
consent
necessary.

all rivers, streams, drains, sewers and passages through which water flows. Under the earlier Acts the Commissioners' jurisdiction only extended to navigable streams, except within two miles of London (*Yeaw v. Holland* (1770), 2 Wm. Bl. 717). The Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 10, described generally the sewers and works which were under the jurisdiction of the Commissioners, but prohibited the exercise thereof over certain existing works of a private character without the consent of the owners. The wide powers under the Land Drainage Act, 1861 (24 & 25 Vict. c. 133), have superseded the limited powers under the earlier Acts. As to the power of depositing mud etc. without compensation under a local Act, see *Re Moulton and Middle Level Commissioners* (1907), 97 L. T. 391.

(a) *I.e.*, the deepening, widening, straightening or otherwise improving any existing watercourse or outfall for water, or removing mill dams, weirs, or other obstructions to watercourses or outfalls for water, or raising, widening, or otherwise altering any existing wall or other defence against water (Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 16). For provisions where local boundaries are affected by such work or by the exercise of any of the powers of Commissioners, see *ibid.*, s. 62.

(b) *I.e.*, the making of any new watercourse or new outfall for water, or the erecting of any new defence against water, the erecting of any machinery, or doing any act required for the drainage, necessary supply of water for cattle, warping, or irrigation of the area within the jurisdiction of the Commissioners (*ibid.*, s. 16); see also *Holt v. Rochdale Corporation* (1870), L. R. 10 Eq. 354 (decided under a local Act).

(c) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 16.

(d) "Person," where the context permits, includes any body of persons, corporate or unincorporate (*ibid.*, s. 3).

(e) *Ibid.*, s. 16. Mandamus will issue to compel the Commissioners to pay compensation (*R. v. Burslem Local Board* (1860), 1 E. & E. 1088, Ex. Ch.; *R. v. Essex Sewers Commissioners* (1823), 1 B. & C. 477; see the text, *infra*; and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 74).

(f) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 16.

(g) "Owner," except where otherwise defined for purposes of rating (see title RATES AND RATING, Vol. XXIV., p. 113), has the same meaning as in the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18) (Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 3); and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 15.

(h) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 17. The questions (*ibid.*, s. 18) (1) whether the proposed removal or interference is

(i) For note (i), see p. 780, *post*.

SECT. 7.

Works.

Notice and
publication of
list of pro-
prietors.

Before commencing any improvements in existing works (*j*), or any new works (*k*), where the cost will be more than £1,000, certain formalities as to notice and publication of a list of proprietors affected must be observed (*l*). Provision is made for the correction of the list, and the Commissioners must hear applications and make such alterations as they see fit, their decision being final. At the end of two months or such further period as the Commissioners may fix for the purpose of hearing applications, the list as settled by the Commissioners becomes conclusive evidence of proprietorship for the purpose of ascertaining the proportion of dissenting proprietors (*m*).

SUB-SECT. 2.—*Restrictions as to Works.*

Restrictions
on works
by Commis-
sioners.

1338. Commissioners cannot (*n*) without consent (1) interfere with any sewers or other works made or used for the drainage and improvement of land under any local or private Act, so as injuriously to affect the same (*o*); (2) interfere with any river, canal, dock, harbour, lock, reservoir or basin, or the supply of water thereto, so as injuriously to affect the navigation thereon or the use or maintenance thereof, or interfere with any towing path so as to interrupt the traffic, where any corporation, company, conservators or individual is or are entitled under any Act to use such river etc. or to receive tolls or dues in respect of such use (*p*); (3) interfere with the works or supply of water of any body or

necessary for the effectual drainage of the land within the jurisdiction of the Commissioners; (2) whether it will cause any injury to the owner; and (3) if so, whether such injury can be compensated for in money, must be decided, if the owner consents, by two or more justices at petty sessions, but if he does not consent, by arbitration. If the removal is not necessary, or if the injury cannot be compensated for in money, the Commissioners may not do the work, otherwise they can do it upon paying compensation (Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 19).

(i) The Commissioners must take the same steps with respect to compensating the parties interested as are required under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), to be taken by purchasers in cases where they are authorised to purchase or take lands by special Act (Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 20); see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 7, 11, 174, 175.

(j) For the meaning of "improvements of existing works," see note (*a*), p. 779, *ante*.

(k) For meaning of "new works," see note (*b*), p. 779, *ante*.

(l) See title RATES AND RATING, Vol. XXIV., p. 112. Notices required to be given by the Commissioners are sufficiently executed if signed by their clerk. Every notice purporting to be so signed is evidence before any court without further proof (Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 42). Notice duly served (see *ibid.*, ss. 44—46) on an owner or proprietor is binding on all persons claiming under him, as if served on them (*ibid.*, s. 43). If the Commissioners cannot discover the proprietor of any lands, they must give notice to that effect in the list (*ibid.*, s. 32).

(m) *Ibid.*, s. 30. In reckoning the proportion of dissenting proprietors to the aggregate proprietors, land to which no one proves his title must be totally excluded (*ibid.*, s. 32). As to the effect of dissent by proprietors, see title RATES AND RATING, Vol. XXIV., p. 113.

(n) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 54.

(o) See, further, note (*m*), p. 774, *ante*.

(p) See, further, titles RAILWAYS AND CANALS, Vol. XXIII., pp. 779 *et seq.*; WATERS AND WATERCOURSES.

persons supplying water to any place so as injuriously to affect the same (g); or (4) execute works in, through, or under any wharves, quays, docks, harbours or basins belonging to any proprietors of any inland navigation constituted by Act of Parliament, or for the use of which they are entitled by any Act to demand tolls (r); or (5) divert any river so as to injure or to diminish the supply of water to any harbour (s). Rivers, canals, or inland navigation or works connected therewith, exempted under any local or private Act, are not within the control of the Commissioners (t).

SECT. 7.
Works.

SUB-SECT. 3.—*Power to Divert Works of Commissioners.*

1339. Canal companies and similar bodies or individuals authorised by Act of Parliament to navigate on or use any river, canal, dock, harbour, or basin, or to demand tolls in respect of such navigation or use, may, at their own expense, divert sewers, drains, culverts and pipes constructed by Commissioners and passing under or interfering with such river etc. on substituting others equally effectual (u).

Diversion
of works.

SUB-SECT. 4.—*Fouling of Watercourses.*

1340. No person may without the consent of the Commissioners foul any watercourse within their jurisdiction (a). This does not apply, however, to a person having a legal right to foul an existing watercourse (b).

Fouling
watercourses.

SUB-SECT. 5.—*Removal of Soil and Weeds.*

1341. The occupiers of land adjoining any river, sewer, or watercourse subject to the jurisdiction of Commissioners may, subject to certain restrictions, remove for their own use gravel, soil, mud or earth, or rushes, flags or other weeds, deposited on the banks by the order of an officer of sewers (c). If any occupier does not remove such matter within the prescribed times, an officer of sewers may enter on the land of such occupier in the daytime and remove it (d). The Commissioners must cause it to be removed within six weeks from the date when any owner or occupier requires them to do so (d).

Removal of
soil and
weeds.

SECT. 8.—*Purchase of Lands.*

1342. Commissioners may, subject to the conditions mentioned below, purchase such lands and easements relating to lands as they

Power to
buy land.

(g) See, further, title WATER SUPPLY.

(r) See titles RAILWAYS AND CANALS, Vol. XXIII., pp. 779 *et seq.*; WATERS AND WATERCOURSES.

(s) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 55; see, further, title WATERS AND WATERCOURSES.

(t) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 57.

(u) *Ibid.*, s. 56.

(a) *Ibid.*, s. 58; and see *Somerset Drainage Commissioners v. Bridgwater Corporation* (1899), 81 L. T. 729, H. L. (a case decided under a private Act).

(b) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 58. As to the fouling of watercourses generally, see title WATERS AND WATERCOURSES.

(c) Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 22. Gravel, soil, mud or earth may be removed by the occupier within six months; rushes, flags, or other weeds within six weeks. The removal must be for at least 10 feet from the land side of the banks (*ibid.*).

(d) *Ibid.*, s. 23.

SECT. 8.
Purchase
of Lands.

Procedure.

may require for the purpose of carrying out their duties (*e*). Persons under disability are empowered to sell and convey (*f*).

Commissioners cannot, however, in virtue of the Land Drainage Act, 1861 (*g*), purchase any land for new works (*h*) otherwise than by agreement until they have obtained the sanction of Parliament in the prescribed manner (*i*). The procedure to be adopted in such a case may be summarised as follows:—

(1) The Commissioners must advertise in the *London Gazette* and a local newspaper describing the nature of the works to be undertaken and the quantity of land required and naming a place where the plan of the work can be inspected, and must serve notices on the owners, lessees, and occupiers of the land (*j*).

(2) A petition must then be presented to the Board of Agriculture and Fisheries (*k*) giving particulars and such evidence as may be required (*l*).

(3) The Board, if it thinks fit, may send an inspector to make an inquiry, at which all persons affected have an opportunity of being heard (*m*).

(4) The Board, if satisfied, may by provisional order empower the Commissioners to acquire the land, and must then take the proper steps to get the provisional order confirmed by Parliament. When so confirmed, it is deemed a public general Act, but until then is of no validity whatever (*n*). The costs incurred by the Board are payable by the Commissioners out of the rates leviable by them (*o*).

(*e*) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 28; see also Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 24. This latter provision, which does not apply to land required for new works, is practically superseded by the provisions in the Land Drainage Act, 1861 (24 & 25 Vict. c. 133), incorporating, as it does, the Lands Clauses Acts. It is, however, still in force, for the Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 60, provides that the powers contained in that Act are in addition to those already existing. If the procedure under the Sewers Act, 1833 (3 & 4 Will. 4, c. 22), is adopted, the provisions of *ibid.*, ss. 28—40, should be observed, dealing with the filing of agreements and orders in relation to land purchased, the costs of jury and witnesses, application of purchase-money, levying of purchase-money, sale of lands not wanted etc. As to the Lands Clauses Acts and compulsory purchase of land, generally, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 1 *et seq.*

(*f*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 7; see also Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 24; title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 57. As to the sale by persons under disability generally, see title SALE OF LAND, pp. 308 *et seq.*, *ante*.

(*g*) 24 & 25 Vict. c. 133.

(*h*) For definition of "new works," see note (*b*), p. 779, *ante*. The Commissioners can purchase land compulsorily for the widening etc. of existing works either under the Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 28, incorporating the Lands Clauses Acts, or under the Sewers Act, 1833 (3 & 4 Will. 4, c. 22), ss. 24—27; see note (*e*), *supra*.

(*i*) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 21.

(*j*) *Ibid.*, s. 22.

(*k*) See title AGRICULTURE, Vol. I., p. 297.

(*l*) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 23.

(*m*) *Ibid.*, ss. 24, 25.

(*n*) *Ibid.*, s. 26.

(*o*) *Ibid.*, s. 27.

SECT. 8.
Purchase
of Lands.

Incorporation of Lands
Clauses Acts.
Vesting of
property.

1343. The Lands Clauses Acts (*p*), with certain exceptions (*q*), are incorporated (*r*) in the first part of the Land Drainage Act, 1861 (*s*). For the purpose of construction, the first part of the Land Drainage Act, 1861 (*s*), is deemed the special Act and the Commissioners are deemed the promoters of the undertaking (*t*).

1344. The property in lands purchased by, and works, buildings, and goods which have been purchased, constructed or made, or which are within the view, cognizance or management of, the Commissioners, are vested in them (*u*).

SECT. 9.—*Liability to Repair.*

1345. Independently of the ordinary liability to contribute to the cost of works through the rates, landowners are often liable to repair or contribute to the repair of sea walls and other defences (*a*). This liability, if disputed, may be settled by a Court of Sewers with or without presentment of jury, subject to appeal to a court of quarter sessions (*b*). If the person liable does not do the repairs, the Commissioners may do them and charge such person with the cost (*c*). The obligation to repair may arise by

Liability to
repair sea
walls and
defences.

(*p*) See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 12 *et seq.*

(*q*) The following provisions of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), are not incorporated, namely, ss. 16 (capital to be subscribed before compulsory powers are put in force), 17 (certificate of justices as evidence that capital subscribed), 84—91 (provisions relating to entry upon lands by promoters of undertaking), 123 (limit of time for compulsory purchase of land), the provisions relating to the manner of serving notices, and the provisions relating to access to the special Act (Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 128 (1)).

(*r*) *Ibid.*, s. 28.

(*s*) 24 & 25 Vict. c. 133.

(*t*) *Ibid.*, s. 28 (2).

(*u*) Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 47, as interpreted in *Stracey v. Nelson* (1844), 12 M. & W. 535; see also *Crossman v. Bristol and South Wales Union Rail. Co.* (1863), 1 Hem. & M. 531; *Newcastle (Duke) v. Clark* (1818), 2 Moore (C. P.), 666; *West Norfolk Farmers' Manure Co. v. Archdale* (1886), 2 T. L. R. 406, C. A.; and see *Smith v. Bell* (1842), 2 Ry. & Can. Cas. 877 (decided under a local Act). As to injury to sea walls and other works for the prevention of floods, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 784.

(*a*) *Callis*, Reading upon the Statute of Sewers, pp. 115—122; and, as to general duty of the Crown to protect the coast, see *A.-G. v. Tomline* (1880), 14 Ch. D. 58, C. A. Neither the Sewers Act, 1833 (3 & 4 Will. 4, c. 22), nor the Land Drainage Act, 1861 (24 & 25 Vict. c. 133), affects these liabilities to repair, except that the latter Act provides that they may be commuted; see Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 15; Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 37 (which provides that the rates to be levied under the Act are to be made only for the purposes to which such liability does not extend); see also stat. (1531) 23 Hen. 8, c. 5, s. 3. The money expended in land drainage is a "tenant right" (*Ward v. Moss* (1867), 16 L. T. 91); and see title AGRICULTURE, Vol. I., pp. 261, 294.

(*b*) See p. 786, *post*.

(*c*) Stat. (1531) 23 Hen. 8, c. 5, s. 3; Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 15. The latter provision requires seven days' notice, but works may be done under the former without notice; see *R. v. Baker* (1867), L. R. 2 Q. B. 621. A mortgagor, not in actual possession, but in receipt of rents and profits of land charged with the repair of a sea bank, is liable for default of reparation (*ibid.*).

SECT. 9.
Liability to
Repair.

Commuta-
tion of
liability.

prescription (*d*), custom (*e*), *ratione tenuræ* (*f*), frontage (*g*), covenant (*h*), or grant.

1346. The Commissioners may, with the consent of the Board of Agriculture and Fisheries (*i*), commute the obligation to repair (*j*). Such commutation may be by way of gross or annual charge on the lands of the person in respect of which the original obligation arose (*k*). The charge is recoverable by the Commissioners in the same manner as tithe rentcharge, and has priority over all incumbrances (*l*). The record of the charge must be deposited in the office of the clerk of the peace (*m*).

SECT. 10.—*Finance.*

§ SUB-SECT. 1.—*Rates.*

Rates.

1347. Rates (*n*) may be levied by Commissioners of Sewers for defraying all costs, charges and expenses incurred by them under the authority of any Act of Parliament, law or custom (*o*).

General
sewers tax.

1348. For certain purposes (*p*) a Court of Sewers may levy a general sewers tax or rate in gross in each parish, township or place on lands within the court's jurisdiction, apportioned as a general sewers rate among the occupiers of lands or individuals liable (*q*).

(*d*) See *Hudson v. Tabor* (1876), 2 Q. B. D. 290, C. A.; *Fobbing Sewers Commissioners v. R.* (1886), 11 App. Cas. 449

(*e*) As to custom generally, see title CUSTOM AND USAGES, Vol. X, pp. 238 *et seq.*

(*f*) Evidence of reputation may be given (*R. v. Bedfordshire (Inhabitants)* (1855), 4 E. & B. 535); see also *R. v. Baker* (1867), L. R. 2 Q. B. 621; *Bighin v. Wylie* (1867), 36 L. J. (Q. B.) 307 (decided under a local Act).

(*g*) See *Hudson v. Tabor*, *supra*.

(*h*) See *Morland v. Cook* (1868), L. R. 6 Eq. 252.

(*i*) See title AGRICULTURE, Vol. I., p. 297

(*j*) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 34, whether the obligation has arisen by reason of tenure, custom, prescription, or otherwise.

(*k*) *Ibid.*, s. 35; and see title RENTCHARGES AND ANNUITIES, Vol. XXIV., p. 477; compare title LAND IMPROVEMENT, Vol. XVIII., p. 301.

(*l*) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 35; and see title ECCLESIASTICAL LAW, Vol. XI., pp. 748, 749.

(*m*) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 36. *I.e.*, of the county in which the district or the greater part of the district within the jurisdiction of the Commissioners is situate. The record, or a certified copy, is evidence in all legal proceedings (*ibid.*).

(*n*) See title RATES AND RATING, Vol. XXIV., p. 103.

(*o*) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 38; see also *ibid.*, s. 39; stat. (1549—50) 3 & 4 Edw. 6, c. 8, s. 2; Commissions of Sewers Act, 1708 (7 Anne, c. 33); Sewers Act, 1833 (3 & 4 Will. 4, c. 22), ss. 14, 18; Sewers Act, 1841 (4 & 5 Vict. c. 45), s. 8; Sewers Act, 1849 (12 & 13 Vict. c. 50), ss. 2, 7; and, as to sewers rates generally, see title RATES AND RATING, Vol. XXIV., pp. 101 *et seq.* As to the persons rateable, see *ibid.*, pp. 106, 107, 113, 114; *Hudson v. Tabor*, *supra*, per COCKBURN, C.J. As to the basis of assessment, see title RATES AND RATING, Vol. XXIV., pp. 107, 114; *Newcastle-upon-Tyne Corporation v. Houseman* (1898), 63 J. P. 85.

(*p*) The cost of opposing a private Bill affecting the Commissioners and their work is within the category; see *R. v. Norfolk Sewers Commissioners* (1850), 15 Q. B. 549; and see title RATES AND RATING, Vol. XXIV., p. 104.

(*q*) Sewers Act, 1841 (4 & 5 Vict. c. 45), s. 1; see title RATES AND

SUB-SECT. 2.—*Borrowing Powers.*

SECT. 10.

Finance.

Borrowing
powers.

1349. For the purpose of defraying expenses properly incurred by them, the Commissioners may, with the sanction of the Board of Agriculture and Fisheries (*r*), borrow money on the credit of the rates authorised to be levied by them (*s*). Repayment of capital and interest may be secured by mortgage of the rates (*t*), and may, by agreement with the mortgagee, be made by equal instalments. The repayment may be spread over such period not exceeding thirty years as the Commissioners with the consent of the Board of Agriculture and Fisheries (*r*) may determine (*u*).

The clauses of the Commissioners Clauses Act, 1847 (*a*), with respect to mortgages are made applicable (*b*). Any mortgagee or assignee may enforce payment of his principal and interest by appointment of a receiver (*c*).

SECT. 11.—*Proceedings before Commissioners.*SUB-SECT. 1.—*Presentment by Jury and Procedure in lieu thereof*

1350. Before 1861 Commissioners could not make any order in respect of the execution of any work or the levying of any rate, the liability of any person to repair or the doing of anything, Presentment.

RATING, Vol. XXIV., p. 105; and, as to the nature of this rate or tax, see titles LANDLORD AND TENANT, Vol. XVIII., p. 490; RATES AND RATING, Vol. XXIV., p. 106.

(*r*) See title AGRICULTURE, Vol. I., p. 297.

(*s*) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 40; see title RATES AND RATING, Vol. XXIV., p. 104. It seems that Commissioners can get grants or loans from the Treasury, on the recommendation of the Development Commissioners, for the purpose of the reclamation and drainage of lands and the construction and improvement of inland navigations; see Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), s. 1; title REVENUE, Vol. XXIV., pp. 762, 763. The Commissioners may also make use of the borrowing powers provided in the Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 41, and in the Sewers Act, 1841 (4 & 5 Vict. c. 45), s. 4. Under the Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 41, they can only borrow for certain purposes specified *ibid.*, and, instead of charging the rates, they charge the lands benefited by the works undertaken with the borrowed money, and they must get the consent of the owners of three-fourths of the land. Under the Sewers Act, 1841 (4 & 5 Vict. c. 45), s. 4, they can borrow for their general purposes and charge the rates and not the land. The Public Works Loan Commissioners can lend money for main drainage (Public Works Loans Act, 1875 (38 & 39 Vict. c. 89), s. 9, Sched. I., extended to underground drainage by the Public Works Loans Act, 1894 (57 & 58 Vict. c. 11), s. 3). Commissioners of Sewers also appear to be "local authorities" within the meaning of the Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 34; see title MONEY AND MONEY-LENDING, Vol. XXI., pp. 58 *et seq.*

(*t*) If the money is borrowed under the earlier Acts, transferable securities in the prescribed form are given to the lenders; see Sewers Act, 1833 (3 & 4 Will. 4, c. 22), ss. 42, 43; Sewers Act, 1841 (4 & 5 Vict. c. 45), ss. 5, 6. The securities cannot be impeached in the hands of *bona fide* holders (*Webb v. Herne Bay Commissioners* (1870), L. R. 5 Q. B. 642).

(*u*) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 40. If the money is borrowed for the expenses with respect to a particular district, the Commissioners must provide for repayment out of the rates of that district (*ibid.*).

(*a*) 10 & 11 Vict. c. 16, ss. 75–88.

(*b*) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 41. For form of mortgage, see *Encyclopædia of Forms and Precedents*, Vol. VIII., p. 205.

(*c*) Land Drainage Act, 1861 (24 & 25 Vict. c. 133).

SECT. 11.
Proceedings
before Com-
missioners.

without presentment (*d*) by a jury summoned for the purpose (*e*). Presentment by jury is in practice the procedure often adopted, but it is no longer necessary. The Commissioners may, without presentment, make any order which formerly they could have made with such presentment (*f*), subject, however, to an appeal to quarter sessions on the part of any person aggrieved (*g*).

SUB-SECT. 2.—*Appeals and Arbitration.*

Appeal.

1351. Quarter sessions may confirm, annul, or modify any order appealed against (*h*).

Reference to
arbitration.

After notice of appeal has been given, either party may apply to quarter sessions for the matter in dispute to be referred to arbitration. If the matter in question consists of matters of account, or of engineering or scientific questions which cannot be satisfactorily tried by quarter sessions, that court can order it to be referred to arbitration (*i*).

Claim for
arbitration.

Where any questions are by the Land Drainage Act, 1861 (*k*), determinable, at the option of the owner, by justices or by arbitration, the owner is deemed to have assented to the determination by justices, unless within ten days of their giving him notice that they propose to have the questions determined he gives the Commissioners notice that he wishes the questions to be determined by arbitration (*l*).

(*d*) As to presentment by jury generally, see Callis, Reading upon the Statute of Sewers. It is not necessary to have a separate presentment for each occasion when it is purposed to make an order (Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 13), but Commissioners cannot make orders for repairs upon a person who has become an owner since the presentment (*R. v. Warton* (1862), 2 B. & S. 719; see also *Fobbing Sewers Commissioners v. R.* (1886), 11 App. Cas. 449; *Warren v. Dix* (1805), 3 C. & P. 71). If it is alleged that several persons are liable to repair one sea wall, bank, sewer or other work, it can be alleged in one presentment (Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 46).

(*e*) For the method of summoning juries and their composition, see Sewers Act, 1833 (3 & 4 Will. 4, c. 22), ss. 11, 12; title JURIES, Vol. XVIII., pp. 238, 239. Juries may be given recompense for expenses and loss of time (Sewers Act, 1841 (4 & 5 Vict. c. 45), s. 7). As to the jury, see also *Birkett v. Crozier* (1827), 3 C. & P. 63; *R. v. Somerset Sewers Commissioners* (1805), 7 East, 71; *Taylor v. Loft* (1853), 8 Exch. 260; title COURTS, Vol. IX., p. 222.

(*f*) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 33.

(*g*) *Ibid.*, s. 47; see also title COURTS, Vol. IX., p. 222.

(*h*) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 47. The appeal must be made within four months of the making of the order and notice must be given to the Commissioners ten days prior to quarter sessions, stating the nature and ground of the appeal. The appellant must also four days from the service of such notice enter into recognisances, with two different sureties, before a justice of the peace (*ibid.*).

(*i*) *Ibid.*, s. 48. Arbitrators are appointed by the parties or by the court in case of disagreement. The award is enforceable as an order of quarter sessions. The provisions of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), apply (*ibid.*, s. 26, Schedule); see also title ARBITRATION, Vol. I., p. 438.

(*k*) 24 & 25 Vict. c. 133.

(*l*) *Ibid.*, s. 50. The procedure is the same as under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), in case of disputed compensation authorised to be settled by justices or arbitration. The costs are in the discretion of the arbitrators (Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 50).

SUB-SECT. 8.—*Fines and Penalties.*

SECT. 11.

Proceedings
before Com-
missioners.Recovery of
penalties.

1352. Fines, amerciaments and penalties imposed by the Commissioners on individuals or bodies corporate for not cleansing, repairing or maintaining, or for obstructing or injuring any of the walls, ditches, banks, gutters, sewers, gotes, bridges and streams, or for any other cause within their jurisdiction, may be demanded and received by the treasurer, clerk or other person appointed to receive the same (*m*). If not paid on demand they may be raised by distress on the warrant of the Commissioners (*n*).

A single Commissioner may, on the complaint of any expeditor or other officer of sewers that a person liable to the payment of any fine or penalty has not paid it, issue a summons requiring such person to appear before any two of the Commissioners to show cause why he refuses to pay; and the two Commissioners can issue a warrant to levy the sum by distress, if satisfied that he is liable to pay (*o*).

SECT. 12.—*Legal Proceedings by and against Commissioners.*

1353. Commissioners of Sewers may sue and be sued in the name of any one Commissioner, or in the name of their clerk (*p*). When suing in respect of their property, it is sufficient to describe the property as belonging to the Commissioners without specifying their names (*q*). Actions by or against Commissioners or their clerk do not abate by the death, resignation, or removal of the Commissioners or of their clerk or because of the expiration of the Commission (*r*).

Legal pro-
ceedings.

(*m*) Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 53. All penalties and sums of money directed to be recovered summarily can be recovered before two justices under the procedure of the Summary Jurisdiction Acts (Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 51). As to fines for non-repair, see also *R. v. Baker* (1867), L. R. 2 Q. B. 621. As to fines for breach of laws and ordinances of the Commissioners, see *Crossman v. Bristol and South Wales Union Rail. Co.* (1863), 1 Hem. & M. 531. Officers may be fined for refusal to take office (Sewers Act, 1849 (12 & 13 Vict. c. 50), s. 5). Jurymen, witnesses and sheriffs may be fined for non-compliance with the statute (Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 27; and see *Ex parte Taylor* (1829), 3 Y. & J. 91; *Ex parte Owt* (1821), 9 Price, 117). As to "amerciament," see *Ramsey v. Nornabell* (1840), 11 Ad. & El. 383.

(*n*) Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 53. For form of warrant, see *ibid.*, s. 54.

(*o*) Sewers Act, 1849 (12 & 13 Vict. c. 50), s. 7; and see title RATES AND RATING, Vol. XXIV., p. 110, note (*m*). The summons or warrant may include several persons (Sewers Act, 1849 (12 & 13 Vict. c. 50), s. 8). The warrant may be directed to any person the two Commissioners may deem fit (*ibid.*, s. 9). Under the Sewers Act, 1841 (4 & 5 Vict. c. 45), the warrant had to be under the hands of at least six Commissioners.

(*p*) Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 57. Commissioners acting in *bona fide* performance of a public duty are only liable for injury to the individual if they have been guilty of negligence or want of skill in doing it (*Grocers' Co. v. Donne* (1836), 3 Scott, 356); and see *Jones v. Bird* (1822), 1 Dow. & Ry. (K. B.) 497; title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 313. As to the payment of expenses of legal proceedings, see title RATES AND RATING, Vol. XXIV., p. 104.

(*q*) Sewers Act, 1833 (3 & 4 Will. 4, c. 23), s. 47. So also in indictments, informations or complaints it is sufficient to state that the property belongs to the Commissioners, without specifying their names (Criminal Law Act, 1826 (7 Geo. 4, c. 64), s. 18; Summary Jurisdiction Act, 1843 (11 & 12 Vict. c. 43), s. 4).

(*r*) Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 57.

SECT. 12.
Legal
Proceedings
by and
against
Commis-
sioners.
—
Injunction.
Mandamus.
Indictment.

A clerk or Commissioner in whose name proceedings are taken is entitled to be reimbursed all costs, charges, damages and expenses (a).

Injunctions may be granted to restrain the undue exercise of authority on the part of Commissioners (b). They may also be granted at the suit of Commissioners (c).

A writ of mandamus may be granted to compel Commissioners to carry out their duties, but is only granted if there is no other specific remedy (d).

Indictments can be preferred against Commissioners in all cases where public bodies would be indictable (e). Commissioners also have power to prefer an indictment against any person injuring their lands or property (f).

SECT. 13.—*Elective Drainage Districts and Drainage Boards.*

Drainage
district.

1354. The proprietors of not less than one-tenth of the acreage of any bog, moor, or other area of land requiring a combined system of drainage, warping or irrigation, may, with the consent (g) of the Board of Agriculture and Fisheries (h), and subject to confirmation by Parliament, constitute such area a separate drainage district (i). But no place within the limits of any Commission of Sewers or of any borough or urban district council may form a separate drainage district or part thereof, without the consent of such Commissioners or council (i).

(a) Sewers Act, 1833 (3 & 4 Will. c. 22), s. 58.

(b) *A.-G. v. Forbes* (1836), 2 My. & Cr. 123, *per* Lord COTTENHAM, L.C., at p. 133; *Box v. Allen* (1727), 1 Dick. 49; see also *Hedley v. Bates* (1880), 13 Ch. D. 498; *Kerrison v. Sparrow* (1815), 19 Ves. 449; and compare title INJUNCTION, Vol. XVII., pp. 227, 262. As to calling in question the laws and decrees of the Commissioners, see p. 777, *ante*.

(c) See *Crossman v. Bristol and South Wales Union Rail. Co.* (1863), 1 Hem. & M. 531.

(d) *R. v. Gamble* (1839), 11 Ad. & El. 69; *R. v. Bristol and Exeter Rail. Co.* (1843), 4 Q. B. 162; *R. v. Kelk* (1841), 1 Q. B. 660 (decided under a local Act). Mandamus will be granted to compel the Commissioners to make compensation (*R. v. Burslem Local Board* (1860), 1 E. & E. 1088, Ex. Ch.; see also *R. v. Essex Sewers Commissioners* (1823), 1 B. & C. 477; *Fobbing Sewers Commissioners v. R.* (1886), 11 App. Cas. 449; *R. v. Norfolk Commissioners* (1850), 15 Q. B. 549); or to compel Commissioners to levy a rate (*R. v. Tendring etc. Sewers Commissioners* (1727), 2 Ld. Raym. 1479; and see *R. v. Ouze Bank Commissioners* (1835), 3 Ad. & El. 544; *Gallsworthy v. Selby Dam Drainage Commissioners*, [1892] 1 Q. B. 348, C. A.; see also title CROWN PRACTICE, Vol. X., pp. 77, 87, 89).

(e) See *R. v. Birmingham and Gloucester Rail. Co.* (1842), 3 Q. B. 223; *R. v. Pagham, Sussex, Sewers Commissioners* (1828), 8 B. & C. 355; and, as to indictable nuisances, see *Dimes v. Petley* (1850), 15 Q. B. 276; *R. v. Ward* (1836), 4 Ad. & El. 384; *R. v. Betts* (1850), 16 Q. B. 1022; title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 412; see also *ibid.*, pp. 235, 236.

(f) Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 47. In this case the property can be laid in the Commissioners generally (Criminal Law Act, 1826 (7 Geo. 4, c. 64), s. 18); see p. 787, *ante*; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 784, 785.

(g) The method of obtaining this consent is similar to that set out at pp. 774, 775, *ante*; and see Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 64.

(h) See title AGRICULTURE, Vol. I., p. 279.

(i) *Ibid.*, s. 63.

1355. The superintendence of matters relating to drainage within drainage districts is vested in "drainage boards" which are elective (*j*). These boards are bodies corporate and have power to hold lands for all the purposes of their constitution (*k*). The powers of Commissioners within a drainage district cease when it becomes an elective drainage district (*l*).

Subject to the provisions in the provisional order constituting the district, statutory regulations apply with respect to all drainage boards (*m*), the electors to drainage boards (*n*), and the mode of conducting elections to boards and their proceedings (*o*).

SECT. 13.
Elective
Drainage
Districts
and
Drainage
Boards.

Drainage
boards.

(*j*) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 66. The Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16), ss. 56—59 (contracts and execution of deeds); 60—64 (liabilities and legal proceedings), 65—74 (appointment and accountability of officers), 80—95 (accounts), 99—101 (notices and orders), apply to drainage boards (Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 71).

(*k*) *Ibid.*, s. 66; see, further, title RATES AND RATING, Vol. XXIV., pp. 102, 103. As to appeals, see *ibid.*, p. 103.

(*l*) Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 67.

(*m*) For these, see *ibid.*, s. 68. The provisional order is evidence that all the required formalities have been observed (*ibid.*, s. 65).

(*n*) For these, see *ibid.*, s. 69.

(*o*) For these, see *ibid.*, s. 70, Schedule.

SEXTON.

See ECCLESIASTICAL LAW.

SHACK, COMMON OF.

See COMMONS AND RIGHTS OF COMMON.

SHAFTS.

See MINES, MINERALS, AND QUARRIES.

SHARES AND SHAREHOLDERS.

See COMPANIES; SHIPPING AND NAVIGATION; STOCK EXCHANGE.

SHEEP.

See ANIMALS.

SHEFFIELD MARKS.

See TRADE MARKS, TRADE NAMES, AND DESIGNS.

SHELL-FISH.

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SHELLEY'S CASE, RULE IN.

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SHERIFFS AND BAILIFFS.

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Part I.—Sheriffs: Their Appointment and Qualification.

SECT. 1.—*Nature of Office.*

Nature of
office.

1356. The office of sheriff is a compulsory office of great antiquity and importance (a). A person duly qualified (b) to serve in the office can only claim exemption by virtue of an Act of Parliament or letters patent (c), and if a person duly appointed refuses to serve

(a) The sheriff is described in Com. Dig., tit. County (B. 1.), as the principal officer in the county. The Lord-Lieutenant is now the first officer in the county; and, as to other officers of the county, see title LOCAL GOVERNMENT, Vol. XIX., pp. 342, 343.

(b) As to the qualification, see p. 795, *post*.

(c) *R. v. Larwood* (1695), 1 *Ld. Raym.* 29, 32, 33. As to the exemptions from liability to serve, see pp. 795, 796, *post*.

he is liable to a criminal information or to be indicted (*d*). The greater part of the ancient civil and criminal jurisdiction of the sheriff has been transferred to the modern county courts and justices of the peace, but he still exercises some judicial functions (*e*), and has ministerial powers and duties of an extensive and important character (*f*).

SECT. 1.
Nature of
Office.

1357. Before entering on the execution of his office every sheriff must make and subscribe a declaration that he will well and truly serve the King, and promote His Majesty's profit in all things belonging to his office as far as he legally can, and will truly preserve the King's rights, and do right to both poor and rich in all things belonging to his office, and will truly and diligently execute the law, and in all things well and truly behave himself in his office, and discharge the same according to the best of his skill and power (*g*). The declaration must be made and subscribed before a judge of the High Court or before a justice of the peace of the county for which the declarant is sheriff (*h*). On making the declaration the sheriff is, without payment of any fee, entitled to exercise all the powers and authorities incident to his office (*i*).

Declaration
of office.

The declaration of office is exempt from stamp duty, and must be transmitted to the clerk of the peace for the county, and be filed by him among the records of his office (*k*).

SECT. 2.—*High Sheriffs of Counties at Large.*

SUB-SECT. 1.—*Appointment.*

1358. A high sheriff is appointed annually for every county at large (*l*), except in the case of the counties of Cambridge and Huntingdon, for which only one high sheriff is appointed as if they were one county (*m*).

Annual
appointment.

The authority of a sheriff does not extend beyond his own county (*n*).

Authority.

1359. On the 12th November in every year, or, if that day falls on a Sunday, then on the ensuing Monday, persons fit to serve as

Nomination.

(*d*) *A.-G. v. Read* (1678), 2 Mod. Rep. 299; *R. v. Larwood* (1695), 1 Ld. Raym. 29; *R. v. Woodrow* (1788), 2 Term Rep. 731; *R. v. Hutchinson* (1893), 32 L. R. Ir. 142.

(*e*) See pp. 807 *et seq.*, *post*.

(*f*) See pp. 805, 806, 809 *et seq.*, *post*.

(*g*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 7 (1). For form of declaration, see *ibid.*, Sched. II. There are appropriate variations in the case of the sheriff of Cornwall. As to the liability of the sheriff for the default of his under-sheriff, see pp. 826 *et seq.*, *post*.

(*h*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 7 (1).

(*i*) *Ibid.*, s. 6 (2).

(*k*) *Ibid.*, s. 30 (1). The clerk of the peace is entitled for filing the declaration to receive from the sheriff such fee as may be fixed from time to time by enactments relating to fees of clerks of the peace, and, until any fee is so fixed, the fee of 5s. (*ibid.*, s. 30 (2)).

(*l*) *Ibid.*, s. 3.

(*m*) *Ibid.*, s. 32.

(*n*) *Platt v. London Sheriffs* (1550), 1 Plowd. 37 a.

SECT. 2.
High
Sheriffs of
Counties at
Large.

high sheriffs are nominated in the customary manner (o) for every county at large, except the counties of Cornwall and Lancaster (p), at the Royal Courts of Justice by the Lord Chancellor, the Chancellor of the Exchequer, the Lord President and others of the Privy Council, and the Lord Chief Justice, or any two or more of them, with the judges of the High Court, or any two or more of them (q).

Pricking the
sheriffs.

1360. The names of the persons so nominated (o) are afterwards engrossed on a roll of parchment and presented to the King in Council, and His Majesty appoints the persons to serve by pricking with a silver bodkin opposite to the names in the list of persons nominated, a ceremony known as "pricking the sheriffs," the name pricked being usually the first one on the list. The names of the persons so appointed are forthwith notified in the *London Gazette*, and warrants are made out (r) and signed by the Clerk of the Privy Council and transmitted to the persons pricked, the appointments so made being of the same effect as if made by patent under the Great Seal (s). A duplicate of the warrant of appointment must within ten days after the date thereof be transmitted by the Clerk of the Privy Council to the clerk of the peace of the county for which each sheriff is appointed, and be enrolled and kept by him without fee (t).

Warrant of
appointment.

Sheriffs of
Lancaster and
of Cornwall.

1361. The sheriff of the county of Lancaster is appointed by the King, as Duke of Lancaster, the list of persons liable to serve being submitted by the Chancellor of the Duchy.

(o) The method of nomination is as follows :—After the great officials and judges have taken their places on the bench, the King's Remembrancer reads the names of nominees for service as sheriffs in the various counties in the preceding year. The names of the sheriffs actually in office are then struck out, and the senior judge of assize who went the last summer circuit gives in another name, which is as a rule adopted and placed on the nomination list. If deaths have occurred, or excuses are made and allowed, other names are supplied, so as to make up a list of three names for each county, the names so settled being read out by the King's Remembrancer and taken to be nominated as placed on the roll. Excuses, such as want of sufficient means, are sometimes made in open court, but as a general rule all excuses are forwarded previously to the office of the Privy Council (as to the Privy Council, see title CONSTITUTIONAL LAW, Vol. VII., pp. 51 *et seq.*), and are mentioned by the Lord President of the Council; see 13 L. J. 718.

(p) See the text, *infra*.

(q) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 6 (1), (4). This applies to sheriffs of the counties of London (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40 (2)), Middlesex (*ibid.*, s. 46 (6)); see note (d), p. 796, *post*, and Westmoreland (Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 31), and to each county in Wales (*ibid.*). In ancient times sheriffs were elected by the inhabitants of counties, and in some cases the office was hereditary (1 Bl. Com. 339, 340). The elections by the inhabitants were put an end to by stat. (1315) 9 Edw. 2, stat. 2, and the last of the hereditary shrievalties, that of Westmoreland, was abolished by stat. (1850) 13 & 14 Vict. c. 30.

(r) For form of warrant, see Sheriffs Act, 1887 (50 & 51 Vict. c. 55), Sched. I.

(s) *Ibid.*, s. 6 (2). Prior to 1833 the appointment was made by patent under the Great Seal; see Fines Act, 1833 (3 & 4 Will. 4, c. 99), s. 3, repealed by the Sheriffs Act, 1887 (50 & 51 Vict. c. 55).

(t) *Ibid.*, s. 6 (3). As to the declaration of office, see p. 793, *ante*.

The shrievalty of the county of Cornwall is annexed to the Duchy, and the appointment of the sheriff is made by the Prince of Wales, as Duke of Cornwall (*a*).

SECT. 2.
High
Sheriffs of
Counties at
Large.

SUB-SECT. 2.—*Qualification.*

1362. A person may not be appointed high sheriff of a county at large unless he has sufficient land within his county to answer the King and his people (*b*).

Qualification.

SUB-SECT. 3.—*Exemptions.*

1363. Members of the House of Commons (*c*), field officers of the Territorial Force (*d*), the Postmaster-General and officers of the Post Office (*e*), Commissioners, officers, collectors and persons employed under the authority of the Commissioners, in relation to inland revenue (*f*), and officers of customs (*g*), are exempt from the liability to assume or serve the office of high sheriff of a county at large; and a person who has been high sheriff of a county for a whole year may not within the three years next ensuing be appointed high sheriff of that county unless there is no other person in the county qualified to fill the office (*h*). Officers of the regular forces on the active list are incapable of being nominated for or appointed to the office of high sheriff (*i*).

Exemptions
from liability
to serve.

Army
officers.

SUB-SECT. 4.—*Tenure of Office.*

1364. The office of high sheriff is held during the pleasure of the Crown, and is an annual one, the grant of the office for more than a year being void (*k*). The office is not avoided by the demise of the Crown, nor in Cornwall by the demise of the Duchy of Cornwall (*l*), nor by the succession of the sheriff to a peerage (*m*).

Tenure of
office.

(*a*) *The Prince's Case* (1606), 8 Co. Rep. 1; *Rowe v. Brenton* (1828), 3 Man. & Ry. (K. B.) 133, 480; Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 37.

(*b*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 4. What is a sufficiency of land has never been laid down. A sheriff, however, should be a man of considerable means on account of the expenditure requisite for the maintenance of the dignity of his office, the necessary expenses being very considerably in excess of the emoluments and allowances.

(*c*) A resolution of the House of Commons of the 7th January, 1689, declares it to be a breach of privilege to nominate any member for the office of high sheriff of a county (Journals of the House of Commons, Vol. IX., p. 378; Vol. X., pp. 324, 335).

(*d*) See title ROYAL FORCES, p. 96, *ante*.

(*e*) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 43; see title POST OFFICE, Vol. XXII., p. 630.

(*f*) Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 8. For definition of "inland revenue," see *ibid.*, s. 39.

(*g*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 9; see title REVENUE, Vol. XXIV., p. 545.

(*h*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 5.

(*i*) See, generally, title ROYAL FORCES, p. 96, *ante*.

(*k*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 3 (1), (2). Although the high sheriff of a county may be dismissed at the pleasure of the Crown, the King cannot legally deprive him of part only of his office or grant any portion of the office to another (*Milton's Case* (1584), 4 Co. Rep. 32 b).

(*l*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 3 (3); Demise of the Crown Act, 1901 (1 Edw. 7, c. 5), s. 1 (1).

(*m*) *Mordant's Case* (1583), Cro. Eliz. 12. As to the effect of the death of a high sheriff, see p. 801, *post*.

SECT. 2.
High
Sheriffs of
Counties at
Large.

Every sheriff of a county at large must continue to act as such until his successor has made the requisite declaration and entered upon the office (*n*).

The sheriff of a county may not transfer his office or let to farm his county or any part thereof (*o*).

SECT. 3.—*Sheriffs of Counties of Cities and Towns.*

Appointment.

1365. In every borough which is a county of itself (*p*), and in the city of Oxford (*q*), a sheriff is appointed by the city or town council on the 9th November in every year at the quarterly meeting of the council immediately after the election of the mayor, and holds office until the appointment of his successor (*r*).

In the event of the death or incapacity of a sheriff so appointed during the tenure of his office, the council must forthwith appoint another fit person to execute the office (*a*).

Qualification.

1366. The necessary qualification of such a sheriff is that he should have sufficient property, whether in land or personalty, to answer the King and his people (*b*).

Exemptions.

1367. The same exemptions from liability to serve apply to sheriffs of counties of cities and counties of towns, and of the city of Oxford, as to high sheriffs of counties at large, with the exception of the exemption of members of the House of Commons, of field officers of the Territorial Force, and the exemption for three years of any person who has been sheriff of a county for a whole year (*c*).

SECT. 4.—*Sheriffs of the City of London.*

Election of
sheriffs.

1368. It is an ancient privilege of the Corporation of the City of London to elect sheriffs for the City (*d*). The office is held of the

(*n*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 7 (2).

(*o*) *Ibid.*, s. 19 (2). As to the duty of the coroner to act in place of the sheriff in the execution of process and under the Lands Clauses Acts where the sheriff is personally interested, see title CORONERS, Vol. VIII., pp. 248 *et seq.*

(*p*) A city or town may be constituted a county of itself by charter from the Crown, and is thereby excepted from the authority of the sheriff of the county at large (*Sherrey v. Richardson* (1591), Poph. 15, 16); and see title MAGISTRATES, Vol. XIX., p. 540, note (*f*). As to county boroughs, see, further, title LOCAL GOVERNMENT, Vol. XIX., pp. 300, 301.

(*q*) The city of Oxford, though not a county of itself, has a right to appoint its own sheriff. The sheriff of the city of Oxford does not execute writs from the superior courts (*Granger v. Taunton* (1836), 3 Bing. (N. C.) 64). As to Oxford, see, further, the text, *infra*; title LOCAL GOVERNMENT, Vol. XIX., p. 302.

(*r*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 170; Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 36 (1); see *ibid.*, s. 7 (2). As to the declaration of office to be made by the sheriff, see p. 793, *ante*.

(*a*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 36 (1).

(*b*) *Ibid.*, s. 36 (2); compare note (*b*), p. 795, *ante*.

(*c*) *R. v. Haythorne* (1826), 5 B. & C. 410, 429, n. As to the exemptions, see p. 795, *ante*.

(*d*) See Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 33 (1); and see title METROPOLIS, Vol. XX., pp. 401, 429. Formerly the sheriffs of the City of London acted jointly as the sheriff of Middlesex, the Corporation of the City of London having bought the shrievalty of Middlesex, *inter alia*, from Henry VI. for a fee-farm rent of £315 (Parliamentary Reports, City and

Corporation, which is answerable to the Crown for its due execution on the part of the sheriffs and their officers (*e*).

SECT. 4.
Sheriffs of
the City of
London.

Two sheriffs are elected annually, and they jointly exercise the office of sheriff within the City (*f*).

Procedure.

The election takes place on Midsummer Day (*g*) in the Court of Common Hall (*h*), the choice being limited to persons in nomination, that is to say, (1) aldermen who have not passed the chair; (2) freemen nominated by the Lord Mayor, not exceeding nine in number; (3) freemen nominated on the day of election by any two electors (*i*). The precepts for the election are issued by the Lord Mayor, and the election is decided by a show of hands, unless a poll is demanded, in which case the poll is taken in accordance with statutory provisions (*k*), the list of voters being prepared by the Secondary (*l*). A bond of £1,000 is required to be given by the sheriffs-elect for due attendance at the Guildhall to be sworn in (*m*).

1369. The approval by the King of the election of the sheriffs is necessary. This is signified by royal warrant under the seal of the Chancellor of the Exchequer, the warrants being delivered to the sheriffs, or their duly authorised agents, without fee, between the 30th September and the 12th November, and the election being

Approval
of election.

County of London Amalgamation, Vol. II., 1894 [C 7493], p. 188), but the sheriff of the county of Middlesex is now appointed in the same manner as the sheriffs of other counties at large (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 46 (6), by which the right of the Corporation of the City of London to elect the sheriff of Middlesex was taken away), and the authority of the sheriffs of the City of London does not extend beyond the City (*ibid.*, s. 41 (8)). As to the Corporation generally, see title METROPOLIS, Vol. XX., pp. 422 *et seq.*

(*e*) Parliamentary Reports, City and County of London Amalgamation, Vol. II., 1894 [C 7493], Appendix iii., 53, 54.

(*f*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 33; Parliamentary Reports, City and County of London Amalgamation, Vol. II., 1894 [C 7493], Appendices iii., 20; v., 4; and see title METROPOLIS, Vol. XX., p. 401. The duties of the sheriffs of the City of London are almost entirely ceremonial, their legal duties being performed by the Secondary (see p. 801, *post*). They attend the Lord Mayor on state occasions, present petitions on behalf of the Corporation to the House of Commons, and attend executions of capital sentence within the City. It is their privilege to wait on the Sovereign, by the direction of the Corporation, with the City Remembrancer, to ascertain the royal will and pleasure as to the reception of addresses from the Corporation (Parliamentary Reports, City and County of London Amalgamation, Vol. II., 1894 [C 7493], Appendix iii., 21).

(*g*) Casual vacancies are filled up by elections on days fixed by the Court of Aldermen.

(*h*) *I.e.*, the mayor, aldermen, and such of the liverymen of the several companies of the City of London as are freemen of the City, in Common Hall assembled. The Lord Mayor presides, and there must be present at least four aldermen and one of the sheriffs (*ibid.*, Appendices iii., 20, 21; v., 4).

(*i*) *Ibid.*, Appendix viii., 7.

(*k*) City of London Ballot Act, 1887 (50 & 51 Vict. c. xiii). The provisions of the Ballot Act, 1872 (35 & 36 Vict. c. 33), are made applicable so far as circumstances admit; see title ELECTIONS, Vol. XII., p. 394.

(*l*) Parliamentary Reports, City and County of London Amalgamation, Vol. II., 1894 [C 7493], Appendix iii., 20.

(*m*) *Ibid.*, Appendix v., 4.

SECT. 4.
**Sheriffs of
 the City of
 London.**

Penalty for
 declining
 office.

deemed approved unless the warrants are stayed by order of His Majesty in Council on or before the 30th September (*n*). The warrants are filed in the Central Office of the Supreme Court (*o*).

1370. If a person, being duly elected, declines the office of sheriff, he is liable to a fine (*p*), the payment of which exempts him from future liability to serve, unless he afterwards takes on himself the office of alderman, in which case he continues liable to serve notwithstanding the payment of the fine (*q*).

SECT. 5.—*Franchises.*

Power to
 grant
 franchises.

1371. The Crown has power at common law to grant to a town or city the franchise or liberty of choosing its own officer to exercise the powers and duties of sheriff (*r*). The technical name for such a franchise or liberty, exempt from the authority of the sheriff of the county, is "bailiwick" (*a*), and the officer—that is, the lord of the franchise or other person or body corporate taking the place of the sheriff—is called the bailiff of the franchise (*b*). Most of these franchises or liberties have, so far as regards the powers and duties of the sheriff, been merged in the counties in which they are situated, in pursuance of statutory provisions (*c*).

Qualifications
 of bailiff of
 a franchise.

1372. No person may be appointed bailiff of a franchise unless he has sufficient land in his bailiwick to answer the King and his

(*n*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 33 (2).

(*o*) *Ibid.*, s. 33 (3).

(*p*) As to the amount and application of the fine, see title METROPOLIS, Vol. XX., p. 401.

(*q*) Parliamentary Reports, City and County of London Amalgamation, Vol. II., 1894 [C 7493], Appendix iii., 21. The exemptions applying to sheriffs of counties of cities and counties of towns apply in the City of London (*ibid.*; see p. 796, *ante*); and, for a further exemption, see title METROPOLIS, Vol. XX., p. 401.

(*r*) 17 Vin. Abr., pp. 87, 89, tit. Prerogative of the King (M. b.) 18, 21. A hundred or wapentake may not now, as regards the powers and duties of sheriff, be severed from the county (Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 19 (1)).

(*a*) 2 Bl. Com. 37. The term "bailiwick" is now commonly used to signify the place in which a sheriff has authority, whether a county at large or other district.

(*b*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 34.

(*c*) Most of them were so merged under the Liberties Act, 1850 (13 & 14 Vict. c. 105); the Cinque Ports and ancient towns of Winchelsea and Rye under the Cinque Ports Act, 1855 (18 & 19 Vict. c. 48), s. 2. By the County of Hertford and Liberty of St. Alban Act, 1874 (37 & 38 Vict. c. 45), s. 7, the liberty of St. Alban was made part of the county of Hertford for all purposes, but provision was made by *ibid.*, s. 38, for saving the rights and privileges of the hundred or hereditary sheriff of the hundred of Cashio. In the Isle of Ely the chief bailiff, who is appointed by the Crown, acts as sheriff except with regard to summoning juries, that duty being performed by the sheriff of the counties of Cambridge and Huntingdon (Liberties Act, 1836 (6 & 7 Will. 4, c. 87), ss. 12, 15; see p. 793 *ante*). In the liberty of the Honor of Pontefract it is the duty of the sheriff of the county of York, and not the bailiff of the liberty, to execute all writs of execution (stat. (1845) 8 & 9 Vict. c. 72, s. 4). Compare also title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 87; p. 808, *post*. For all purposes connected with parliamentary elections, franchises and liberties are considered part of the county

people (*d*); and a bailiff of a franchise must either hold the office himself or put in bailiffs possessing a similar qualification (*e*).

SECT. 5.

Franchises.

1373. So far as he has the powers and duties of a sheriff, the bailiff of a franchise is, generally speaking, in the same position as a sheriff with respect to the appointment and responsibility for the acts of bailiffs and officers (*f*), the liability for misconduct or breach of duty (*f*), the return of panels and juries (*f*), the due execution of writs (*f*), taking of fees, extortion, and otherwise in relation to the office and duties of a sheriff, except as regards his appointment and the duration of his office and that of his bailiff (*g*).

Position of
bailiff of a
franchise.

Part II.—Under-Sheriffs, Deputies, Bailiffs, and Officers.

SECT. 1.—Under-Sheriffs.

SUB-SECT. 1.—Appointment and Tenure of Office.

1374. Every sheriff of a county at large must, within one month after the notification of his appointment in the *London Gazette*, appoint by writing under his hand a fit person (*h*) to be his under-sheriff, and must transmit a duplicate of such written appointment to the clerk of the peace for the county, to be filed by him among the records of his office (*i*).

Appointment.

Before entering on the execution of his office every under-sheriff must make a declaration in similar form to that made by the high sheriff (*k*), with appropriate variations, before a judge of the High Court or a justice of the peace for the county for which he is

Declaration
of office.

or division of the county in which they are situated; see pp. 809, 810, *post*. As to the direction of a writ to be issued within a franchise, see pp. 811, 812, *post*.

(*d*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 4; see note (*b*), p. 795, *ante*.

(*e*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 34 (*a*).

(*f*) As to the general powers, liabilities and duties of sheriffs, see pp. 805 *et seq.*, *post*. As to the execution of writs in a franchise, see pp. 811, 812, *post*.

(*g*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 34. The high bailiff of Southwark, who is also returning officer for the borough, is elected annually by the Corporation of the City of London. The office is at present held by the Secondary of the City of London, the Corporation paying him a salary of £105 as high bailiff. He performs the ordinary duties of a sheriff in regard to the summoning of juries, the execution of process of the High Court and of the borough court of record within the borough etc., and attends assizes and quarter sessions for the county of Surrey when required (Parliamentary Reports, City and County of London Amalgamation, Vol. II., 1894, [C 7493], Appendix iii., 55); and see title METROPOLIS, Vol. XX., p. 427, note (*r*).

(*h*) No particular qualification is necessary. A solicitor of standing is usually appointed.

(*i*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 23 (1). For filing the duplicate, the clerk of the peace is entitled to such fee from the under-sheriff as may be fixed from time to time in pursuance of the enactments relating to clerks of the peace, and, until any fee is so fixed, a fee of 6s. (*ibid.*, s. 23 (2)).

(*k*) See p. 793, *ante*.

SECT. 1.
Under-Sheriffs.

Security.

appointed (*l*). The declaration is exempt from stamp duty (*m*). The under-sheriff on his appointment usually executes a bond (*n*), with sureties, in favour of the high sheriff for the due and faithful discharge of his duties, and indemnifying the high sheriff against any liability for breach of duty on his part or on the part of his servants in the execution of the office.

Tenure of office.

1375. Only one under-sheriff of a county may be appointed (*o*), and he may be removed at the pleasure of the high sheriff even though his appointment purported to be irrevocable (*p*). The office of the under-sheriff comes to an end on the expiration of that of the high sheriff (*q*), but he may be reappointed by the high sheriff's successor.

Sale or letting of office prohibited.

1376. The office of under-sheriff may not, directly or indirectly, be bought, sold, let, or taken to ferm, nor may any valuable consideration be given or received for the office; but this prohibition does not prevent the high sheriff from giving a salary or remuneration for the execution of the office (*r*).

SUB-SECT. 2.—*Nature of Office and Duties.*

Duties and powers.

1377. The under-sheriff usually performs all the judicial and other duties of the office of sheriff, with a few exceptions where the personal presence of the high sheriff is necessary (*s*). As under-sheriff he has all the powers incident to the sheriff's office which are not personal to the high sheriff, and a covenant or condition in restraint of such powers is void (*t*). He has authority *virtute officii* to execute a deed in the name and under the seal of the high sheriff in the course of the execution of the office (*u*), and it is his duty in all cases to act in the name of the high sheriff (*a*). Any action in respect of the non-performance of the duties of the

(*l*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 23 (3). The bailiffs put in by a bailiff of a franchise (see p. 798, *ante*) are required to make a similar declaration (Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 34 (a)).

(*m*) *Ibid.*, s. 30 (1).

(*n*) For a form, see Watson on Sheriffs, 2nd ed., p. 459.

(*o*) *Denny v. Trapnell* (1768), 2 Wils. 378 (inquisition before two under-sheriffs held void).

(*p*) Com. Dig., tit. Viscount (B. 1.); *Norton v. Simmes* (1614), Hob. 12.

(*q*) Com. Dig., tit. Viscount (B. 1.). As to effect of the death of the high sheriff, see p. 801, *post*.

(*r*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 27. The under-sheriff is generally allowed to take the fees and emoluments of the office by way of remuneration.

(*s*) 1 Bl. Com. 345; Com. Dig., tit. Viscount (B. 1.).

(*t*) As, for instance, a covenant or condition that he will not execute process for a sum in excess of a certain amount without a warrant from the high sheriff (*Chamberlain v. Goldsmith* (1609), 2 Brownl. 280; *Parker v. Kett* (1701), 1 Salk. 95; *Boucher v. Wiseman* (1595), Cro. Eliz. 440; *Norton v. Simmes*, *supra*).

(*u*) *Doe d. James v. Brawn* (1821), 5 B. & Ald. 243 (assignment by deed of a term of years taken in execution); *Wood v. Rowcliffe* (1846), 6 Hare, 183, 186 (bill of sale by under-sheriff).

(*a*) *Parker v. Kett*, *supra*.

office must be brought against the high sheriff, who is alone liable (b).

SECT. 1.
Under-Sheriffs.

Duty to act as high sheriff in certain cases.

1378. Where the high sheriff dies before the expiration of his year of office or before his successor has entered on the office, the under-sheriff nevertheless continues in office, and it is his duty to exercise the office of high sheriff in the name of the deceased until another high sheriff for the county has been appointed and made the declaration of office, and he is answerable for the execution of such office as the deceased would have been if living (c), the security given to the deceased sheriff operating as a security to the Crown and all other persons for the under-sheriff's due execution of the offices of high sheriff and under-sheriff (d). It is also the duty of the under-sheriff to execute the office of high sheriff while the high sheriff, being a Militia officer or officer of the Territorial Force, is discharged from personally performing his office during embodiment (e). An under-sheriff is not, however, personally responsible for any sum received by a deceased high sheriff (f).

SECT. 2.—*Secondary of the City of London.*

1379. In the City of London, the Secondary, who is elected by the Court of Common Council, occupies a similar position to that of the under-sheriff of a county, and performs, in the name of the sheriffs, all the duties ordinarily incident to the office of an under-sheriff (g). There were formerly two secondaries, but since 1871 there has been only one (h).

Appointment and duties.

The office of Secondary is held of the Corporation of the City of London, which is liable to the Crown for any breach of duty on his part (i). The Secondary gives a bond to the Corporation efficiently to discharge all duties as representative of the sheriffs, he himself being bound in an unlimited amount, with two sureties jointly and severally bound in the sum of £2,500 (i).

Office.

(b) *Cameron v. Reynolds* (1776), 1 Cowp. 403.

(c) See *Gloucestershire Banking Co. v. Edwards* (1887), 20 Q. B. D. 107, C. A., where the executors of a deceased under-sheriff, who had acted in the place of a deceased high sheriff, were held liable to execution creditors for a sum improperly deducted by the under-sheriff for charges to which he was not entitled. As to the powers of the under-sheriff to appoint a deputy in such a case, see p. 802, *post*.

(d) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 25 (1). As to the death of a sheriff of a county of a city or town, see p. 796, *ante*.

(e) See title ROYAL FORCES, p. 96, note (p), *ante*.

(f) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 21 (2) (b).

(g) Parliamentary Reports, City and County of London Amalgamation, Vol. II., 1894 [C 7493], Appendices iii., 53—55; x., 18; and see title METROPOLIS, Vol. XX., p. 427, note (r). As to the further duties of the Secondary, see *ibid.*, p. 429, note (p); title JURIES, Vol. XVIII., pp. 236, 237; and see pp. 797, note (q), 799, *ante*, 803, note (t), 805, 808, 809, note (k), 811, note (c), 821, note (a), 833, note (t), 841, *post*. The duties of the under-sheriffs of the City of London are entirely ceremonial. They take the annual allowance of £750 made by the Corporation to the sheriffs, and, in addition, get an allowance from the sheriffs. The Secondary performs all the legal duties of the sheriffs. The present Secondary is also high bailiff of the borough of Southwark; see note (g), p. 799, *ante*.

(h) Act of Common Council, 1871.

(i) Parliamentary Reports, City and County of London Amalgamation, Vol. II., 1894 [C 7493], Appendix iii., 53—55.

SECT. 3.

Deputies.

London
deputy and
his duties.

1380. Every sheriff (*k*) must appoint a sufficient deputy, who must reside or have an office within a mile from the Inner Temple Hall, for the receipt of writs, the granting of warrants thereon, the making of returns thereto, and the acceptance of all rules and orders to be made on or touching the execution of any process or writ directed to the sheriff (*l*). The delivery of a writ to the London deputy operates as a delivery to the sheriff (*m*).

Franchise
deputy.

1381. In the case of a franchise, the sheriff of the county in which the franchise is situated must, within a month after request by the lord of the franchise, appoint a sufficient deputy at such cost, to be paid by the lord of the franchise, and to reside at such convenient place in or near the franchise, as may be appointed from time to time by the Lord Chancellor and the Lord Chief Justice or one of them (*n*). Every such deputy must reside at the place appointed and, in the sheriff's name, receive all writs, the execution or return of which belongs to the bailiff of the franchise, and must without delay issue to the bailiff of the franchise under the seal of the sheriff the warrants required for due execution of the writs (*o*).

Deputies in
other cases.

1382. A sheriff may by writing appoint a deputy to take the inquisition under a writ of inquiry (*p*) or for ascertaining the amount of compensation on a compulsory acquisition of land (*q*), though the under-sheriff usually acts as deputy in taking such inquisitions, and in certain cases a deputy may be appointed by the sheriff to act as returning officer in a parliamentary election (*r*).

Deputy of
under-sheriff.
Declaration
of office.

When it becomes the duty of an under-sheriff to act as high sheriff owing to the death of the high sheriff before he has been superseded (*s*), the under-sheriff may by writing appoint a deputy (*t*): otherwise an under-sheriff has no power to appoint a deputy, though he may authorise another to do a particular act (*a*).

1383. Every deputy sheriff must, before impanelling or returning any inquest, jury or tales, or intermeddling with the execution of any writ, make a declaration, which is exempt from stamp duty, before a judge of the High Court or a justice of the peace for the county or borough in which he exercises authority, to the effect that he will not use or exercise his office corruptly, or take any fee or reward before the impanelling or returning of any inquest,

(*k*) Including a sheriff of a county of a city or county of a town (see p. 796, *ante*); see Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 36 (4).

(*l*) *Ibid.*, s. 24.

(*m*) *Woodland v. Fuller* (1840), 11 Ad. & El. 859, 867.

(*n*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 34 (b). As to sheriffs of franchises, see p. 798, *ante*.

(*o*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 34 (c).

(*p*) See title COURTS, Vol. IX., p. 119.

(*q*) See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 87.

(*r*) See title ELECTIONS, Vol. XII., p. 258.

(*s*) See p. 801, *ante*.

(*t*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 25 (2).

(*a*) *Parker v. Kell* (1701), 1 Salk. 95.

jury or tales above the fees allowed by law, but will truly and indifferently with convenient speed impanel all juries and return all writs appertaining to his office (b).

SECT. 3.
Deputies.

1384. The office of deputy sheriff may not, directly or indirectly, be bought, sold, let or taken to ferm, nor may any valuable consideration be given or received therefor; but this prohibition does not prevent the sheriff from giving a salary or remuneration for the execution of the office (c).

Prohibition
of sale or
letting of
office.

SECT. 4.—*Bailiffs and Officers.*

1385. Bailiffs or sheriff's officers are appointed by sheriffs for the purpose of summoning juries, collecting fines, and executing writs and processes (d). They are generally paid by salary, and usually give a bond, with sureties, to the sheriff for the due execution of the office and the accounting to the sheriff for the fees and perquisites received in respect thereof, and indemnifying him against liability for any extortion or breach of duty on their part; hence they are sometimes called "bound bailiffs" (e).

Appointment.

Security.

In the City of London the bound bailiffs are called "serjeants-at-mace" and their assistants "yeomen." It is the duty of the Secondary to take securities on behalf of the sheriffs from the serjeants-at-mace.

In the City
of London.

The office of bailiff or sheriff's officer being one of responsibility and trust, an infant ought not to be appointed (f). The office is a personal one, and cannot be executed by a deputy (g), nor is any partnership possible between two such officers so as to render the acts of one binding on the other (h).

Nature of
office.

1386. A bailiff or other sheriff's officer must, before taking upon himself to impanel or return any inquest, jury, or tales, or to intermeddle with the execution of any writs issued by any court of record, make a similar declaration to that required from a deputy sheriff (i) before a judge of the High Court or justice of the peace for the county or borough in which he exercises authority (k).

Declaration
of office.

1387. No person may directly or indirectly by himself or by any person in trust for him, or for his use, buy, sell, let, or take to ferm

Prohibition
of sale or
letting of
office.

(b) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 26. For form of declaration, see *ibid.*, Sched. II.

(c) *Ibid.*, s. 27.

(d) 1 Bl. Com. 345.

(e) *Ibid.*, 346. In *Farebrother v. Worsley* (1831), 5 C. & P. 102, it was held that a sheriff who defended an action for a false return as well as he could was entitled to recover his costs from the sureties of the bailiff who executed the writ, though the verdict was given against him on the ground of the non-production of certain evidence which ought to have been produced; and, as to the nature and extent of the liability of the sureties, see also *Cook v. Palmer* (1827), 6 B. & C. 739; *Farebrother v. Worsley* (1831), 1 Tyr. 424. For form of bond, see Watson on Sheriffs, 2nd ed., 463.

(f) *Cuckson v. Winter* (1828), 2 Man. & Ry. (K. B.) 313, 317.

(g) *Jackson v. Hill* (1839), 10 Ad. & El. 477, per PATTESON, J., at p. 484.

(h) *Jons v. Perchard* (1796), 2 Esp. 507.

(i) See p. 802, ante.

(k) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 26, Sched. II.

SECT. 4.
Bailiffs and Officers. the office of bailiff, or any other office appertaining to the office of sheriff, nor contract for, promise, or grant for valuable consideration any such office, nor give, promise, or receive any valuable consideration therefor (*l*), but this does not prevent the sheriff or under-sheriff from taking the lawful fees of any employment belonging to the office of sheriff, or from taking security for duly answering the same, nor any officer of the sheriff from accounting to him for fees received in respect of his office, or from giving security so to account, nor does it prevent a sheriff from giving nor an officer from receiving a salary or remuneration for the execution of his office (*m*).

Special
 bailiff.

1388. The term "special bailiff" is sometimes used to signify a particular officer appointed to execute a writ at the instance of the person issuing the writ. Such an officer is, as between the person issuing the writ and the sheriff, regarded rather as the agent of the former than the latter, so as to exonerate the sheriff, as a general rule, from liability to the person issuing the writ for any misconduct or breach of duty on the part of the officer in the execution of the writ (*n*).

Part III.—Disqualifications of Sheriffs and Officers.

Sheriff:
 as justice of
 the peace;
 as member
 of Parlia-
 ment.

1389. The high sheriff of a county is disqualified from acting as a justice of the peace for the county (*o*); and, being returning officer, is not eligible as a member of Parliament for the county, or for any riding or division thereof, but he is eligible for any other county, or for a borough even within the county of which he is sheriff (*p*).

Sale of
 intoxicating
 liquor.
 Service on
 jury.

1390. All sheriff's officers are disqualified from holding licences to retail intoxicating liquor (*q*); they are also exempt from service upon any jury or inquest (*r*), and no sheriff or officer of a sheriff may return in any panel, for an inquest or jury, any officer or servant of the sheriff or of such officer (*s*).

(*l*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 27 (1).

(*m*) *Ibid.*, s. 27 (3).

(*n*) See p. 828, *post*.

(*o*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 17; *Ex parte Colville* (1875), 1 Q. B. D. 133.

(*p*) 1 Bl. Com. 175; 2 Hatsell, Precedents of the House of Commons, 30—34; *Abingdon Case* (1776), 1 Doug. El. Cas. 420; *Southampton Case* (1776), 4 Doug. El. Cas. 87, 118.

(*q*) Beerhouse Act, 1836 (11 Geo. 4 & 1 Will. 4, c. 64), s. 2; Refreshment Houses Act, 1860 (23 & 24 Vict. c. 27), s. 8; Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 35 (1); and see title INTOXICATING LIQUORS, Vol. XVIII., pp. 54, 56.

(*r*) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 9, Sched.

(*s*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 12; and see title JURIES, Vol. XVIII., p. 231.

Part IV.—Powers, Duties, and Liabilities.

SECT. 1.—*At Assizes.*

SECT. 1.

At Assizes.

1391. It is the duty of the sheriff of the county (*t*) to make arrangements for the proper reception of the judges of assize on arrival at the assize town, to provide a proper equipage and escort for conveying the judges on arrival to their lodgings, and for conveying them during the holding of the assizes daily to and from the court, to make provision for the judges' lodgings, to arrange for any church services which may be desired by the judge or judges, and attend such services with their under-sheriffs, to make arrangements for the opening of the commission, and generally to attend on the judges, and see that they are properly lodged and cared for and treated with all respect, and to arrange for their departure on the termination of the assizes (*a*).

Reception
of and
attendance
on judges
of assize.

The necessary arrangements are usually made by the under-sheriff as deputy of the high sheriff, but it is the duty of the high sheriff in person to meet the judge or judges on arrival (*b*), and to give his attendance throughout the assizes (*c*). Either the high sheriff or under-sheriff should attend the court throughout each day for the purpose of looking after the jurors who are under the sheriff's control, and observing any directions of the judge, the clerk of assize, or clerk of arraigns.

Attendance
in person.

1392. It is usual to have men-servants in livery in attendance for the purpose of providing an escort, and keeping order in and within the precincts of the court, and of protecting the judges (*d*). A court of quarter sessions in the county may direct that in lieu of such men-servants a sufficient number of police constables shall be employed, but, if no such direction is given, it is the duty of the sheriff to have a sufficient number of men-servants in livery

Men-servants
in livery
and police
constables in
attendance.

(*t*) The sheriff of a city or town which is a county of itself (see p. 706, *ante*; title MAGISTRATES, Vol. XIX., p. 540, note (*f*)) must also attend where there are cases to be tried concerning the city or town. The sheriffs of the City of London are required to attend every session of the Central Criminal Court, and they provide a daily luncheon for the judges and privileged persons and pay the expenses of jurors locked up for the night (Parliamentary Reports, City and County of London Amalgamation, 1894, Vol. I. [C 7493], p. 77, Vol. II., Appendix iii., 21). The Secondary also attends during the trial of City prisoners, and attends the sittings for the trial of City of London actions at the High Court (*ibid.*, Appendix iii., 54).

(*a*) It is also the duty of the bailiff of any franchise (see p. 798, *ante*) who has in times past been accustomed to attend to continue to do so, and to execute any writs directed to him for the administration of justice in the franchise (Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 35). As to the assizes, see title COURTS, Vol. IX., p. 73.

(*b*) In practice the high sheriff is always accompanied by his under-sheriff.

(*c*) *Ex parte Fernandez* (1861), 10 C. B. (N. S.) 3, 52.

(*d*) 1 Bl. Com. 346. Stat. (1662) 14 Car. 2, c. 21, provided that no sheriff should have more than forty men-servants in livery, nor less than twenty in England or twelve in Wales, attending him. This provision was repealed by the County and Borough Police Act, 1859 (22 & 23 Vict. c. 32), s. 18.

- SECT. 1.** for the purposes mentioned (*e*). The power of directing constables to be employed may, in the case of a county of a city or county of a town, be exercised by the city or town council instead of quarter sessions (*f*).
- At Assizes.**
- Duty to summon juries.** **1393.** It is the duty of the under-sheriff, as deputy of the sheriff, to summon the juries pursuant to a precept from the presiding judge, which directs him to summon a sufficient number of duly qualified jurors for the trial of all issues, civil or criminal, which may come on for trial, including a sufficient number of special jurors to try special jury cases, and to deliver a return to the precept to the clerk of assize (*g*).
- Proclamation of the assizes.** **1394.** On receipt of the precept directing him to summon jurors, it is the duty of the sheriff to give public notice of the holding of the assizes, which is generally done by means of advertisements in the leading county newspapers.
- Calendar of prisoners.** **1395.** It was formerly the duty of the sheriff, as the custodian of prisoners, to deliver the calendar of prisoners to the presiding judge, but this duty has devolved upon the gaoler (*h*).
- Execution of death sentence.** The duty of carrying the judgment of the court into execution (*i*) is now confined, in the case of criminal sentences, to the sentence of death (*k*).

SECT. 2.—At Quarter Sessions.

- Duties at county quarter sessions.** **1396.** It is the duty of the sheriff at county quarter sessions to summon the necessary jurors on a precept from the clerk of the peace (*l*). This duty is generally performed by the under-sheriff, who attends the court in order to deliver a return to the precept to the clerk of the peace, and to look after the jurors (*m*). It is not usual for the high sheriff to attend.
- Borough quarter sessions.** The sheriff has no duties to perform at borough quarter sessions, and is under no obligation to attend (*n*).

(*e*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 9. This requirement of the maintenance of men-servants does not apply to the sheriffs of the city of London (*ibid.*, s. 33 (4)).

(*f*) *Ibid.*, s. 36 (4).

(*g*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 20; Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 105, 108, as partially repealed by the Special Juries Act, 1898 (61 & 62 Vict. c. 6), s. 1 (1); and see title JURIES, Vol. XVIII., pp. 236, 237.

(*h*) See title PRISONS, Vol. XXIII., p. 244.

(*i*) 1 Bl. Com. 344.

(*k*) See pp. 823 *et seq.*, *post*.

(*l*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 20; and see titles JURIES, Vol. XVIII., p. 238; MAGISTRATES, Vol. XIX., p. 631. The gaoler now delivers the calendar of prisoners to the clerk of the peace, a duty formerly performed by the sheriff; see title PRISONS, Vol. XXIII., p. 244.

(*m*) See title MAGISTRATES, Vol. XIX., p. 631. As to the duty of the bailiff of any franchise (see p. 798, *ante*) within the county to attend if he has been accustomed to do so, see Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 35.

(*n*) In this case the duties of summoning juries etc. are performed by the clerk of the peace and registrar of the borough civil court (if any; see title COURTS, Vol. IX., pp. 129 *et seq.*) respectively (Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 186); and see titles JURIES, Vol. XVIII., p. 238; MAGISTRATES, Vol. XIX., p. 625.

SECT. 3.—*Judicial Functions.*SUB-SECT. 1.—*In General.*SECT. 3.
Judicial
Functions.

1397. In ancient times the sheriff had civil jurisdiction in small causes, and also a criminal jurisdiction, which were exercised, respectively, in the county court and sheriff's tourn (*o*). The civil jurisdiction of the sheriff has now been superseded by that of the modern county courts (*p*), and the criminal jurisdiction by that of the justices of the peace at petty sessions. The sheriff is now only bound to hold a county court where it is required for the purpose of an election (*q*), or for the due execution of some writ or some other specific purpose (*r*), in which case he must hold a court at the time fixed by law or by the writ, or, if no time is so fixed, as soon as reasonably practicable after he is informed of the necessity of holding the court, or receives the writ, and, if more than one court is necessary for any such purpose, the courts must be held at intervals of not more than a month (*s*).

Ancient
civil and
criminal
jurisdiction.County
court.

The sheriff's tourn is entirely abolished (*t*), and a sheriff may not under any commission or writ take any inquest whereby any person is indicted (*a*).

Tourn.

(*o*) Com. Dig., tiths. County (C), Leet (A). As to the two ancient Sheriffs' Courts of the City of London, see title COURTS, Vol. IX., p. 177.

(*p*) The City of London Court was, prior to the County Courts Act, 1867 (30 & 31 Vict. c. 42), known as the Sheriffs' Court of the City of London. It is now assimilated to the ordinary county courts (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 185); see title COUNTRY COURTS, Vol. VIII., p. 412, note (*o*).

(*q*) See p. 809, *post*.

(*r*) As, for instance, in the case of inquisitions on writs of *elegit* (see pp. 808, 809, *post*; title COURTS, Vol. IX., pp. 118, 119) and writs of extent (see title CROWN PRACTICE, Vol. X., pp. 14 *et seq.*), and under the Lands Clauses Acts (see p. 808, *post*), and for the assessment of damages under writs of inquiry (see title COURTS, Vol. IX., pp. 119, 120); see also title JURIES, Vol. XVIII., pp. 238, 239.

(*s*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 18 (1); see *R. v. Diplock* (1869), L. R. 4 Q. B. 549. The court must be held at the place appointed or authorised by law, or at such other place as the sheriff may fix with the consent of the authority for the time being having power to divide the county into polling districts for the purpose of parliamentary elections (Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 18 (2)).

(*t*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 18 (4). But, notwithstanding the abolition of the sheriff's tourn and the repeal of any enactment by the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), every court leet, court baron, law day, view of frankpledge, or other like court which was held at the passing of that Act (16th September, 1887), must continue to be held on the days and in the places accustomed, but has no larger powers, nor may any larger fees be taken, than before, and any indictment or presentment found at any such court may be dealt with in like manner as before (*ibid.*, s. 40 (1)). Where any enactment repealed by the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), applied to any coroner, escheator, or other officer, he continues to be governed thereby as if it were not repealed, except that where any provision as regards a sheriff or sheriff's officer is substituted by the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), for the repealed enactment, it applies to such coroner, escheator, or officer in lieu of the repealed enactment (*ibid.*, s. 40 (2)).

(*a*) *Ibid.*, s. 18 (3).

SECT. 3.
Judicial
Functions.
Writs of
inquiry.

SUB-SECT. 2.—*Writs of Inquiry.*

1398. Writs of inquiry are in certain cases issued from the High Court to the sheriff for the assessment of damages with a common or special jury. The sheriff may appoint a special deputy to execute such a writ, but the under-sheriff usually acts as his deputy and presides at the inquiry. In the City of London such inquiries are taken by the Secondary as deputy for the sheriffs, the court being held at the Guildhall (*b*).

SUB-SECT. 3.—*Under the Lands Clauses Acts (c).*

Ascertain-
ment of
compensation
on com-
pulsory
purchase
of land.

1399. When the amount of disputed compensation exceeding £50 for land compulsorily taken or injuriously affected is to be determined by the verdict of a jury otherwise than on a trial in the High Court, it is the duty of the sheriff or his deputy, who is generally the under-sheriff, for the place where the land is situated, to summon the jury and preside at the inquiry (*d*). The person presiding at the inquiry must sign the verdict, and give and sign judgment for the amount of compensation assessed, which may be enforced by action (*e*).

Westminster
and City of
London.

If the land is within the city and liberty of Westminster, the high bailiff of the city and liberty or his deputy is substituted for the sheriff (*f*). In the City of London the Secondary summons the jury, which is generally a special jury who have viewed the premises, and presides at the hearing (*g*).

Where sheriff
interested.

1400. Where the high sheriff has a direct pecuniary interest in the matter, his duties devolve on the coroner of the county and not on the under-sheriff (*h*), and, where the under-sheriff is interested, the high sheriff may proceed himself or appoint a disinterested deputy (*i*).

SUB-SECT. 4.—*Inquisitions on Writs of Elegit.*

Writs of
elegit.

1401. On the receipt of a writ of *elegit* it is the duty of the sheriff, generally performed by the under-sheriff, to summon a jury

(*b*) See titles COURTS, Vol. IX., pp. 119, 120; DAMAGES, Vol. X., p. 349; JURIES, Vol. XVIII., pp. 228, 240.

(*c*) As to the Lands Clauses Acts, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 12 *et seq.*

(*d*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 3, 41, 43. For form of warrant to common jury to assess compensation under *ibid.*, see Encyclopædia of Forms and Precedents, Vol. VIII., p. 60.

(*e*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 50. For details as to summoning juries, the procedure at the inquiry, form of verdict, entering, enforcing or vacating the judgment, and the penalty for default on the part of the sheriff, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 86 *et seq.*; and, as to the duty of the sheriff to deliver possession of the land in certain cases, see *ibid.*, p. 102.

(*f*) Lands Clauses Consolidation Act, 1869 (32 & 33 Vict. c. 18), s. 3.

(*g*) Parliamentary Reports, City and County of London Amalgamation, Vol. II., 1894 [C 7493], Appendix iii., 54.

(*h*) Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 39; see, further, title CORONERS, Vol. VIII., pp. 249, 250.

(*i*) *Worsley v. South Devon Rail. Co.* (1851), 16 Q. B. 539; *Ex parte Baddeley* (1849), 5 Ry. & Can. Cas. 542.

to inquire what lands the execution debtor holds in the county and what is their value, and to preside at the inquisition (*j*).

SECT. 3.
Judicial
Functions.

SECT. 4.—*As to Juries.*

1402. The sheriff (*k*) is the proper summoning officer (*l*) of grand, special, and common juries for the High Court, assizes (*m*), and the Central Criminal Court (*n*). It is also the duty of the sheriff of every county, and of the high bailiffs of Westminster and Southwark respectively, to supply lists of persons qualified and liable to serve as jurors to the registrars of county courts, county court jurors being summoned from the lists so supplied (*o*). In the City of London the jury lists are prepared by the Secondary, who is also the summoning officer, and from these lists jurors are summoned for the Mayor's Court and the City of London Court (*p*).

Summoning
juries.

Jury lists.

SECT. 5.—*As to Elections.*

1403. At any parliamentary election for a county, including a county of a city or a county of a town (*q*), or for any riding, division, or part of a county, the sheriff is the returning officer (*r*) to whom

Returning
officers at
parliamentary
elections
for counties.

(*j*) See title COURTS, Vol. IX., pp. 118, 119. As to the nature of the writ and the proceedings thereunder, see title EXECUTION, Vol. XIV., pp. 61 *et seq.*

(*k*) The under-sheriffs perform all the duties of the sheriff with regard to juries; see p. 800, *ante*.

(*l*) If the sheriff is interested, the duty devolves on the coroner, and, if he is interested also, on elisors; see title JURIES, Vol. XVIII., pp. 236, 237.

(*m*) See p. 806, *ante*; and see title JURIES, Vol. XVIII., p. 237.

(*n*) The sheriff is also the summoning officer in the case of inquisitions in lunacy (see title LUNATICS AND PERSONS OF UNSOUND MIND, Vol. XIX., pp. 419 *et seq.*) and under the Lands Clauses Acts (see p. 808, *ante*), and inquiries under commissions of sewers (see title COURTS, Vol. IX., p. 221); and, as to the duties and liabilities of sheriffs and their officers in connexion with juries, see, generally, title JURIES, Vol. XVIII., pp. 236 *et seq.*, where the subject is fully dealt with.

(*o*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 102; and see note (*g*), p. 799, *ante*. As to county court juries, see, generally, title COUNTY COURTS, Vol. VIII., pp. 520 *et seq.*

(*p*) See title JURIES, Vol. XVIII., p. 263.

(*q*) For a list of parliamentary boroughs which are counties of themselves, see title ELECTIONS, Vol. XII., p. 260, note (*n*). In the City of London the Secondary superintends and conducts, under the sheriffs, the election of members for the City. On receipt of the writ he gives notice of the day of nomination and election, provides polling stations, presiding officers etc., makes the return to the Clerk of the Crown, and generally performs all the duties of returning officer. He also acts in a capacity similar to that of the town clerk of a municipal borough with regard to the registration (see title ELECTIONS, Vol. XII., pp. 241 *et seq.*) of parliamentary and county electors of the City, and superintends and conducts all elections of corporate officers in the City (Parliamentary Reports, City and County of London Amalgamation, Vol. II., 1894 [C 7493], Appendix iii., 54). For a list of such officers, see title METROPOLIS, Vol. XX., pp. 422 *et seq.*

(*r*) Com. Dig., tit. Parliament (D. 8.); Parliamentary Elections Act, 1853 (16 & 17 Vict. c. 68), s. 1. The counties palatine of Lancaster and Durham are now, so far as parliamentary elections are concerned, in the same position as other counties at large (Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 57; Parliamentary Electors Registration Act, 1868 (31 & 32 Vict. c. 58), s. 21). The Isle of Wight is, for the purpose of parliamentary elections, a county of itself, and the sheriff of the Isle of Wight or his deputy is the returning officer (Representation of the People Act, 1832

SECT. 5.
As to
Elections.

the writ is addressed (*s*), and all liberties and franchises are, with regard to the election of county members, considered as included in the counties or ridings or divisions of the counties in which they are locally situated (*a*).

Returning
officers at
parliamentary
elections for
boroughs.

1404. For every parliamentary borough which is not a county of itself or a municipal borough (*b*), the high sheriff of the county in which the borough is situated must in the month of March nominate a returning officer, who acts in that capacity until the nomination of his successor in the following year (*c*). Where any such borough is situated in more than one county, the sheriff of the county in which the largest part of the borough in extent is situated makes the appointment (*d*). The returning officer so nominated need not be resident in the borough, but must have an office therein for the purpose of his duties in connexion with elections (*e*).

Where, by reason of a temporary vacancy or other cause, there is no person qualified in any borough, city or town to perform the duties of returning officer, the writ for the election must be delivered to the sheriff of the county in which the borough, city or town is situated, and he must act as returning officer, but it is not lawful for the sheriff of the county to receive or execute the writ in such a case unless there is no person within the borough, city or town, who is legally qualified and competent to execute it (*f*).

No remunera-
tion.

1405. No sheriff or other returning officer is entitled to any remuneration in respect of the performance of his duties as returning officer (*g*).

Election
petitions.

1406. It is the duty of the sheriff or other returning officer, on receipt of a copy of a parliamentary election petition, forthwith to publish it in the county or borough as the case may be (*h*).

(2 & 3 Will. 4, c. 45), s. 16). As to the election of university members, see title ELECTIONS, Vol. XII., p. 258. A sheriff may in certain cases appoint a deputy; see *ibid.* As to the duties of returning officers, see *ibid.*, pp. 261 *et seq.*

(*s*) As to the mode of delivery of the writ to, and the indorsement thereon of the date of its receipt by, the sheriff, see *ibid.*, p. 258.

(*a*) Representation of the People Act, 1832 (2 & 3 Will. 4, c. 45), s. 66.

(*b*) In municipal boroughs the mayor is the returning officer. The high bailiff of Westminster is the returning officer of parliamentary boroughs the whole or the larger part of the area of which were within the old parliamentary borough of Westminster (Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), s. 12 (5)).

(*c*) Representation of the People Act, 1832 (2 & 3 Will. 4, c. 45), s. 11, extended by the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), s. 12 (1), to parliamentary boroughs constituted under that Act in which there is not for the time being a mayor; see title ELECTIONS, Vol. XII., p. 259.

(*d*) Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), s. 12 (3).

(*e*) *Ibid.*, s. 12 (2).

(*f*) Returning Officers Act, 1854 (17 & 18 Vict. c. 57), s. 1.

(*g*) See title ELECTIONS, Vol. XII., pp. 260, 261. As to the returning officer's expenses, see *ibid.*, pp. 333 *et seq.*

(*h*) Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), s. 7.

At the trial of the petition the judges are received at the place where the petition is to be tried in the same manner, so far as circumstances allow, as a judge of assize is received at the assize town (i).

SECT. 5.
As to
Elections.

SECT. 6.—*As Conservators of the Peace.*

1407. As conservator of the King's peace, it is the duty of the sheriff (k) to suppress unlawful assemblies and riots, and apprehend offenders, and to defend his county against invasion by the King's enemies, for which purposes he may take with him the *posse comitatus* (l). Any person who, without physical impossibility, refuses to assist in the suppression of a riot, may if it was reasonably necessary to call on him for assistance, be indicted, and it is no ground of defence that, owing to the number of rioters, his assistance would have been ineffectual (m).

Suppression
of riots:

"*posse
comitatus.*"

1408. In former times it was part of the duty of the sheriff to pursue and arrest felons within his county, and for that purpose to raise the hue and cry (n). Legally every person in a county is still bound to be ready at the command of the sheriff and at the cry of the country to arrest a felon, whether within a franchise or without, and in default is, on conviction, liable to a fine, and, if a bailiff, besides the fine, to imprisonment for a term not exceeding one year (o); but this power of raising the *posse comitatus* for the arrest of felons is not now used in practice owing to the establishment of the county police (p).

Arrest of
felons:

"hue and
cry."

SECT. 7.—*Execution of Process.*

SUB-SECT. 1.—*Receipt and Execution of Writ.*

1409. Save in a few exceptional cases, all writs of execution on judgments and orders of the Supreme Court are directed to the sheriff (q), and it is his duty to execute them (r). Even in the case

Writs of
execution.

(i) See p. 805, *ante*. As to the reception of election petition judges in the case of county and borough elections, see title ELECTIONS, Vol. XII., p. 411.

(k) Including a sheriff of a county of a city or county of a town; as to which, see title MAGISTRATES, Vol. XIX., p. 540, note (f). In the City of London it is the duty of the Secondary to aid the Lord Mayor and sheriffs in maintaining the peace.

(l) 1 Bl. Com. 343; Com. Dig., tit. Viscount (C. 2.); stats. (1303—4) 17 Ric. 2, c. 8; (1411) 13 Hen. 4, c. 7; (1414) 2 Hen. 5, stat. 1, c. 8; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 472 *et seq.* As to the *posse comitatus*, compare Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 8 (1); and see the text, *infra*.

(m) *R. v. Brown* (1841), Car. & M. 314; and see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 506, 507; POLICE, Vol. XXII., p. 499.

(n) 4 Bl. Com. 293, 294. As to the hue and cry, see also title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 300, note (c).

(o) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 8 (1). If default is found in the lord of a franchise, the franchise must be forfeited (*ibid.*).

(p) As to the sheriff's duty in certain cases upon the order of the court to pay rewards to persons assisting in the apprehension of offenders, see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 449.

(q) As to the proceedings on issue of the writ, see title EXECUTION, Vol. XIV., p. 16.

(r) As to the persons by whom and the manner in which writs of

SECT. 7.
Execution
of Process.

Liability of
sheriff.

of execution within a franchise, the writ ought to be directed to the sheriff and not to the bailiff of the franchise, it being the duty of the bailiff of the franchise to execute it under a mandate from the sheriff (s).

1410. The writ is an absolute justification to the sheriff for what is done in pursuance of it, even though the judgment on which it is founded may be afterwards set aside (t). But he is liable if any act is done in excess of the authority given by the writ (a), and it is not necessary, in an action against him for trespass, to prove actual damage (b). The sheriff may be sued by the execution creditor for not duly enforcing the writ, and by either the creditor or the debtor for any unreasonable delay or negligence in the execution, provided actual damage is shown (c).

execution are executed, and the duties and liabilities of the sheriff generally, see title EXECUTION, Vol. XIV., pp. 18 *et seq.*; and, as to execution of process in the county court, see title COUNTY COURTS, Vol. VIII., pp. 550 *et seq.* As to the duty of the sheriff in case of supervening bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 274, 275; and, as to the remedies of the sheriff in case of resistance or interference in the execution, see title EXECUTION, Vol. XIV., p. 22.

(s) *Grant v. Bugge* (1802), 3 East, 128 (writ directed to the bailiff of the Isle of Ely held void); and see title EXECUTION, Vol. XIV., pp. 18, 19. As to the liability of the sheriff where the bailiff makes no return, see *ibid.*, p. 23.

(t) *Rutland's Countess's Case* (1605), 6 Co. Rep. 52 b; *Parsons v. Loyd* (1772), 3 Wils. 341; *Ives v. Lucas* (1823), 1 C. & P. 7.

(a) *Saunderson v. Baker* (1772), 3 Wils. 309 (trespass for seizing goods of the wrong person); *Ash v. Dawnay* (1852), 8 Exch. 237 (trespass for remaining in possession an unreasonable time); *Playfair v. Musgrove* (1845), 14 M. & W. 239 (remaining on premises after property sold); *Lee v. Dangar, Grant & Co.*, [1892] 2 Q. B. 337, C. A. (refusing to withdraw until the payment of fees improperly demanded). Trover lies if more goods are sold than sufficient to satisfy the levy (*Batchelor v. Vyse* (1834), 4 Moo. & S. 552; *Stead v. Gascoigne* (1818), 8 Taunt. 527; *Aldred v. Constable* (1844), 6 Q. B. 370; see title TROVER AND DETINUE). The high bailiff of a county court is not liable as a trespasser, nor without proof of special damage, by reason of a mere irregularity or informality in the execution of a warrant, and is only liable for costs in such a case if the damages exceed 40s. (County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 52; see title COUNTY COURTS, Vol. VIII., p. 426); but trespass lies against him if premises are wrongfully entered and a substantial grievance is suffered (*De Coppett v. Barnett* (1901), 17 T. L. R. 273, C. A.), or if he seizes the goods of a third person (*White v. Morris* (1852), 11 C. B. 1015), and trover if he seizes and sells the goods of a third person (*Jelks v. Hayward*, [1905] 2 K. B. 460, C. A.). As to the liability of the execution creditor for a wrongful seizure, and the right of the sheriff to indemnity against him when misled by the indorsement on the writ, see title EXECUTION, Vol. XIV., pp. 28 *et seq.* As to the liability of the sheriff for the wrongful acts of his officers, see pp. 826 *et seq.*, *post.* As to wrongful and irregular execution generally, see title EXECUTION, Vol. XIV., pp. 28 *et seq.* As to the protection of public authorities generally, see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 299 *et seq.*

(b) *Saunderson v. Baker*, *supra*; *Lee v. Dangar, Grant & Co.*, *supra*. As to trespass generally, see title TRESPASS.

(c) *Mullet v. Challis* (1851), 16 Q. B. 239 (sale at an undervalue in consequence of negligence); *Aireton v. Davis* (1833), 9 Bing. 740; *Olifton v. Hooper* (1844), 6 Q. B. 468; *Carlile v. Parkins* (1822), 3 Stark. 163 (all cases of unreasonable delay); and see title EXECUTION, Vol. XIV., pp. 56, 57.

1411. No writ or process may be executed on Sunday except in cases of treason, felony, and breach of the peace (*d*). A writ of attachment for contempt of court of a *quasi*-criminal or public nature may, however, be executed on Sunday, such a contempt of court being regarded as a breach of the peace (*e*).

SECT. 7.
**Execution
of Process.**

Execution on
Sunday.

1412. A sheriff is justified in breaking open the outer door of a dwelling-house or other building in order to execute any process, by arresting a debtor or otherwise, at the suit of the Crown (*f*), or in order to execute a writ of attachment for contempt of a *quasi*-criminal nature (*g*), or to execute a writ of possession or *capias utlagatum*, though at the suit of a subject (*h*), if he cannot otherwise enter; but he ought in the first instance to require the door to be opened, and is only justified in breaking it open on a refusal of admission (*i*).

Right to break
open doors. •

In other cases of civil process between subject and subject the sheriff is not warranted in breaking open the outer door of a dwelling-house (*k*), but he may enter if the door is open (*l*), or may open it by any of the usual means, such as by turning the key, lifting the latch, or drawing back the bolt (*m*). He may also make an entry through an open window (*n*), or by further opening a window which is already partly open (*o*), but not by opening a window which is shut, even though it may not be fastened (*p*).

Right of
entry in
civil process.

(*d*) Sunday Observance Act, 1677 (29 Car. 2, c. 7), s. 6; see *Wells v. Gurney* (1828), 8 B. & C. 769; *Lyford v. Tyrrel* (1792), 1 Anst. 85; *R. v. Myers* (1786), 1 Term Rep. 265; *Ex parte Eggington* (1853), 2 E. & B. 717; *Atkinson v. Jameson* (1792), 5 Term Rep. 25; and see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 309; EXECUTION, Vol. XIV., pp. 7, 30.

(*e*) *Anon.* (1744), Willes, 459 (attachment for a rescue); *Burdett v. Abbot* (1811), 14 East, 1, 162; and see title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., p. 319.

(*f*) *Semayne's Case* (1604), 5 Co. Rep. 91 a; 1 Smith, L. C., 11th ed., p. 104; *Burdett v. Abbot*, *supra*, at p. 154; *Harvey v. Harvey* (1884), 26 Ch. D. 644, 649.

(*g*) *Burdett v. Abbot*, *supra*, per Lord ELLENBOROUGH, C.J., at p. 154, and BAYLEY, J., at p. 162; *Harvey v. Harvey*, *supra* (writ of attachment for non-compliance with an order of the court for delivery of deeds and documents); *Re Freston* (1883), 11 Q. B. D. 545, C. A. (disobedience by a solicitor to an order to pay money as an officer of the court). An attachment is of a *quasi*-criminal nature for this purpose whenever it is punitive or disciplinary (*Re M'Williams* (1803), 1 Sch. & Lef. 169, 174; *Re Freston*, *supra*, at pp. 553 et seq.).

(*h*) *Semayne's Case*, *supra*; *Harvey v. Harvey*, *supra*, at p. 655; *R. v. Bird* (1680), 2 Show. 87.

(*i*) *Semayne's Case*, *supra*; *Burdett v. Abbot*, *supra*, at p. 162; *Launock v. Brown* (1819), 2 B. & Ald. 592.

(*k*) *Semayne's Case*, *supra*; *Burdett v. Abbot*, *supra*; *Harvey v. Harvey*, *supra*, at pp. 648, 649; *Brunswick (Duke) v. Slowman* (1849), 8 C. B. 317.

(*l*) *Semayne's Case*, *supra*.

(*m*) *Ryan v. Shilecock* (1851), 7 Exch. 72 (a case of distress, but the same rule probably applies to execution of process; see *ibid.*, at p. 77); *Huncock v. Austin* (1863), 14 C. B. (N. S.) 634; *Attack v. Bramwell* (1863), 3 B. & S. 520.

(*n*) *Nixon v. Freeman* (1860), 5 H. & N. 652 (a case of distress).

(*o*) *Crabtree v. Robinson* (1885), 15 Q. B. D. 312 (a case of distress).

(*p*) *Nash v. Lucas* (1867), L. R. 2 Q. B. 590; and see title DISTRESS, Vol., XI., p. 164.

SECT. 7.

Execution of Process.

Breaking open after arrest, seizure of goods, or entry.

Extent of privilege of not having outer door broken.

Effect of illegal breaking open.

If a person is lawfully arrested, an outer door may be broken open in order to complete the execution and take him into custody (*q*), and if, after arrest, the prisoner escapes, the sheriff may justify a breaking open, on a fresh pursuit, to retake him (*a*). An outer door may be broken open in order to carry away goods lawfully seized if there is nobody there to open the door or after refusal to open it (*b*); and if, after an entry has been made, the officer is forcibly expelled, he may break open the outer door to re-enter without any previous demand for re-entry (*c*).

1413. The privilege of not having an outer door broken open only extends to the occupier of the house, and does not operate to protect a person who flies or puts his goods there to prevent the execution of process (*d*). But in order to justify the entering and searching of the house of a stranger to arrest or seize the goods of the person against whom the process is issued, the sheriff must prove that the person to be arrested was, or the goods to be seized were, in fact in the house (*e*). He cannot justify by proving that there was reasonable ground of suspicion (*c*). A sheriff may, however, justify entering the house of the administrator on a writ of *fi. fa.* against an intestate, to search for the goods, though they may not be found there, because the administrator may naturally be expected to be in custody of them (*f*).

The privilege is confined to dwelling-houses. The outer door of premises occupied by the debtor, but not being his dwelling-house, nor within the curtilage of his dwelling-house, may lawfully be broken open (*g*).

1414. The fact that an outer door is illegally broken open does not, in the case of an execution against property, affect the validity of the subsequent seizure and sale of the property, though it gives a right of action to the person aggrieved (*h*). It is otherwise in the case of an arrest of the person, a person arrested by illegal means being entitled to be discharged before he can be lawfully arrested (*h*).

(*q*) *Sandon v. Jervis* (1858), E. B. & E. 935 (where the officer, executing a writ of *ca. sa.*, put his hand through a broken window and touched the debtor, saying, "You are my prisoner," and it was held that that constituted an arrest).

(*a*) *Anon.* (1774), Loftt. 390.

(*b*) *Pugh v. Griffith* (1838), 7 Ad. & El. 827.

(*c*) *Aga Kurbooke Mahomed v. R.* (1843), 4 Moo. P. C. C. 239; *Bannister v. Hyde* (1860), 2 E. & E. 627; *Boyd v. Profaze* (1867), 16 L. T. 431; *Eagleton v. Gutteridge* (1843), 11 M. & W. 465; and see title EXECUTION, Vol. XIV., p. 40.

(*d*) *Semayne's Case* (1604), 5 Co. Rep. 91 a; 1 Smith. L. C., 11th ed., p. 104; *Lee v. Gansel* (1774), 1 Cowp. 1.

(*e*) *Morrish v. Murrey* (1844), 13 M. & W. 52; *Johnson v. Leigh* (1815), 6 Taunt. 246; and see title EXECUTION, Vol. XIV., pp. 40, 41.

(*f*) *Cooke v. Birt* (1814), 5 Taunt. 765.

(*g*) *Hodder v. Williams*, [1895] 2 Q. B. 663, C. A. (writ of *fi. fa.*); *Brown v. Glenn* (1851), 16 Q. B. 254 (writ of *fi. fa.*); and see *Long v. Clarke*, [1894] 1 Q. B. 119, C. A. (where a distress bailiff climbed over a wall surrounding the yard of a dwelling-house, and got in through an open window).

(*h*) *Hooper v. Lane* (1857), 6 H. L. Cas. 443, 550, H. L.; *Percival v. Stamp* (1853), 9 Exch. 167; compare title EXECUTION, Vol. XIV., pp. 30, 41.

1415. When once an entry has been made, the doors of particular rooms, cupboards or trunks may be broken open in order to complete the execution (*i*), and it is not necessary to demand that such inner doors etc. shall be opened before the breaking (*k*).

SECT. 7.
Execution of Process.

Inner doors and cupboards.

SUB-SECT. 2.—*Return to Writ.*

1416. Although, theoretically, it is the duty of the sheriff to make a return to every writ of execution, in practice a return is never made, except in the case of the writ of *elegit*, unless it is required by the execution creditor (*h*). No proceedings lie in respect of the non-return of a writ until the sheriff has been required to make a return (*m*), and an order for a return is in the discretion of the court (*n*).

Duty to return writ.

Where, in the case of the non-return of a writ, the sheriff returns that he has delivered the writ for execution to the bailiff of a franchise, the sheriff may be ordered to execute the writ, notwithstanding the franchise, and to cause the bailiff of the franchise to attend before the High Court and answer why he did not execute the writ (*o*).

Non-return by bailiff of franchise.

An action does not lie for a false return without proof of special damage (*p*).

False return.

SUB-SECT. 3.—*Arrest on Civil Process.*

1417. Except in the case of Crown debts (*q*), arrest and imprisonment for non-payment of money are confined to certain specific cases defined by statute (*r*), and the subject is therefore of much less importance than it was formerly.

Arrest now confined to specific cases.

1418. It is the duty of the responsible officer to whom the warrant is directed (*s*) to attend an arrest for the purpose of

Duty of responsible officer.

(*i*) *R. v. Bird* (1680), 2 Show. 87 (writ of *fi. fa.*); *Ratcliffe v. Burton* (1802), 3 Bos. & P. 223 (writ of *ca. sa.*); *Lee v. Gansel* (1774), 1 Cowp. 1 (door of lodger's apartment broken open in order to arrest him); *Lloyd v. Sandilands* (1818), 8 Taunt. 250 (window of apartment broken open on refusal to open door).

(*k*) *Hutchison v. Birch* (1812), 4 Taunt. 619.

(*h*) As to returns to writs generally, and proceedings to compel a return, see title EXECUTION, Vol. XIV., pp. 22 *et seq.* As to making a return after the expiration of the sheriff's year of office, see *ibid.*, p. 24.

(*m*) *Shaw v. Kirby* (1888), 52 J. P. 182.

(*n*) *Angell v. Baddeley* (1877), 3 Ex. D. 49, C. A. See, further, title EXECUTION, Vol. XIV., pp. 22, 23.

(*o*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 34 (*f*). A sheriff may not return to a writ that he has delivered it to a bailiff of some liberty not recorded in the Exchequer (*ibid.*, s. 10 (2)). As to franchises, see p. 798, *ante*.

(*p*) *Wylie v. Birch* (1843), 4 Q. B. 506; *Levy v. Hale* (1859), 29 L. J. (C. P.) 127; *Hobson v. Thellusson* (1867), 8 B. & S. 476; *Stimson v. Farnham* (1871), L. R. 7 Q. B. 175.

(*q*) The liability to arrest and imprisonment in respect of debts due to the Crown is not affected by the Debtors Act, 1869 (32 & 33 Vict. c. 62); see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 338.

(*r*) The subject is fully dealt with under titles BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 337 *et seq.*; CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., pp. 298 *et seq.* As to execution on a writ of attachment for contempt, see *ibid.*, pp. 318 *et seq.*

(*s*) See pp. 811, 812, *ante*.

SECT. 7.
Execution
of Process.

Manner of
arrest.

supervision (*t*), but, provided the arrest is effected by his authority and direction, it is not necessary that it should actually take place in his presence or sight (*a*).

The proper mode of effecting an arrest is to touch the person to be arrested and intimate that he is a prisoner (*b*). Mere words, without touching, are not sufficient to constitute an arrest, unless the person to be arrested acquiesces by going with the officer or otherwise (*c*), or unless he is actually placed under restraint (*d*). The warrant ought to be produced by the officer on making an arrest (*e*).

Place of
arrest.

1419. A person may not be arrested on civil process in the King's presence or within the verge of a royal palace which is also a royal residence, or in any place where the King's justices are actually sitting (*f*).

Custody of
prisoner.

1420. The sheriff is not bound to bring before the court a person arrested on civil process unless he is so directed. He is justified in detaining him until ordered to return the process (*g*).

A person in custody by virtue of any writ, or attachment for debt (*h*), may not be conveyed without his free and voluntary consent (*i*) to any house licensed for the sale of intoxicating liquor, or to the private house of the officer, or of any tenant or relation of the officer, having him in custody; nor may the officer charge him any sum for, or procure him to call for, any liquor, food or other thing except what he freely asks for; nor take him to any prison within twenty-four hours of arrest, unless he refuses to be carried to a safe and convenient dwelling-house of his own nomination, not being his own private dwelling-house, within the borough or town where he is arrested, or if not arrested in a borough or town, within three miles of the place and in the county or franchise in which he is arrested (*k*); but the officer must permit him to send for food or

(*t*) *Rhodes v. Hull* (1857), 26 L. J. (EX.) 265; and see *Collins v. Yewens* (1839), 10 Ad. & El. 570; *Housin v. Barrow* (1794), 6 Term Rep. 122.

(*a*) *Blatch v. Archer* (1774), 1 Cowp. 63.

(*b*) *Sandon v. Jervis* (1858), E. B. & E. 935; and see title TRESPASS. As to arresting on Sunday and breaking open doors in order to effect an arrest, see pp. 813 *et seq.*, *ante*.

(*c*) *Russen v. Lucas* (1824), 1 C. & P. 153.

(*d*) *Grainger v. Hill* (1837), 4 Bing. (N. C.) 212.

(*e*) *Robins v. Hender* (1835), 3 Dowl. 543.

(*f*) 3 Bl. Com. 289; and see title CONSTITUTIONAL LAW, Vol. VI., p. 409. Hampton Court Palace is not a royal palace for this purpose because it is not a royal residence (*A.-G. v. Dakin* (1870), L. R. 4 H. L. 338; compare *Winter v. Miles* (1809), 10 East, 578; *A.-G. v. Donaldson* (1842), 10 M. & W. 117). As to the Tower, see *Batson v. McLean* (1815), 2 Chit. 51; compare title CORONERS, Vol. VIII., pp. 230, 231.

(*g*) *Greaves v. Keene* (1870), 4 Ex. D. 73.

(*h*) An order for commitment under the Debtors Act, 1869 (32 & 33 Vict. c. 62), for default in payment of a judgment debt is not an attachment for debt within the meaning of this enactment, and the person committed need not be detained for twenty-four hours before being taken to prison (*Mitchell v. Simpson* (1890), 25 Q. B. D. 183, C. A.).

(*i*) See *Barsham v. Bullock* (1839), 10 Ad. & El. 23.

(*k*) A person arrested does not refuse to be carried to a safe and convenient dwelling-house within the meaning of the enactment unless the

liquor from what place he thinks fit, and to have bedding, linen and other necessary things supplied and to use the same without restriction (*l*).

Every court of county quarter sessions must from time to time make an order allowing sums which may be taken from prisoners arrested in the county, to be applied in respect of one or more nights' lodging or for a day's diet or other expenses, and may, from time to time vary any such order (*m*).

1421. The following persons are privileged from arrest on civil process (*n*):—

Members of the Royal Family, servants of the King and other members of the royal household (*o*), including chaplains (*p*).

Ambassadors and other public Ministers of any foreign States authorised and received as such (*q*).

Peers (*r*), including Scottish and Irish non-representative peers (*s*), and peeresses, whether in their own right or by marriage (*t*).

SECT. 7. Execution of Process.

Maintenance
of prisoners.

Privilege
from arrest.

Royal
household.

Diplomatists.

Peers.

proposal is made to him (*Simpson v. Renton* (1833), 5 B. & Ad. 35; *Gordon v. Laurie* (1846), 9 Q. B. 60), but the sheriff has a reasonable discretion in determining whether the house nominated is safe for his custody (*Pitt v. Middlesex Sheriff* (1830), 1 Dowl. 201). A mere request to be taken to a house to consult someone is not a nomination within the enactment (*Silk v. Humphery* (1836), 4 Ad. & El. 959). As to prisoners generally, see title PRISONS, Vol. XXIII., pp. 243 *et seq.*

(*b*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 14 (1). A printed copy of *ibid.*, s. 14, must be delivered by the sheriff, under-sheriff or secondary to the officer employed to execute the writ (*ibid.*, s. 14 (4)), and the officer must show a printed copy to every person he arrests and goes with to any house where intoxicating liquor is sold, and permit him to read it before any liquor or food is called for or brought to him, any breach of this provision being deemed a misdemeanour in the execution of the writ (*ibid.*, s. 14 (5)).

(*m*) *Ibid.*, s. 14 (2). A copy of such order signed by the clerk of the peace must be fixed in some conspicuous place in the sessions house (*ibid.*, s. 14 (3)).

(*n*) As to privilege from arrest on process of contempt, see title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., pp. 320 *et seq.*

(*o*) *Barlett v. Hebbes* (1793), 5 Term Rep. 686; *King v. Foster* (1810), 2 Taunt. 167 (menial servant, though carrying on a trade); *Reynolds v. Porcock* (1838), 4 M. & W. 371 (page of the presence); *Aldridge v. Barry* (1835), 3 Dowl. 450, n. (lord of the bedchamber); *Dyer v. Disney* (1847), 16 M. & W. 312 (Somerset Herald-at-Arms); *Sard v. Forrest* (1822), 2 Dowl. & Ry. (K. B.) 250 (yeomen of the guard); *Hatton v. Hopkins* (1817), 6 M. & S. 271 (servants of yeomen of the guard); compare *Tapley v. Battine* (1822), 1 Dowl. & Ry. (K. B.) 79^o; and, as to officers of the Tower, see *Batson v. M'Lean* (1815), 2 Chit. 51; *Bidgood v. Davies* (1826), 6 B. & C. 84.

(*p*) *Winter v. Dibdin* (1844), 2 Dowl. & L. 211; *Byron v. Dibdin* (1835), 3 Dowl. 448; *Harvey v. Dakins* (1849), 3 Exch. 266; *Re Swan v. Dakins. Ex parte Dakins* (1855), 16 C. B. 77.

(*q*) See title CONSTITUTIONAL LAW, Vol. VI., pp. 428 *et seq.*

(*r*) *Couch v. Arundel (Lord)* (1802), 3 East, 127; and see, generally, titles CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., p. 320, note (*m*); PARLIAMENT, Vol. XXI., pp. 779, 780; PEERAGES AND DIGNITIES, Vol. XXII., p. 271.

(*s*) *Davis v. Rendlesham (Lord)* (1817), 7 Taunt. 679; *Storey v. Birmingham* (1823), 3 Dowl. & Ry. (K. B.) 488; *Coaks v. Hawarden (Lord)* (1827), 7 B. & C. 388; *Digby v. Stirling (Lord)* (1831), 8 Bing. 55; and see titles PARLIAMENT, Vol. XXI., pp. 624, note (*k*), 779, note (*y*); PEERAGES AND DIGNITIES, Vol. XXII., pp. 270, 271.

(*t*) 1 Bl. Com. 402; *Huntingdon's (Countess) Case, Anon.* (1676), 1 Vent. 298; and see title PARLIAMENT, Vol. XXI., p. 779, note (*y*).

SECT. 7. Execution of Process.	Members of the House of Commons during, and for forty days before and forty days after, each session of Parliament, whether the session is ended by a prorogation or dissolution (<i>a</i>). The privilege continues for forty days after a dissolution, although the person claiming it, being a member of the old Parliament, may have lost his seat before the time of the arrest (<i>b</i>).
Parliamentary privilege.	Seryants of either House of Parliament in regular attendance, and witnesses summoned before Parliament (<i>c</i>).
Army and Navy.	Soldiers of the regular forces, and petty officers and seamen of the Royal Navy, marines and non-commissioned officers of marines in certain cases (<i>d</i>).
Bankrupts. Clergy.	Bankrupts (<i>e</i>). Clergymen and ministers in the 'performance of ministerial duties (<i>f</i>), and members of Convocation while actually attending (<i>g</i>).
Judicial officers.	Judges, magistrates, justices of the peace (<i>h</i>) and coroners (<i>i</i>), while discharging their duties and while going to and from the performance thereof.
Persons attending courts of justice.	All persons having any relation to a judicial proceeding which calls for their attendance in a court of justice (<i>j</i>), whether compelled by process or not, and whether as parties, solicitors, witnesses, or bail, <i>eundo, morando et redeundo</i> (<i>k</i>). The privilege extends to

(*a*) *Goudy v. Duncombe* (1847), 1 Exch. 430; *Cassidy v. Stuart* (1841), 2 Man. & G. 437.

(*b*) *Re Anglo-French Co-operative Society* (1880), 14 Ch. D. 533; see, further, title PARLIAMENT, Vol. XXI., pp. 779 *et seq.*

(*c*) See *ibid.*, p. 781; and see note (*k*), *infra*.

(*d*) See title ROYAL FORCES, p. 94, *ante*.

(*e*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 60, 62, 63.

(*f*) See title ECCLESIASTICAL LAW, Vol. XI., p. 555; *Goddard v. Harris* (1831), 7 Bing. 320.

(*g*) 3 Bl. Com. 289; and see title ECCLESIASTICAL LAW, Vol. XI., pp. 394, 555.

(*h*) *Clendenning v. Browne* (1854), 3 I. C. L. R. 115; *Dubois v. Wyse* (1855), 5 I. C. L. R. 300, 303 (justices or magistrates attending petty sessions or police courts in discharge of their duty).

(*i*) See title CORONERS, Vol. VIII., p. 250.

(*j*) This includes attendance as a witness at a naval or military court-martial (Naval Discipline Act (29 & 30 Vict. c. 109), s. 66; Army Act, s. 125); see title ROYAL FORCES, pp. 11 *et seq.*, 44 *et seq.*, *ante*; and, as to the Army Act, see title ROYAL FORCES, p. 30, note (*s*), *ante*.

(*k*) *Walpole v. Alexander* (1782), 3 Doug. (K. B.) 45; *Croze v. Odell* (1819), 2 Mol. 525; *Ex parte Burt* (1842), 2 Mont. D. & De G. 666. Parties:—*Lightfoot v. Cameron* (1776), 2 Wm. Bl. 1113; *Ohilderston v. Barrett* (1809), 11 East, 439 (waiting at coffee-house in vicinity in expectation of cause coming on); *Pitt v. Coomes* (1834), 5 B. & Ad. 1078; *Newton v. Harland* (1839), 8 Scott, 70; *Persse v. Persse* (1856), 5 H. L. Cas. 671; *Williams v. Webb* (1843), 2 Dowl. (N. S.) 904; *Newton v. Askew* (1848), 6 Hare, 319; *Hoborn v. Fowler*, *Ex parte Hoborn* (1893), 62 L. J. (Q. B.) 49. Solicitors:—*Strong v. Dickenson* (1836), 1 M. & W. 488; *Re Keane* (1837), Sau. & Sc. 81; *Re O'Neill* (1837), Sau. & Sc. 78; *Re Fitton*, *Longfield v. Carpenter* (1839), 1 I. Eq. R. 349; *Re Ahearne* (1842), 2 Dr. & War. 141; *Re Hope* (1845), 9 Jur. 856; *Re J. T., A.-G. v. Leathersellers' Co.* (1844), 7 Beav. 157; *Williams v. Webb*, *supra*; *Olutterbuck v. Halls* (1846), 4 Dow. & L. 80; *Re N., Jones v. Rose* (1847), 11 Jur. 379; *Re Burrow*, *Byre v. Burrow* (1858), 4 Jur. (N. S.) 652; *Re Jewitt* (1864), 33 Beav. 559. Parliamentary agents attending appeals in House of Lords:—*A.-G. v. Skinners' Co.* (1837), 1 Coop. Pr. Cas. 1; *Ex parte Watkins* (1837), 1 Jur. 236. Witnesses:—*Ex parte Byne* (1813), 1 Ves. & B. 316; *Last's Case* (1813), 2

persons attending bankruptcy proceedings (*l*) or arbitrations (*m*), and to a person attending the police court as prosecutor or witness on a pending charge (*n*); but not to a voluntary prosecutor or common informer, or person attending before justices for the purpose of obtaining a summons, either while going or returning (*o*). A person accused of a criminal offence is privileged during a remand on bail (*p*), but not while returning from the court after being acquitted (*q*).

SECT. 7.
**Execution
of Process.**

A solicitor who attends merely for the purpose of advising bail is not privileged (*r*), nor is a solicitor entitled to any privilege if he is about to leave the country (*s*). The privilege of a solicitor does not extend to a solicitor's clerk attending the court on his master's business (*t*).

Solicitors.

Barristers are privileged while on circuit or attending court to conduct a cause or hear judgment (*a*).

Barristers.

Lunatics are not, as such, privileged from arrest (*b*); nor is a voter attending an election (*c*).

Persons not
privileged.

1422. If a person is unlawfully arrested by a sheriff or his officers, the sheriff is liable to an action for false imprisonment (*d*). No action, however, lies on the ground that the person arrested was privileged as a witness, even if the officer was aware of the privilege (*e*); nor does an action lie where the arrest was warranted

Unlawful
arrest.

Ves. & B. 373; *Ex parte Temple* (1814), 2 Ves. & B. 391, 395 (arbitration by order of the court); *Franklyn v. Colquhoun* (1816), 1 Madd. 580; *Re Sewerkrop, Ex parte Clarke* (1832), 2 Deac. & Ch. 99; *Gibbs v. Phillipson* (1829), 1 Russ. & M. 19; *R. v. Wigley* (1835), 7 C. & P. 4. *Bail, attending to justify*:—*Rimmer v. Green* (1813), 1 M. & S. 638. See also title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., p. 290.

(*l*) *B.g.*, a creditor attending to prove debt (*List's Case* (1813), 2 Ves. & B. 373; *Ex parte King* (1802), 7 Ves. 312), or to oppose debtor's discharge (*Willingham v. Matthews* (1815), 6 Taunt. 356; *Chauvin v. Alexander* (1862), 2 B. & S. 47 (debtor attending); *Selby v. Hills* (1832), 8 Bing. 166 (petitioning creditor attending to watch progress of bankruptcy)).

(*m*) *Spence v. Stuart* (1802), 3 East, 89; *Ricketts v. Gurney* (1819), 1 Chit. 682; *Rishon v. Nisbett* (1834), 1 Mood. & R. 347; *Spence v. Newton* (1837), 6 Ad. & El. 623.

(*n*) *Mountague v. Harrison* (1857), 3 C. B. (N. S.) 292.

(*o*) *Ex parte Cobbett* (1857), 7 E. & B. 955.

(*p*) *Gilpin v. Cohen* (1809), L. R. 4 Exch. 131.

(*q*) *Goodwin v. Lordon* (1834), 1 Ad. & El. 378; *Jacobs v. Jacobs* (1835), 3 Dowl. 675; *Hare v. Hyde* (1851), 16 Q. B. 394.

(*r*) *Jones v. Marshall* (1857), 2 C. B. (N. S.) 615.

(*s*) *Thomson v. Moore* (1841), 1 Dowl. (N. S.) 283; *Flight v. Cook* (1843), 1 Dow. & L. 714.

(*t*) *Phillips v. Pound* (1852), 7 Exch. 881. As to solicitors and solicitors' clerks generally, see title SOLICITORS.

(*a*) See title BARRISTERS, Vol. II., p. 380.

(*b*) *Kernot v. Norman* (1788), 2 Term Rep. 390; *Nutt v. Verney* (1790), 4 Term Rep. 121; *Abbotson v. Gahway (Lord)* (1795), 6 Term Rep. 133; *Steel v. Alan* (1801), 2 Bos. & P. 362.

(*c*) *Nixon v. Burt* (1817), 7 Taunt. 682 (burgess attending an election of burgesses).

(*d*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 15; *Kelly & Lawrence* (1864), 3 H. & C. 1, Ex. Ch. (arrest of wrong person by mistake); and see title TRESPASS.

(*e*) *Magnay v. Burt* (1843), 5 Q. B. 381, Ex. Ch. Such an arrest is a contempt of court rendering the sheriff or officer liable to punishment, but it is not actionable.

SECT. 7.
Execution
of Process.

by a writ or judge's order, though the writ may be afterwards set aside or the order be invalid (*f*).

A person wrongfully arrested must be discharged before he can be lawfully arrested (*g*).

Escape.

1423. Where a prisoner in the custody of a sheriff or his officers on civil process escapes, the sheriff is liable for any damages sustained by the person at whose suit the prisoner was taken into custody (*h*), but the sheriff is not liable for the escape of any prisoner confined in a prison subject to the Prison Act, 1877 (*i*). Only the actual damage suffered can be recovered in an action for an escape (*k*), the measure of damages being the value of the custody of the prisoner at the time of the escape (*l*). The sheriff has no power to retake a prisoner after a voluntary release (*m*), but, if a prisoner allowed to go at large returns to custody, and is in custody at the return of the writ, the sheriff is not liable as for an escape (*n*).

SUB-SECT. 4.—*Receipt of Crown Debts.*

Receipt of
Crown debts.

1424. In ancient times the sheriff was the collector and receiver of all sums due to the Crown in his county. At the present day he has no authority to receive debts due to the Crown except under process of a court. The ordinary process for enforcing payment of Crown debts is the writ of extent, which is usually preceded by a *scire facias*, though the writ of extent may issue at once without any preliminary proceedings if the debt is in danger (*o*).

Duty to give
receipt.

Where a sheriff or his officer employed in collecting by process any debt due to the Crown receives any sum due to the Crown, he must give a receipt for it, and at the next account (*p*) after its receipt the sheriff must procure the effectual discharge of the person making the payment (*q*). If the sum is received by an officer of

(*f*) *Brown v. Watson* (1871), 23 L. T. 745, (order under the Debtors Act, 1869 (32 & 33 Vict. c. 62)); see p. 812, *ante*; and see, further, title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 323 *et seq.*

(*g*) *Hooper v. Lane* (1857), 6 H. L. Cas. 443; *Humphery v. Mitchell* (1836), 2 Bing. (N. C.) 619.

(*h*) *Sheriffs Act*, 1887 (50 & 51 Vict. c. 55), s. 16 (1). As to voluntary release, see *Slackford v. Austen* (1811), 14 East, 468; *Piggott v. Wilkes* (1820), 3 B. & Ald. 502; *Re Mozley, Moore v. Moore* (1858), 25 Beav. 8; *Allen v. Carter* (1870), L. R. 5 C. P. 414; release on ground of ill-health, *Haines v. East India Co.* (1856), 11 Moo. P. C. C. 39; escape by negligence, *Benton v. Sutton* (1797), 1 Bos. & P. 24; *Nicholl v. Darley* (1828), 2 Y. & J. 399.

(*i*) 40 & 41 Vict. c. 21; *Sheriffs Act*, 1887 (50 & 51 Vict. c. 55), s. 16 (2); and see title PRISONS, Vol. XXIII., pp. 231 *et seq.*

(*k*) *Williams v. Mostyn* (1838), 4 M. & W. 145; *Hemming v. Hale* (1859), 7 C. B. (N. S.) 487.

(*l*) *Arden v. Goodacre* (1851), 11 C. B. 371; *R. v. Leicestershire Sheriff* (1850), 9 C. B. 659; *Re Mozley, Moore v. Moore* (1858), 25 Beav. 8; *Macrae v. Clark* (1866), L. R. 1 C. P. 403.

(*m*) *Atkinson v. Jameson* (1792), 5 Term Rep. 25; *Filewood v. Clement* (1838), 6 Dowl. 508.

(*n*) *Lewis v. Morland* (1818), 2 B. & Ald. 56.

(*o*) As to the execution of writs of extent and other processes for the recovery of debts due to the Crown, see, generally, title CROWN PRACTICE, Vol. X., pp. 14 *et seq.*

(*p*) As to sheriffs' accounts, see pp. 841, 842, *post*.

(*q*) *Sheriffs Act*, 1887 (50 & 51 Vict. c. 55), s. 11 (1). As to moneys in the hands of public servants, see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., p. 315.

the sheriff he must account for it to the sheriff, and the sheriff must give him a receipt for it (r). In case of default in giving any such receipt or procuring the discharge of the debtor, the sheriff and his real and personal representatives are liable to pay any damage suffered by the debtor in consequence of the default (s).

1425. It is the duty of the sheriff to levy all fines, penalties, and forfeited recognisances payable to the Crown (t).

1426. Fines and forfeited recognisances imposed or forfeited by or before any justice or justices of the peace, otherwise than at quarter sessions, must be certified by the justice or justices to the clerk of the peace or town clerk, as the case may be, on or before the ensuing quarter sessions, and be copied by the clerk of the peace or the town clerk on a roll, together with all fines and forfeited recognisances imposed or forfeited at such quarter sessions (a), and the clerk of the peace or town clerk must, within twenty-one days after the adjournment of the court, send a copy of the roll with a writ of *distringas* and *capias* or of *feri facias* and *capias* (b) to the sheriff of the county, or the sheriff or other officer of the city, borough, or place having the execution of process therein (c), whose duty it is immediately to proceed to the levying and recovery of the fines and forfeited recognisances by execution on the goods and chattels of the person liable, and, in case the goods and chattels are insufficient, then by taking him into custody and lodging him in gaol to abide the judgment of the following court of quarter sessions (d).

SECT. 7.
**Execution
of Process.**

Levy of fines
and estreats.

Fines and
recognisances
imposed or
forfeited at
petty and
quarter
sessions.

(r) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 11 (2).

(s) *Ibid.*, s. 11 (3).

(t) A fine imposed on conviction on an indictment is a debt of record due to the Crown immediately judgment is pronounced (*R. v. Woolf* (1819), 2 B. & Ald. 609); and, a penalty imposed by a statute, which does not specify who is to recover it, is payable to the Crown (*Bradlaugh v. Clarke* (1883), 8 App. Cas. 354).

(a) It is not necessary to certify fines imposed or recognisances forfeited at quarter sessions, it being the duty of the clerk of the peace or town clerk to take notice thereof without being certified (*R. v. Isle of Ely Justices* (1855), 5 E. & B. 489). As to the payment of fines imposed by and recognisances forfeited before courts of summary jurisdiction, see title MAGISTRATES, Vol. XIX., pp. 602 *et seq.*

(b) As to these writs, see title EXECUTION, Vol. XIV., pp. 37 *et seq.*, 60, 61, 73, 74.

(c) In the City of London the Secondary levies and collects all fines and forfeited recognisances which are payable to the Corporation of the City; see Parliamentary Reports, City and County of London Amalgamation, Vol. II., 1894 [C 7493], Appendix iii., 54; Levy of Fines Act, 1822 (3 Geo. 4, c. 46), s. 16.

(d) Levy of Fines Act, 1822 (3 Geo. 4, c. 46), s. 2; Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 17; and see title MAGISTRATES, Vol. XIX., p. 636. The clerk of the peace or town clerk must take an oath that the roll is carefully made up and contains all the fines and forfeited recognisances, distinguishing those which have been paid, either in court or otherwise (Levy of Fines Act, 1822 (3 Geo. 4, c. 46), s. 3). It is the duty of the sheriff to discharge out of custody any person arrested who gives security for his appearance at the following quarter sessions and for payment of the amount of the fine or forfeited recognizance (*ibid.*, s. 5); and the court of quarter sessions before which any person committed to gaol or giving security appears may order the discharge of the whole or any part of the fine or forfeited recognizance, such an order operating as a discharge to the sheriff on passing his accounts (*ibid.*, s. 6). As to sheriffs' accounts, see pp. 841, 842,

SECT. 7.

Execution of Process.

Return to writs and continuation of process.

At the opening of the court of the ensuing quarter sessions, the sheriff or other officer to whom the writs were delivered must return them and state on the back of the roll what has been done in the execution of the process (e), and at that and subsequent courts of quarter sessions it is the duty of the clerk of the peace or town clerk to insert in the roll for the particular sessions all fines and forfeited recognisances not duly levied or recovered and not discharged, and to continue the process from sessions to sessions until it is ascertained that there are no goods or chattels on which the sum can be levied, and that the person liable cannot be found, the original writs and rolls continuing in force and being sufficient authority to the sheriff or other officer, without the necessity for issuing further writs (f).

Copy of roll to be sent to Treasury.

It is the duty of the clerk of the peace or town clerk within twenty days from the opening of the court of quarter sessions to send to the Treasury a copy or extract of the roll delivered by the sheriff or other officer at the opening of the court and the answer given by the sheriff or officer where any fine or forfeited recognisance has not been recovered (g).

Fines imposed and recognisances forfeited at assizes.

1427. It is the duty of the clerk of assize to copy on a roll all fines imposed and recognisances forfeited at assizes, distinguishing such as have been paid, and to send a copy of the roll with a writ of execution to the sheriff or officer of the county or place in which the parties liable are stated to be resident, whose duty it is to take the same steps for the purpose of levying and recovering the fines and forfeited recognisances as in the cases of fines imposed and recognisances forfeited at quarter sessions (h), any person arrested in execution to be kept in gaol until payment or discharge by the Treasury or otherwise according to law (i). Accounts of all such fines and forfeited recognisances must be sent by the clerk of assize to the Treasury (j).

Return to writs.

The sheriff or other officer must return all such writs to the Treasury, and state on the back of the roll what has been done in execution of the process (k); and, until all the fines and forfeited recognisances have been paid or recovered or discharged, or it is ascertained that the persons in default have no goods or chattels in the county or place of the sheriff or officer, or in any other county, borough, city or other place in England in which a levy can be made, and that they cannot be found, the original writs remain in force and must be retained by the sheriff or other officer, together

post; and, as to fines imposed or recognisances forfeited by coroners, see title CORONERS, Vol. VIII., p. 266.

(e) Levy of Fines Act, 1822 (3 Geo. 4, c. 46), s. 8.

(f) Levy of Fines Act, 1823 (4 Geo. 4, c. 37), s. 1, as amended by the Queen's Remembrancer Act, 1859 (22 & 23 Vict. c. 21), s. 30; and see title MAGISTRATES, Vol. XIX., p. 636.

(g) Levy of Fines Act, 1823 (4 Geo. 4, c. 37), s. 5.

(h) See p. 821, *ante*.

(i) Queen's Remembrancer Act, 1859 (22 & 23 Vict. c. 21), s. 32. As to the oath to be taken by the clerk of assize, see *ibid.*, s. 33; and, as to the sheriffs of the county of Chester and of counties in Wales, see Law Terms Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 70), s. 33.

(j) Fines Act, 1833 (3 & 4 Will. 4, c. 99), s. 29.

(k) Queen's Remembrancer Act, 1859 (22 & 23 Vict. c. 21), s. 34.

with the roll, the sheriff or officer delivering to the Treasury a copy of the roll on returning the writs and copies of any former rolls in which the fines and forfeited recognisances have not been paid or discharged (l).

SECT. 7.
Execution of Process.

1428. Where the party subject to a fine or forfeited recognisance resides or removes out of the jurisdiction of the sheriff or officer to whom the writ is delivered, such sheriff or officer must issue his warrant with a copy of the writ to the sheriff or officer acting for the county or other place where the party is, or where his goods or chattels are to be found, and the sheriff or officer to whom the warrant is issued must act on it as if the original writ had been delivered to him by order of the court of assize or of quarter sessions, as the case may be, for the county or place for which he acts as sheriff, and he must within thirty days return to the sheriff or officer from whom he received the warrant what he has done in the execution thereof, and must pay over to such sheriff or officer all sums received in connexion therewith (m).

Recovery from party resident in another county.

1429. The King's Remembrancer must from time to time certify and extract and make out and transmit to the Treasury an account of all fines imposed and recognisances forfeited in the Supreme Court, distinguishing in the account those which have been paid (n), and issue process from time to time for levying and enforcing payment thereof until they have been either fully paid or levied or vacated or discharged (o).

Fines imposed and recognisances forfeited in Supreme Court.

SUB-SECT. 5.—*Liability in respect of Goods Seized.*

1430. After seizure by the sheriff, the goods seized are *in custodia legis*, and are held on behalf of the legal owner (p). The general property in the goods until sale remains in the execution debtor, if they belong to him (q), but the sheriff has a special property in them, and may maintain trespass or trover against a person taking them out of his custody (r). No property passes to the execution creditor by virtue of the seizure (s).

Property in goods seized.

SECT. 8.—*Execution of Sentence of Death.*

1431. When judgment of death has been passed upon a convict at any court of assize, oyer and terminer, or gaol delivery for a

Sheriff charged with execution.

(l) Queen's Remembrancer Act, 1859 (22 & 23 Vict. c. 21), s. 35.

(m) Levy of Fines Act, 1823 (4 Geo. 4, c. 37), s. 3; Queen's Remembrancer Act, 1859 (22 & 23 Vict. c. 21), s. 36.

(n) Fines Act, 1833 (3 & 4 Will. 4, c. 99), ss. 26, 27. As to the King's Remembrancer, see, further, title CONSTITUTIONAL LAW, Vol. VI., pp. 470 *et seq.*

(o) Fines Act, 1833 (3 & 4 Will. 4, c. 99), s. 32.

(p) *Richards v. Jenkins* (1887), 18 Q. B. D. 451, *per* Lord ESHER, at p. 455. As to the right of the sheriff to interplead where the goods are claimed by a third person, see title INTERPLEADER, Vol. XVII., pp. 588 *et seq.* As to the duty of the sheriff to keep the goods safely, see title EXECUTION, Vol. XIV., p. 21; and, as to his duty to retain possession until sale, see *ibid.*, p. 58.

(q) *Re Clarke*, [1898] 1 Ch. 336, C. A.; *Giles v. Grover* (1832), 1 Cl. & Fin. 72, H. L.; *Playfair v. Musgrove* (1845), 14 M. & W. 239.

(r) *Wilbraham v. Snow* (1670), 2 Saund. 47; *Giles v. Grover*, *supra*.

(s) *Giles v. Grover*, *supra*, at p. 97.

SECT. 8.
Execution
of Sentence
of Death.

county or part of a county, the sheriff of the county is charged with the execution of the judgment, and may carry it out in any prison which is the common gaol of his county, or in which the convict was confined for the purpose of safe custody prior to his removal to the place where the court was held, and for the purpose of the execution has the same jurisdiction and powers over and in the prison in which the judgment is to be carried into execution, whether it is situated within his county or not, and over the officers of such prison, as he had at common law over and in the common gaol of his county and the officers thereof, and is subject to the same responsibility and duties as he was subject to at common law (t).

Sentence
passed at
Central
Criminal
Court.

1432. A judgment of death passed at the Central Criminal Court may be carried into execution in any prison in the Central Criminal Court district, or in the county where the offence was committed, which the court may order, and, if no such order is made, then in the prison in which the convict is for the time being confined, and such sheriff as may be ordered by the court, or, if no such order is made, the sheriff of the county where the offence was committed, or, if it was committed on the high seas, or if the county in which it was committed does not clearly appear, the sheriff of Middlesex, is charged with the execution, and has the same jurisdiction, powers and duties in the prison in which the judgment is to be carried into execution, though it may not be in his county, as he had at common law with respect to the common gaol of his county (a).

Execution for
murder to
be within
prison walls.

1433. Every sentence of death on an indictment or inquisition for murder must be carried into effect within the walls of the prison in which the convict is confined at the time of the execution (b). The

(t) *Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 13 (1).* At common law the custody of county gaols was vested in the sheriff *ex officio*, the gaolers being his servants and being appointed by him. The Prison Acts, 1865 and 1877 (28 & 29 Vict. c. 126; 40 & 41 Vict. c. 21), reserved the authority of the sheriff in regard to prisoners sentenced to death, so far as was necessary to carry the judgment into execution, and this reservation is continued by the *Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 13 (1)*. The Prison Act, 1877 (40 & 41 Vict. c. 21), s. 30, gives power to the Secretary of State by rule to direct that any prison locally situated in a county is to be considered the prison of any county, riding, county of a city or town, borough, liberty or other place having separate prison jurisdiction, and provides that, subject to any such rule, the transfer under the Act of prisons to which it applies shall not affect the jurisdiction of any sheriff having jurisdiction in respect of such prison. The *Chester Courts Act, 1867 (30 & 31 Vict. c. 36), s. 4*, provides for the execution by the sheriff of the county of Chester of all persons on whom sentence of death is passed at any court of assizes or gaol delivery for Chester. Previously the sheriff for the city of Chester was charged with such executions. As to counties of cities and counties of towns, see also *Counties of Cities Act, 1811 (51 Geo. 3, c. 100)*, and *Criminal Justice Administration Act, 1851 (14 & 15 Vict. c. 55), s. 23*.

(a) *Central Criminal Court (Prisons) Act, 1881 (44 & 45 Vict. c. 64), s. 2 (5); Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 13 (2); and see note (t), supra.*

(b) *Capital Punishment Amendment Act, 1868 (31 & 32 Vict. c. 24), s. 2.* Prior to this Act executions took place in public. The Act is confined to executions for murder, and in the case of treason and other capital offences public executions are still legal.

sheriff charged with the execution (*c*), and the gaoler (*d*), chaplain (*e*), and surgeon (*f*) of the prison, and such other officers of the prison as the sheriff requires, must be present at the execution (*g*). It is the duty of the sheriff to provide the executioner, for whom he is responsible.

SECT. 8.
Execution
of Sentence
of Death.

1434. As soon as may be after the execution the surgeon or other chief medical officer of the prison must examine the body and ascertain the fact of death, and sign a certificate thereof, and deliver the same to the sheriff; and the sheriff, gaoler, chaplain, and such justices or other persons present as the sheriff requires or allows, must also sign a declaration to the effect that judgment of death has been executed on the offender (*h*). The certificate and declaration and a duplicate of the coroner's inquisition (*i*) must be sent by the sheriff with all convenient speed to the Secretary of State, and printed copies thereof must be exhibited for twenty-four hours on or near the principal entrance of the prison (*j*).

Certificate of
death and
declaration.

1435. The body must be buried within the walls of the prison in which the execution took place, unless the Secretary of State, on being satisfied by the visiting justices (*k*) that there is not convenient space for the burial within the prison, by writing under his hand has appointed some other fit place for the purpose (*l*).

Burial.

1436. Executions should take place in the week following the third Sunday after the sentence on any week-day, except Monday, at 8 a.m.; public notice under the hands of the sheriff and governor of the prison of the date and hour appointed should be posted on the prison gate not less than twelve hours before the execution, and should remain until the inquest on the body has been held; the bell of the prison or of the parish or a neighbouring church should be tolled for fifteen minutes after the execution; and persons engaged to carry out the execution should report themselves at the prison not later than four o'clock in the afternoon preceding the

Regulations
as to
executions.

(*c*) Or the under-sheriff or other deputy acting in the sheriff's absence and with his authority (Capital Punishment Amendment Act, 1868 (31 & 32 Vict. c. 24), s. 11).

(*d*) Or the deputy gaoler acting in the gaoler's absence and with his authority, or, if there is no gaoler, the governor, keeper or other chief officer of the prison or his deputy acting with his authority (*ibid.*).

(*e*) Or in the absence of the chaplain, the assistant chaplain or other person acting in place of the chaplain (*ibid.*).

(*f*) Or if there is no surgeon, the chief medical officer of the prison (*ibid.*).

(*g*) *Ibid.*, s. 3. Any justice of the peace for the county, borough, or other jurisdiction to which the prisoner belongs, and such relatives of the prisoner or other persons as the sheriff or visiting justices think proper to admit, may also be present (*ibid.*).

(*h*) *Ibid.*, s. 4. For form of certificate and declaration, see the Schedule to the Act. It is a misdemeanour knowingly and wilfully to make a false declaration or certificate (Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 5; see *ibid.*, s. 17, sched., repealing the Capital Punishment Amendment Act, 1868 (31 & 32 Vict. c. 24), s. 9).

(*i*) As to the duty of the coroner to hold an inquest on the body, see title CORONERS, Vol. VIII., p. 241. As to the form and requisites of the inquisition, see *ibid.*, pp. 273 *et seq.*

(*j*) Capital Punishment Amendment Act, 1868 (31 & 32 Vict. c. 24), s. 10.

(*k*) See title PRISONS, Vol. XXIII., pp. 232 *et seq.*

(*l*) Capital Punishment Amendment Act, 1868 (31 & 32 Vict. c. 24), s. 6.

SECT. 8.
Execution
of Sentence
of Death.

execution and remain in the prison from the time of their arrival until the execution has been completed and permission has been given to them to leave (*m*). It is the duty of the sheriff to notify the date of execution to the Home Office, and also to the coroner to enable him to make arrangements for holding the inquest.

SECT. 9.—*Proclamation as to Fairs.*

Fairs.

1437. All sheriffs are required to proclaim and publish that lords who have fairs shall hold the same for the time they ought according to their charters or of right, and no longer (*n*).

SECT. 10.—*Publication of Royal Proclamations.*

Royal pro-
clamations.

1438. Copies of all royal proclamations except those for further proroguing Parliament are sent to the sheriffs of all counties, cities, and towns, who are required to make them known in the accustomed manner (*o*).

SECT. 11.—*Liability of Sheriff for Acts of Officers.*

Civilly but not
criminally
liable for all
wrongs of
officers in
course of
employment.

1439. A sheriff is civilly liable for any fraud or wrongful act or omission on the part of his under-sheriff, bailiff or officer in the course of his employment (*p*), though there may be no proof of any recognition by the sheriff of the act or default complained of (*q*); but the sheriff is not criminally liable for any act committed without his actual authority (*r*).

(*m*) Statutory Rules of the 5th June, 1902 (Stat. R. & O. Rev., Vol. X., Prison, England, p. 65), made in pursuance of the Capital Punishment Amendment Act, 1868 (31 & 32 Vict. c. 24), ss. 7, 8.

(*n*) Stat. (1328) 2 Edw. 3, Statute of Northampton, c. 15. As to fairs generally, see title **MARKETS AND FAIRS**, Vol. XX., pp. 1 *et seq.*

(*o*) Crown Office Act, 1877 (40 & 41 Vict. c. 41), s. 3; Order in Council, 22nd February, 1878 (Stat. R. & O. Rev., Vol. II., Clerk of the Council in Chancery, p. 9). As to royal proclamations, see title **CONSTITUTIONAL LAW**, Vol. VI., pp. 360, 388; Vol. VII., pp. 14 *et seq.*

(*p*) *Laicoock's Case* (1627), 1 Lat. 187; *Woodgate v. Knatchbull* (1787), 2 Term Rep. 148; *Raphael v. Goodman* (1838), 8 Ad. & El. 565 (a bailiff having by fraud obtained from the execution creditor a bond of indemnity for seizing goods under a writ of *fi. fa.*, it was held that the sheriff was responsible for the fraud and was not entitled to recover on the bond); *Wright v. Child* (1866), L. R. 1 Exch. 358 (sheriff held liable to execution debtor for the negligence of his officer in the conduct of a sale, in consequence of which the goods were sold at an undervalue). The sheriff is liable in trespass if his bailiff on the execution of a writ of *fi. fa.* takes the goods of a person other than the execution debtor (*Saunderson v. Baker* (1772), 3 Wils. 309; *Ackworth v. Kempe* (1778), 1 Doug. (K. B.) 40; *Smith v. Milles* (1786), 1 Term Rep. 475, 480), or wrongfully seizes goods after payment (*Gregory v. Otterell* (1855), 5 E. & B. 571, Ex. Ch.), or wrongfully breaks and enters the premises of a third person (*Smith v. Pritchard* (1849), 8 C. B. 565, a case of a county court bailiff), or for a false imprisonment by his officers (*Saunderson v. Baker*, *supra*, at p. 317). In any action against or by a sheriff in respect of matters connected with the execution of his office, the court may order that the affidavit in answer to interrogatories or an order for discovery shall be made by the officer actually concerned (R. S. C., Ord. 31, r. 28).

(*q*) *Saunderson v. Baker*, *supra*; *Ackworth v. Kempe*, *supra*.

(*r*) *Saunderson v. Baker*, *supra*; *Woodgate v. Knatchbull*, *supra*; and

The civil liability of the sheriff extends not merely to acts done by his bailiff or officer in pursuance of his warrant, but also to anything done by him by colour of the warrant, the reason for the extended liability being that the sheriff is supposed to be executing his duty in person. The impossibility of so doing authorises him to delegate his duty, but he puts the delegate in his place, and is liable not only for what is done *virtute mandati*, but also for what is done *colore mandati* (s). Thus, if a bailiff to whom a warrant is delivered to execute a writ of *feri facias* improperly authorises an assistant to execute it in his absence, the sheriff is civilly liable for the acts and misconduct of the assistant, and for money received by him in reference to the execution, though it may not have been paid over (t).

SECT. 11.
Liability of
Sheriff for
Acts of
Officers.

Liability
extended to
acts done
*colore
mandati*.

The sheriff is liable even though the act done may have been contrary to the express terms of the writ, as if the person of the debtor is taken on a writ of *feri facias* (u), or in disobedience to his express instructions (a), provided only that it is done in the purported exercise of the officer's authority.

Act in dis-
obedience to
instructions.

1440. A sheriff is not liable for the acts of a bailiff or officer which are quite outside the scope of his duties, and are not done for the purpose of executing the authority entrusted to him, or under colour of such authority (b), or for money received by the bailiff or officer otherwise than in the course of exercising or purporting to exercise his authority (c).

Acts outside
scope of
duties..

1441. A sheriff is not liable at the suit of an execution creditor or debtor for an act of misconduct on the part of his officer which

Misconduct
at request of
plaintiff.

see the cases cited at p. 831, *post*; and see, generally, titles AGENCY, Vol. I., pp. 201 *et seq.*; MASTER AND SERVANT, Vol. XX., pp. 244 *et seq.*

(s) *Gregory v. Colterell* (1805), 5 E. & B. 571, 585, Ex. Ch.; *Smith v. Pritchard* (1849), 8 C. B. 565, *per* MAULE, J., at p. 588; *Raphael v. Goodman* (1838), 8 Ad. & El. 565.

(t) *Gregory v. Colterell*, *supra*.

(u) *Smart v. Hutton* (1833), 8 Ad. & El. 568, n.

(a) *Searje v. Halifax* (1840), 7 M. & W. 288, 290.

(b) *Brown v. Gerard* (1834), 3 Dowl. 217 (sheriff held not bound by an undertaking of his officer on behalf of the defendant that in consideration of the plaintiff accepting a certain amount the pleas in the action should be withdrawn and the plaintiff should have judgment); *Smith v. Pritchard*, *supra* (high bailiff of county court held not liable for assault and false imprisonment by a bailiff, not under colour of his warrant, but in assertion of a statutory power given to the individual officer wrongfully obstructed).

(c) *Cook v. Palmer* (1827), 6 B. & C. 739 (goods of debtor seized under a writ of *fi. fa.*: the debtor became bankrupt and the assignees in bankruptcy authorised the bailiff to deliver the goods to a third person for a certain sum, which he did, and satisfied the execution creditor out of the sum received, but did not pay over the balance to the assignees. Held, that the sheriff was not liable to the assignees for the balance, the authority of the bailiff to realise more than sufficient to satisfy the levy being derived from them and not from the sheriff); *Woods v. Fennis* (1852), 7 Exch. 363 (bailiff, on the execution of a writ of *ca. sa.*, received the debt and costs and failed to pay over the amount. Held that the sheriff was not liable, it being no part of the officer's duty, in executing such a writ, to receive the amount due on behalf of the creditor); and see title MASTER AND SERVANT, Vol. XX., pp. 248 *et seq.*

SECT. 11.
Liability of
Sheriff for
Acts of
Officers.

was done at the request or with the knowledge and assent of the party complaining (*d*). The mere fact, however, that the debtor or creditor induces the officer to commit a breach of his duty does not absolve the sheriff from his general responsibility for the misconduct of the officer, but only exonerates him from liability for the particular act or omission assented to by the plaintiff (*e*).

Special bailiff.

1442. Where a special bailiff (*f*) is employed to execute a writ at the instance of the execution creditor, who gives him his instructions, the sheriff is not liable to the execution creditor for the negligence or misconduct of the bailiff (*g*); nor is the sheriff in such a case bound to return the writ, and if he does so he is not liable for a false return (*h*). The employment of a special bailiff does not, however, relieve the sheriff from his own general responsibility and duty, or from liability to the execution creditor for his own negligence or that of his under-sheriff: it only absolves him from liability to the execution creditor for the acts and defaults of the bailiff (*i*).

Acts con-
stituting
a special
bailiff.

A mere request by an execution creditor or his solicitor that a particular officer may be employed to execute the writ does not necessarily constitute the officer a special bailiff (*k*), even if it is coupled with information given direct to the officer to assist him in the execution of the writ (*l*); but if the execution creditor or his

(*d*) *Crowder v. Long* (1828), 8 B. & C. 598 (goods of debtor seized under a writ of *fi. fa.*: the creditor authorised the bailiff to give up possession, the debtor consenting to his returning at any time in order to sell: the bailiff afterwards returned, but before sale another writ of *fi. fa.* was issued, to which the sheriff, who had paid the value of the goods to the first creditor, returned *nulla bona*: the second creditor recovered the value of the goods in an action for false return. Held that the sheriff was entitled to recover the amount he had paid the first creditor unless he had knowledge when he made the payment of the bailiff's misconduct in quitting possession).

(*e*) *Wright v. Child* (1866), L. R. 1 Exch. 358 (execution debtor persuaded a bailiff who had seized goods not to advertise them for sale and to postpone the sale, and subsequently to sell, in order to satisfy also another writ under which the bailiff could not otherwise have sold; held, that this did not exonerate the sheriff from liability for the bailiff's negligence in not properly lotting the goods, so that they sold at an undervalue).

(*f*) As to special bailiffs, see p. 804, *ante*.

(*g*) *De Moranda v. Dunkin* (1790), 4 Term Rep. 119; *Ford v. Leche* (1837), 6 Ad. & El. 699 (sheriff not liable for an escape); *Doe v. Trye* (1839), 7 Dowl. 636 (similar case). As to the bailiff's liability in such a case, see *Futcher v. Hinder* (1858), 3 H. & N. 757.

(*h*) *Porter v. Viner* (1815), 1 Chit. 613, n.; *Pallister v. Pallister* (1816), 1 Chit. 614, n.; *Hurding v. Holden* (1841), 2 Man. & G. 914; *De Moranda v. Dunkin*, *supra*.

(*i*) *Taylor v. Richardson* (1800), 8 Term Rep. 505 (improperly discharging debtor who was in the custody of the sheriff under another writ).

(*k*) *Balson v. Meggat* (1836), 4 Dowl. 557; *Seal v. Hudson* (1847), 4 Dowl. & L. 760; *Corbet v. Brown* (1838), 6 Dowl. 794.

(*l*) *Alderson v. Davenport* (1844), 13 M. & W. 42, 46 (creditor's solicitor sent a writ of *ca. sa.* to a bailiff desiring him to execute it in a week and informing him where the debtor was to be met with; the bailiff returned the writ to the solicitor, who then sent it to the under-sheriff with a request to forward it to the bailiff "whom he had instructed as to the execution" thereof. Held, that the bailiff was not a special bailiff of the creditor so as to absolve the sheriff from liability for his negligence in the execution of the writ).

solicitor requests that the warrant shall be directed to a particular officer, and instructs him as to the manner in which the writ is to be executed, the officer is thereby constituted a special bailiff of the execution creditor (*m*).

SECT. 11.
Liability of
Sheriff for
Acts of
Officers.

Evidence to
connect
sheriff with
officer.

1443. In order to maintain an action against a sheriff for the wrongful act or default of a bailiff or officer it is necessary to show that the officer whose conduct is complained of was authorised by the sheriff in the particular transaction (*n*). It is not sufficient to prove merely that the officer is the bound bailiff of the sheriff in the particular writ (*n*). As a general rule, either the original warrant directed by the sheriff to the bailiff ought to be produced and proved (*n*), or the non-production of the original be accounted for in such a manner as to warrant the admission of secondary evidence (*o*). The production of a warrant proved to have been issued by the under-sheriff or the sheriff's London deputy to the particular officer under the sheriff's seal of office is sufficient, without proof of the writ of execution (*p*); and proof of the warrant may be dispensed with where there is other satisfactory evidence that the officer was duly authorised by the sheriff in the particular transaction (*q*). If the sheriff has by his conduct recognised or shown an intention to adopt the acts of the officer, that is sufficient

(*m*) *Doe v. Trye* (1839), 7 Dowl. 636 (writ of *ca. sa.*).

(*n*) *Drake v. Sikes* (1797), 7 Term Rep. 113; *George v. Perring* (1801), 4 Esp. 63; *Martin v. Bell* (1816), 1 Stark. 413; *Snowball v. Goodricke* (1833), 4 B. & Ad. 541. It is not necessary after a *venditioni exponas* on a writ of *fi. fa.* to prove a new warrant in order to connect the officer who is still in possession under the original warrant with the sheriff (*Jacobs v. Humphrey* (1834), 2 Cr. & M. 413).

(*o*) As by reasonable proof of the loss of the original (*Minshall v. Lloyd* (1837), 2 M. & W. 450; *Moon v. Raphael* (1835), 2 Bing. (N. C.) 310), or of service of a notice to produce on the London agents of the sheriff to whom the warrant was sent (*Suter v. Burrell* (1858), 2 H. & N. 867). As to secondary evidence generally, see title EVIDENCE, Vol. XIII., pp. 422, 423, 518 *et seq.*

(*p*) *Gibbins v. Phillipps* (1828), 7 B. & C. 535, n. (action of trover for goods seized); *Shepherd v. Wheble* (1838), 8 C. & P. 534 (warrant produced by bailiff and stated by him to have been received from the London agents of the sheriff, proved to be the London agents by the under-sheriff); *Grey v. Smith* (1809), 1 Camp. 387; *Bessey v. Windham* (1844), 6 Q. B. 166.

(*q*) *Jones v. Wood* (1812), 3 Camp. 228 (production of paper shown to have been written in the sheriff's office and directed to the particular officer requiring him to give instructions for a return to the writ); *Francis v. Neave* (1821), 6 Moore (C. P.), 120 (proof of indorsement of officer's name on the writ by a clerk in the under-sheriff's office); *Scott v. Marshall* (1832), 2 Cr. & J. 238 (examined copy of writ with indorsement of the bailiff's name held sufficient on proof that it was the course of the sheriff's office to indorse on the writ the name of the bailiff to whom the warrant was granted); *Tealby v. Gascoigne* (1817), 2 Stark. 202. But it has been held insufficient merely to prove the writ with the bailiff's name written in the margin (*Jones v. Wood*, *supra*), or to produce an examined copy of the writ returned with the indorsement of the name of the bailiff without proof that the indorsement was made by the sheriff's authority (*Hill v. Middlesex (Sheriff)* (1816), 7 Taunt. 8; see *Morgans v. Bridges* (1818), 1 B. & Ald. 647; *Fermor v. Phillips* (1817), 5 Moore (C. P.), 184, n.; *Sarjeant v. Cowan* (1832), 5 C. & P. 492).

SECT. 11.
Liability of
Sheriff for
Acts of
Officers.

Bailiff of
franchise.
Admissions.

evidence of privity, and such a recognition or adoption may be indicated by the pleadings in the action (r).

1444. The sheriff is not answerable for the acts or defaults of the bailiff of a franchise in reference to the execution of process (s).

1445. Any statement made by an under-sheriff or sheriff's officer tending to show that he has been guilty of a breach of duty, or made in the ordinary course of executing his office, is admissible in evidence in an action against the sheriff (a). But a declaration which does not accompany any official act, nor tend to charge the officer making it, cannot be given in evidence against the sheriff (b).

Notice.

1446. The knowledge of a sheriff's officer of any fact or circumstance connected with his employment which it is his duty to communicate to the sheriff or under-sheriff operates as notice thereof to the sheriff (c).

SECT. 12.—Punishment for Misconduct.

Offences
punishable as
contempt of
court and by
penalty.

1447. If a sheriff, under-sheriff, bailiff or sheriff's officer, or person employed in levying or collecting debts due to the Crown by process of any court, or an officer to whom the return or execution of a writ belongs, withholds a prisoner bailable after he has offered sufficient security, or takes or demands any money or reward under any pretext whatever other than the fees or sums allowed by or in pursuance of some statutory enactment, or grants a warrant

(r) *Martin v. Bell* (1816), 1 Stark. 413; *Smart v. Hutton* (1833), 8 Ad. & El. 568, n.; *Barsham v. Bullock* (1839), 10 Ad. & El. 23 (plea traversing the alleged wrong, but admitting in effect that the act was that of the defendant's officer); *Reed v. Thoys* (1840), 6 M. & W. 410 (similar case); *Brickell v. Hulse* (1837), 7 Ad. & El. 454 (where the sheriff used the affidavit of the officer on a motion. Held that the affidavit could be used as evidence against the sheriff in subsequent proceedings).

(s) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 34 (d); *Boothman v. Surry* (Earl) (1787), 2 Term Rep. 5.

(a) *North v. Miles* (1808), 1 Camp. 389 (action for false return; what the bailiff said when asked by the plaintiff's solicitor why he did not execute the writ held evidence against the sheriff); *Bowsher v. Calley* (1808), 1 Camp. 391, n. (statement by officer while he had debtor in custody as to removal of the debtor); *Fabsley v. Doble* (1697), 1 Ld. Raym. 190 (confession of escape by under-sheriff); *Jacobs v. Humphrey* (1834), 2 Cr. & M. 413 (declaration by officer while in possession under a writ of *fi. fa.* after the return of the writ held evidence in an action against the sheriff for neglecting to sell within a reasonable time and before the return of a *venditioni exponas*); see *Brickell v. Hulse*, *supra*; *Gardiner v. Moult* (1839), 10 Ad. & El. 464; and compare title EVIDENCE, Vol. XIII., pp. 423, 424.

(b) *Snowball v. Goodricke* (1833), 4 B. & Ad. 541 (action for taking illegal poundage; declaration by the under-sheriff after he was out of office held not admissible to prove that the bailiff was the sheriff's authorised officer).

(c) See, generally, title AGENCY, Vol. I., pp. 215, 216. But notice to a man left in possession by the bailiff executing a writ of a bankruptcy petition against the debtor, does not operate as notice to the sheriff, because the duties of the man in possession are confined to retaining possession, selling, and handing over the proceeds (*Ex parte Warren* (1885), 1 T. L. R. 430, C. A.); and see *Gibbon v. Coggon* (1809), 2 Camp. 188.

for the execution of any writ before he has actually received the writ, or is guilty of any offence against or breach of the provisions of the Sheriffs Act, 1887 (*d*), or of any wrongful act, or neglect, or default in the execution of his office, or of any contempt of a superior court, he, as well as any person procuring the commission of the offence, is liable to be punished as for a contempt of court (*e*), and to forfeit £200 and pay all damages suffered by any person aggrieved, the forfeiture and damages being recoverable by such person as a debt by action in the High Court (*f*).

SECT. 12.
Punishment
for
Misconduct.

The penalty of £200 is inflicted for an act in the nature of a criminal offence, and to support an action for its recovery there must be evidence of *mens rea* on the part of the defendant (*g*). A person who makes an unintentional overcharge is not liable to the penalty (*h*), and in any case the only persons liable are those actually committing the offence or procuring its commission (*i*). It is not, however, a necessary ingredient in the offence of extortion that the officer should make the wrongful demand or taking of money a condition precedent to doing his duty (*k*).

Mens rea
necessary.

1448. An application for punishment as for a contempt of court may be made either to the High Court, or to any court of assize, oyer and terminer, or gaol delivery, or to any judge of any of such courts, or, where the alleged offence has been committed in relation to any writ issued out of any other of record, then to that court (*l*). The application may be made by complaint, which may be heard in a summary manner, and evidence be given either by examination of witnesses or by affidavit or interrogatories (*l*), or the offence may be dealt with by any such court, being a superior court, in like manner as for any contempt of such court (*m*). Where the proceeding is in a summary manner it must be taken before the

Court having
jurisdiction to
deal with
offences.

Summary
proceedings.

(*d*) 50 & 51 Vict. c. 55.

(*e*) See title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., p. 295; and, as to contempt, generally, see *ibid.*, pp. 280 *et seq.*

(*f*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 29 (2), (3); and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 482.

(*g*) *Lee v. Dangar, Grant & Co.*, [1892] 2 Q. B. 337, C. A.; see *Woolford's Estate (Trustee) v. Levy*, [1892] 1 Q. B. 772, C. A.; and see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 234.

(*h*) *Lee v. Dangar, Grant & Co.*, *supra*; *Shoppee v. Nathan & Co.*, [1892] 1 Q. B. 245. But a sheriff is liable to attachment if excessive fees are taken, though unintentionally, unless he returns the excess and pays the costs of the proceedings (*Gill v. Jose* (1856), 6 E. & B. 718).

(*i*) *Bagge v. Whitehead*, [1892] 2 Q. B. 355, C. A. (sheriff held not liable to the penalty for the misconduct of his bailiff in not excepting from seizure wearing apparel, bedding, tools etc. up to £5, as required by the Small Debts Act, 1845 (8 & 9 Vict. c. 127), s. 8).

(*k*) *Lee v. Dangar, Grant & Co.*, *supra*, dissenting on this point from *Woolford's Estate (Trustee) v. Levy*, *supra*. As to extortion, see, further, p. 833, *post*.

(*l*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 29 (3). The costs of or occasioned by any such complaint may be ordered to be paid by either party to the other, an order of the High Court on any such summary proceedings to pay any costs, damages or penalty being enforceable as a judgment of the High Court (*ibid.*, s. 29 (4)).

(*m*) *Ibid.*, s. 29 (5); and see title CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL, Vol. VII., p. 295.

SECT. 12. end of the sittings of the court held next after the offence was
Punishment committed (*n*).

for
Misconduct.

Wrongful
assumption
of office.

1449. If any person, not being an under-sheriff, bailiff or officer of a sheriff, assumes or pretends to act as such, or demands or takes any fee or reward under colour or pretext of any such office, he is liable to punishment as if he were an under-sheriff guilty of a contempt of the High Court (*o*).

No second
punishment
for same
offence.

1450. No person, in pursuance of the foregoing provisions, is liable to be punished more than once in respect of the same offence, but where any proceeding is taken for an offence the court or judge may postpone or stay the proceeding and direct any other available proceeding to be taken for punishing the offence (*p*).

Neglect to
levy fines.

1451. A sheriff who refuses or neglects to perform any duty in connexion with the levying of any fine or forfeited recognisance imposed or forfeited at assizes or quarter sessions is liable to a penalty of £50, recoverable by any person who sues for it (*q*).

Liability of
bailiff of
franchise.

1452. In the case of a franchise, the bailiff of the franchise and not the sheriff is liable for the non-execution, mis-execution or insufficient return of any writ, or for any misconduct in the performance of his office, and any fine imposed on the bailiff of the franchise or his bailiff or officer is, notwithstanding any grant, payable to the Crown (*r*).

Other
offences by
sheriff.

1453. Offences by sheriffs in connexion with their duties in respect of juries (*s*), returns to writs of execution (*t*), arrest of felons and custody of prisoners (*u*), and elections (*v*), are dealt with elsewhere.

Part V.—Fees and Poundage.

SECT. i.—*In General.*

Right to fees
statutory.

1454. Only such fees and poundage may be demanded or taken by a sheriff or his officers as are allowed by or in pursuance of some statutory enactment (*w*), and no sheriff or sheriff's officer may

(*n*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 29 (7). The provision (*ibid.*) limiting the time for proceedings to two years is superseded by the provisions of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61); see title PUBLIC AUTHORITIES AND PUBLIC OFFICERS, Vol. XXIII., pp. 339 *et seq.*

(*o*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 29 (6).

(*p*) *Ibid.*, s. 29 (8).

(*q*) Levy of Fines Act, 1822 (3 Geo. 4, c. 46), s. 9; Queen's Remembrancer Act, 1859 (22 & 23 Vict. c. 21), s. 37. As to the sheriff's duties in this respect, see pp. 821, 822. *ante.*

(*r*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 34 (d).

(*s*) See title JURIES, Vol. XVIII., pp. 268 *et seq.*

(*t*) See title EXECUTION, Vol. XIV., pp. 22 *et seq.*

(*u*) See title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 487.

(*v*) See title ELECTIONS, Vol. XII., pp. 260, 261.

(*w*) *Dew v. Parsons* (1819), 2 B. & Ald. 562; *Graham v. Grill* (1814), 2

demand or take, directly or indirectly, any reward for doing his duty or abstaining therefrom, or in respect of the mode in which he executes his office or duty, other than such fees or poundage (a).

If a sheriff's bailiff or officer takes too much in respect of fees, or poundage, an action as on an implied contract lies against the sheriff for the excess without any proof that the money has come to his hands (b), and the action survives against his executors or administrators (c).

A sheriff may not take a bond for his fees, because under colour thereof he might recover more than the fees (d), and a sheriff or under-sheriff is not entitled to refuse to execute process until his fees have been paid (e).

An express promise to pay extra remuneration for the execution of process is void (f).

SECT. 1.
In General.

Extortion.

Security for fees.

Promise to pay extra remuneration.

SECT. 2.—Crown Process.

1455. A sheriff is entitled, in respect of all sums due to the Crown collected by him under process of any court, to an allowance in his

Poundage in respect of Crown debts.

M. & S. 294; *R. v. Jones* (1814), 1 Price, 205 (writ of extent; sheriff selling under writ of *venditioni exponas* not entitled to deduct anything for extra expenses beyond the poundage allowed by statute); *Gill v. Jose* (1856), 6 E. & B. 718 (no more mileage than allowed by the table of fees, though proved to be customary in the particular county to take more); *Halliwell v. Heywood* (1862), 10 W. R. 780 (charge for second man in possession under writ of *fi. fa.* held extortion); *Davies v. Edmonds* (1843), 12 M. & W. 31 (not entitled on execution of writ of *fi. fa.* to extra expense incurred by keeping two men in possession for protection of the property by reason of an adverse claim, such expense not being included in the statutory table of fees); *Slater v. Hames* (1841), 7 M. & W. 413; *R. (in aid of Parsons) v. Ferday* (1817), 4 Price, 131 (extraordinary trouble in keeping goods seized under writ of extent); *E. v. Crackenthorp* (1794), 2 Anst. 412 (auctioneer's charge of 5 per cent. for selling malt seized under a writ of extent in addition to poundage disallowed); *E. v. Palmer* (1802), 2 East, 411 (no poundage on sums levied under a writ of attachment); *Brathwaite v. Marriott* (1862), 1 H. & C. 591; *Re Woodham, Ex parte Conder* (1887), 20 Q. B. D. 40 (expenses of reaping growing crops disallowed). As to the right of a coroner to fees when acting for a sheriff, see title CORONERS, Vol. VIII., p. 249.

(a) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 20 (3). The fees and emoluments of the office of the sheriffs of the City of London (see p. 796, *ante*) are retained by the Corporation, and it is the duty of the Secondary to account for all fees in respect of the execution of process to the Chamberlain at the end of every three months (Parliamentary Reports, City and County of London Amalgamation, Vol. II., 1894 [C 7493], Appendix iii., 21, 55). The sheriff of a county of a city or town (see p. 796, *ante*) may receive the accustomed fees and remuneration out of the borough fund or other accustomed fund (Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 36 (3)).

(b) *Jons v. Perchard* (1796), 2 Esp. 507; *Blake v. Newburn* (1848), 5 Dow. & L. 601; *Dew v. Parsons* (1819), 2 B. & Ald. 562. As to the liability of a sheriff or his officers to punishment for extortion, see pp. 830, 831, *ante*.

(c) *Gloucestershire Banking Co. v. Edwards* (1887), 20 Q. B. D. 107, C. A.

(d) *Lyster v. Bromley* (1832), Cro. Car. 286.

(e) *Hescott's Case* (1694), 1 Salk. 330. If he does he is liable to an action for not doing his duty, or, if the fees are paid, to punishment for extortion (*ibid.*); see pp. 830, 831, *ante*.

(f) *Bridge v. Cage* (1605), Cro. Jac. 103.

SECT. 2.

Crown
Process.

Extent in
different
counties for
same debt.

accounts of 1s. 6d. in the pound for every sum not exceeding £100, and 1s. for every pound exceeding the first £100 (*g*).

Where there are two or more writs of extent issued in different counties for the same debt, and the money is completely levied under one of the writs, the sheriff who completed the levy is entitled to the whole of the poundage (*h*). But if, in such a case, the debt is paid directly to the officers of the Crown, and not to either of the sheriffs, the poundage is apportioned between the sheriffs, even though the debt was paid under compulsion of a levy under only one of the writs (*i*).

Apportion-
ment where
sheriff dies
or is super-
seded.

Where a sheriff seizes any personal estate for a sum due to the Crown and dies or is superseded before he has sold it, and his successor sells it, the poundage due in respect of the seizure and sale is apportionable between the sheriffs in such manner as a judge of the High Court determines, having regard to the expense and trouble of each of the sheriffs (*h*).

No right
to levy
poundage on
extent for
simple
contract debt.

1456. A sheriff has no right to levy poundage or incidental expenses under a writ of extent on a simple contract debt, nor has he a right to receive any poundage or expenses under a compromise in consideration of a stay of the proceedings made under the duress of a seizure (*l*). In such a case the Crown alone is liable for payment of the sheriff's poundage, and, if it is paid by the debtor, the sheriff will be ordered to repay it (*m*).

(*g*) *Sheriffs Act, 1887* (50 & 51 Vict. c. 55), s. 20 (1). In *R. v. Villers* (1820), 8 Price, 587, it was held that a sheriff was not entitled under the *Estreats Act, 1716* (3 Geo. 1, c. 15), s. 16 (now repealed), to poundage on money seized in the debtor's possession, nor in respect of money paid by the sureties of a Crown debtor arrested on Crown process, in order to obtain his release, nor in respect of debts due to the Crown debtor received by him, because he had no authority under the writ of extent to collect such debts; but the language of the *Sheriffs Act, 1887* (50 & 51 Vict. c. 55), is different, and probably gives the sheriff the right to poundage in such cases.

(*h*) *R. v. Caldwell* (1793), 1 Anst. 279; *R. v. Barber* (1796), 3 Anst. 717. Where there were two writs of extent against A., and a writ of extent in aid against B. in another county, and B. paid the whole debt, giving notice to the sheriff to retain the money until the legality of the extent in aid had been tried, and subsequently A. by arrangement paid part of the amount to B., it was held that the sheriffs who took the inquisitions against A. were not entitled to any share of the poundage (*R. v. Bowles* (1810), 1 Wight. 116).

(*i*) *R. v. Fry* (1793), 3 Anst. 718, n.

(*k*) *Sheriffs Act, 1887* (50 & 51 Vict. c. 55), s. 20 (4).

(*l*) *R. in aid of Oldacre v. Tidmarsh* (1817), 5 Price, 189.

(*m*) *R. v. Frome* (1815), 2 Price, 58 (writ of extent against acceptors of bills of exchange in favour of the Crown, the drawers of which, after the execution of the process, took up and paid them; the sheriff, having retained poundage, was ordered to repay it to the assignees of the bankrupt acceptor's estate). The rule that the sheriff is not entitled to levy poundage in such cases seems to be founded on the principle that the Crown does not, generally speaking, receive or pay costs. In cases—as for instance in suits on bonds or specialties (see stat. (1541—42) 33 Hen. 8, c. 39, s. 36)—where the Crown has a statutory right to recover costs, poundage for which the Crown is liable to the sheriff may be levied as an item of such costs (*R. v. Collingridge* (1816), 3 Price, 280).

SECT. 3.—*Proceedings other than Crown Process.*SUB-SECT. 1.—*In General.*

1457. A sheriff or sheriff's officer concerned in the execution of process directed to the sheriff, other than process for the recovery of sums due to the Crown, may demand and take such fees and poundage as may from time to time be fixed by order of the Lord Chancellor with the consent of the judges of the Court of Appeal and High Court, or any three of them, and with the concurrence of the Treasury (n), and, until they may be altered by any such order, any fees and poundage authorised by or in pursuance of any enactment repealed by the Sheriffs Act, 1887 (o).

SECT. 3.
Proceedings
other than
Crown
ProcessFees and
poundage
fixed by
order.

1458. The amount of the poundage, fees, and expenses of the execution may in all cases be levied over and above the sum recovered (p). This rule applies although the judgment creditor may not be entitled to the costs of the action in which the judgment was obtained (q). The amount of the authorised fees may be levied though they are not indorsed on the writ, and it is not necessary that the sheriff should particularise the respective items in his return to the writ (r). But if, after seizure, the judgment creditor becomes disentitled to recover the amount of the debt, the sheriff is not entitled, at all events without the creditor's instructions, to sell any portion of the goods seized for the purpose of paying his fees and expenses (s).

Fees,
poundage
and expenses
may be levied
in addition to
debt.SUB-SECT. 2 —*Poundage.*

1459. In respect of process otherwise than at the instance of the Crown, poundage (a) at the rate of 1s. in the pound, where the sum does not exceed £100, and where it exceeds that sum, 1s. in the pound for the first £100, and 6d. in the pound on the amount in excess of £100, may be demanded and taken in respect of any sum levied by

Rate of
poundage.

(n) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 20 (2). The only fees fixed under this provision have reference to the execution of writs of *fi. fa.*; see p. 836, *post*.

(o) 50 & 51 Vict. c. 55, s. 39 (4), (5). For tables of fees still in force, see note (n), p. 837, *post*. As to special bailiffs, see title EXECUTION, Vol. XIV., p. 32, note (h).

(p) R. S. C., Ord. 42, r. 15. See, further, title EXECUTION, Vol. XIV., pp. 32 *et seq.*

(q) *Armistage v. Jessop* (1866), L. R. 2 C. P. 12 (plaintiff not entitled to costs, because he recovered less than a certain amount in an action which might have been brought in the county court).

(r) *Curtis v. Mayne* (1842), 2 Dowl. (N. S.) 37.

(s) *Sneary v. Abdy* (1876), 1 Ex. D. 299, C. A. (sheriff held liable to the execution debtor as for an unlawful sale); see *Goode v. Langley* (1827), 7 B. & C. 26 (a gig which had been sold by A. to B., and was seized under a writ of *fi. fa.* against A., was delivered to B. with the assent of the judgment creditor, it was subsequently seized again by the sheriff's officer to secure his poundage. Held, that the sheriff was liable to B. in trover whether the property in the gig had passed to B. at the time of the original seizure or not, the sheriff, having parted with the possession, having no right to make a second seizure to satisfy his own charges).

(a) As to the circumstances in which the sheriff is entitled to poundage, and the sum on which it is payable, see title EXECUTION, Vol. XIV., pp. 33 *et seq.*

SECT. 3.
Proceedings
other than
Crown
Process.

Writ of
attachment.

execution on the lands, goods or chattels of any person, or for which the body of any person is taken in execution (*b*), and, in the case of a writ of *elegit* (*c*) or writ of possession, the same rate of poundage on the annual value of the property seized (*d*).

1460. A sheriff is not entitled to poundage on a sum levied under a writ of attachment for non-payment of money (*e*).

SUB-SECT. 3.—*Writ of Fieri Facias.*

Fees on
execution of
feri facias.

1461. The fees, other than poundage (*f*), to which a sheriff is entitled in respect of the execution of a writ of *feri facias*, are fixed by a statutory order and table dated the 3rd August, 1888 (*g*).

(*b*) Stat. (1587) 29 Eliz. c. 4, s. 1; Estreats Act, 1716 (3 Geo. 1, c. 15), s. 3. The right to poundage under these statutes is not affected by stat. (1837) 7 Will. 4 & 1 Vict. c. 55, s. 2 (now repealed), or the table of fees (as to which see note (*n*), p. 837, *post*) made under it (*Davies v. Griffiths* (1838), 4 M. & W. 377; *Pilkington v. Cooke* (1847), 16 M. & W. 615; *Wrightup v. Greenacre* (1847), 10 Q. B. 1), or by the order made under the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), as to fees for the execution of writs of *fi. fa.* (see note (*g*), *infra*). The right to poundage under the statute of Elizabeth extends to the sheriff of a county of a city or county of a town (see p. 796, *ante*) executing the process of a superior court, but not to such a sheriff executing the process of an inferior court (*Lyster v. Bromley* (1632), Cro. Car. 286).

(*c*) As to when poundage is payable under a writ of *elegit*, see title EXECUTION, Vol. XIV., p. 35.

(*d*) Estreats Act, 1716 (3 Geo. 1, c. 15), s. 16; *Nash v. Allen* (1843), 4 Q. B. 784.

(*e*) *R. v. Palmer* (1802), 2 East, 411; *R. v. Devon (Sheriff)* (1834), 3 Dowl. 10.

(*f*) As to poundage, see the text, *supra*; and, as to the sheriff's right to fees and possession money, see title EXECUTION, Vol. XIV., pp. 35 *et seq.*

(*g*) Stat. R. & O. Rev., Vol. XI., Sheriff, England, p. 1, made in pursuance of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 20 (2); see p. 835, *ante*. The table is as follows:—

	£	s.	d.
1. For expenses incurred by the sheriff's officer in making inquiries as to the goods of an execution debtor, and as to claims for rent and other claims on the goods, the actual expenses not exceeding under any circumstances	1	1	0
2. For seizure by the sheriff's officer; for each building or place separately rated at which a seizure is made	1	1	0
3. For mileage: to include the mileage of the bailiff or the man in possession, per mile from the sheriff's officer's residence	0	1	0
4. For man in possession, per day	0	5	0
To provide his own board in every case.			
5. For removal of goods or animals to a place of safe keeping, when necessary, the actual cost.			
6. When goods or animals are removed, for warehousing and taking charge of the same (including feeding of animals) 2½ per cent. of the value of the goods or animals removed, or the sum indorsed on the writ of execution, whichever is the less. No fees for keeping possession of the goods or animals to be charged after the goods or animals have been removed.			
7. For the inventory and valuation, cataloguing, lotting, and preparing for sale, when no sale takes place by reason of the execution being withdrawn, satisfied, or stopped, 2½ per cent. on the value of the goods.			
8. For advertising and giving publicity to the sale by auction, the sum actually and necessarily paid.			

1462. The fees numbered 1, 2 and 3 in the table are payable by the execution creditor, and are not recoverable by him although the execution proves abortive (*h*). The fees numbered 2—6 and 8—11 are to be levied in every case in which the execution is completed by sale as fees payable to sheriffs were levied before the making of the order. Where the execution is withdrawn, satisfied or stopped, the fees are payable by the person issuing the execution, or the person at whose instance the sale is stopped, as the case may be, and the amount of any costs and charges payable under the scale are to be taxed by a master of the Supreme Court or district registrar of the High Court, in case the sheriff and the party liable to pay such costs and charges differ as to the amount thereof (*h*). There is no appeal from a master or district registrar as to the amount of costs and charges so payable (*i*), unless the question involved is one of principle, and not merely of amount (*k*).

The fee numbered 7 in the table, for the inventory and valuation, cataloguing, lotting, and preparing for sale, where no sale takes place, is not payable in the case of the seizure of a ship (*l*).

SUB-SECT. 4.—*Other Civil Process, Inquisitions, and Jury Process.*

1463. Fees in respect of execution on civil process, writs of trial and inquiry, inquisitions on writs of *elegit* and on compulsory acquisition of land, and jury process, except so far as they are superseded by the order as to writs of *fiery facias* already referred to (*m*), depend upon various statutory rules made from time to time (*n*).

SECT. 3.
Proceedings
other than
Crown
Process.

By whom
fees payable.

Fees for
civil process
other than
writs of
fiery facias.

9. For commission to the auctioneer on a sale by auction, 7½ per cent. on the sum realised, not exceeding £100, 5 per cent. on the next £200, 4 per cent. on the next £200; and, on any sum exceeding in all £500, 3 per cent. up to £1,000, and 2½ per cent. on any sum exceeding £1,000.
10. For any sale by private contract, half the percentage allowed on a sale by auction.
11. Poundage and the fee for delivery of the writ to the under-sheriff to be the same as before the making of this order.

(*h*) These provisions are contained in the order fixing the table of fees. The execution creditor is liable to the sheriff for the fees where the sheriff withdraws pursuant to an order of the court; see *Montague v. Davies, Benachi & Co.*, [1911] 2 K. B. 595. The sheriff may be allowed the costs of taxation; see *Buller v. Smith* (1895), 39 Sol. Jo. 406.

(*i*) *Townend v. Yorkshire Sheriff* (1890), 24 Q. B. D. 621.

(*k*) *Re Beeston*, [1899] 1 Q. B. 626, C. A.

(*l*) *Cohen v. De las Rivas, Ex parte Durham (Sheriff)* (1891), 64 L. T. 661. In such a case only poundage and such of the other fees as may be payable can be charged.

(*m*) See p. 836, *ante*.

(*n*) Under stat. (1837) 7 Will. 4 & 1 Vict. c. 55. These tables of fees have no application to process at the suit of the Crown, as to which see pp. 833, 834, *ante*. They are as follows (omitting the fees in replevin and certain other fees as obsolete):—

For every Warrant which shall be granted by the Sheriff to his Officers upon any Writ or Process.

	£	s.	d.
In London and Middlesex	0	2	6
In all other counties, where the most distant part of the county does not exceed 100 miles from London	0	5	0
Not exceeding 200 miles	0	6	0

SECT. 3.

		£	s.	d.
Proceedings other than Crown Process.	Exceeding 200 miles	0	7	0
	For an arrest in London	0	10	6
	In Middlesex, not exceeding a mile from the General Post Office	0	10	6
	Not exceeding seven miles from the same place	1	1	0
	In other counties, not exceeding a mile from the officer's residence	0	10	6
	Not exceeding seven miles	1	1	0
	Exceeding seven miles	1	11	6
	For conveying the defendant to gaol from the place of arrest, per mile	0	1	0
	For undertaking to give a bail bond	0	10	6
	<i>For a Bail Bond.</i>			
	If the debt does not exceed £50	0	10	6
	" " " £100	1	1	0
	" " " £150	1	11	6
	" " " £300	2	2	0
	" " " £400	3	3	0
	" " " £500	4	4	0
	If it exceeds £500	5	5	0
	For receiving money under the statute upon deposit for arrest, and paying the same into court, if in London or Middlesex	0	6	8
	If in any other county	0	10	0
	<i>For Filing the Bail Bond.</i>			
	If the arrest be made in London or Middlesex	0	2	0
	If in any other county	0	10	0
	<i>Assignment of Bail or other Bond.</i>			
	If in London or Middlesex	0	5	0
	If in any other county (including postage)	0	7	6
	For the return to any writ of <i>habeas corpus</i> , if one action	0	12	0
	And for each action after the first	0	2	6
	For the bailiff to conduct prisoners to gaol, per diem	0	10	6
	And travelling expenses per mile	0	1	0
	For searching offices for detainer	0	1	0
	Bailiff's messenger for that purpose	0	2	6
	To the bailiffs for executing warrants on <i>ne exeat</i> , attachment, <i>elegit</i> , writ of possession, forfeited recognisance, and other like matters, for each, if the distance from the sheriff's office or the bailiff's residence do not exceed five miles	1	1	0
	If beyond that distance, per mile	0	0	6
	On <i>distringas</i> in London	0	5	0
	In Middlesex, not exceeding five miles from the General Post Office	0	5	0
	Exceeding five miles	0	10	0
	In other counties, not exceeding five miles from the officer's residence	0	5	0
	Exceeding five miles	0	10	0
	For each man left in possession, when absolutely necessary :—			
	If boarded, per diem	0	3	6
	If not boarded, per diem	0	5	0
	For every sale by auction, notwithstanding the defendant should become bankrupt or insolvent, where the property sold does not produce more than £300, 5 per cent. ; £400, 4 per cent. ; £500, 3 per cent. ; and, when it exceeds £500, 2½ per cent.	0	2	6
	Bond of indemnity besides stamp	1	10	0
	Certificate of execution having issued for record	0	5	0
	<i>On Writs of Trial and Inquiry.</i>			
	For a deputation	1	1	0
	On lodging writ for entering cause and warrant for summoning jury, which fee shall be forfeited in case of countermand of trial	0	4	0

<i>On Trial or Inquisition.</i>			SECT. 3. Proceedings other than Crown Process.
	£	s. d.	
Sheriff, for presiding	1	1 0	
Bailiff, for summoning jury and attendance in court.	0	4 0	
And if not held at the office of the under-sheriff :—			
For hire of room if actually paid, not exceeding	0	10 0	
For travelling expenses of under-sheriff from his office to place where trial or inquisition held, per mile	0	1 0	
To the bailiff from his residence, per mile	0	0 6	
(In all cases where it shall appear to the master that a saving of expense has accrued to the parties by reason of writ of trial having been executed by deputation, the fee for such depu- tation shall be allowed).			

<i>On Writs of Elegit and Others of Like Nature.</i>		
For summoning jury, use of room, presiding at the inquisition etc.	2	2 0
Jury	0	12 0
For travelling expenses of under-sheriff from his office to place of inquisition, per mile	0	1 0
For drawing and engrossing the inquisition, per folio	0	1 6
For summons for the attendance of a witness	0	5 0
For any <i>supersedeas</i> , writ of error, order, <i>liberate</i> , or discharge to any writ or process, or for the release of any defendant in custody (unless in the prison of the county) or of any goods taken in execution	0	4 6
For the return of any writ or process, and filing same, exclusive of the fee paid on filing	0	1 0
For any duty not provided for, such sum as one of the masters of the [Supreme Court] may upon special application allow.		

Jury Process.(See *Bennett v. Thompson* (1856), 6 E. & B. 683.)

For return to common <i>venire</i>	0	3 6
The like to special	0	5 0
The like on <i>distringas</i> or <i>habeas corpus</i> for common jury	0	12 0
The like for special jury.	0	14 0
The like with a view	1	0 0
The like to traverse <i>venire</i>	0	14 6
For attendance naming special jury	2	2 0
Twenty-four warrants to summon special jury	1	4 0
For bailiff, for summoning each special juror	0	2 0

(No extra expenses is allowed for summoning special jurors
on account of their residing at a distance from each other
(*Lane v. Sewell* (1819), 1 Chit. 175).)

Sheriff attending in court	1	1 0
For any duty not provided for, such sum as one of the masters of the [Supreme Court] may upon special application allow.		

The following additional fees were prescribed by Regula Generalis,
Trinity Term, 1864 :—

	£	s. d.
Sheriff, for attending in court on the trial of every common law jury cause or issue, from the party who entered the same for trial, the sum of	0	10 6
For attending the court on the trial of every cause or issue tried by a special jury, summoned by precept under s. 108 of the Common Law Procedure Act, 1852, from the party at whose instance the same was so tried, the sum of	1	1 0

The following fees were prescribed by Regula Generalis, Hilary Term,
1853, and by the Crown Office Rules, 1886, r. 159, and Appendix (Stat.
R. & O. Rev., Vol. XII., pp. 440, 542):—*Fees for View.*

For travelling expenses to under-sheriff, shewers, and jurymen, reasonable expenses actually paid.		
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SECT. 3.

Proceedings
other than
Crown
Process.Right to sue
creditor
for fees.SUB-SECT. 5.—*Action for Fees.*

1464. If a sheriff is unable, without any default on his part, to levy his fees against the execution debtor, he has a right of action for them against the execution creditor by or on whose behalf he is requested to execute the writ (*o*); but the sheriff is not entitled to recover fees from the execution creditor where he has done nothing of any benefit in pursuance of the writ, as, for instance, in respect of a levy which is ineffectual because the goods seized do not belong to the execution debtor (*p*).

	£	s.	d.
Fee to under-sheriff, where the distance does not exceed five miles from his office	1	1	0
Where such distance exceeds five miles	2	2	0
And in case he is necessarily absent more than one day, then, for each day after the first, a further fee of	1	1	0
Fee to each of the shewers—the same as the under-sheriff, calculating the distance from their respective places of abode.			
Fee to each common juryman, per diem	0	5	0
" special	1	1	0
Allowance for refreshment to under-sheriff, shewers, and jury-men, whether common or special, each, per diem	0	5	0
To the bailiff, for summoning each juryman whose residence is not more than five miles distant from the office of the under-sheriff	0	2	6
And for each whose residence does exceed five miles of such distance	0	5	0

The following fees in respect of inquiries under the Lands Clauses Acts were fixed by an order dated 2nd August, 1900 (Stat. R & O. Rev., Vol. XI., Sheriff, England, p. 3):—

	£	s.	d.
1. Notice of nominating special jury	0	5	0
2. Notice of holding inquiry	0	5	0
3. Nominating jury	2	2	0
4. Notices of reducing	0	5	0
5. Reducing	1	1	0
6. Twenty-four warrants to summon special jury	1	4	0
7. Summoning officer, 2s. each	2	8	0
8. Attending, engaging room, and afterwards attending arranging room	0	5	0
9. For hire of room—reasonable amount actually paid.			
10. { Presiding in court and { three hours	5	5	0
{ Preparing inquisition { all day	10	10	0
11. Attending filing inquisition	0	13	4
12. Incidental expenses	1	1	0
13. Clerk	2	2	0
14. Ushers	0	10	0
15. Copy warrant	0	5	0
16. Subpœna for three names	0	5	0
17. Under-sheriff's view (if required)	1	1	0
18. Travelling allowance for under-sheriff and clerk—reasonable expenses actually incurred.			

Note.—Common jury same as special jury.

(*o*) Com. Dig., tit. Viscount (F. 2.); *Stanton v. Suliard* (1599), Cro. Eliz. 654; *Bunbury v. Matthews* (1844), 1 Car. & Kir. 380; *Marshall v. Hicks* (1847), 10 Q. B. 15; *Maybery v. Mansfield* (1846), 9 Q. B. 754; *Bawstorne v. Wilkinson* (1815), 4 M. & S. 256. In an action by a sheriff for poundage, proof that he has acted as sheriff is sufficient evidence of his being so without any further proof of his appointment (*Bunbury v. Matthews, supra*).

(*p*) *Cole v. Terry* (1861), 5 L. T. 347 (levy ineffectual by reason of claim

Part VI.—Expiration of Office.

PART VI. Expiration of Office.

1465. It is the duty of every sheriff, at the expiration of his term of office, to deliver to the incoming sheriff a correct list and account under his hand of all prisoners in his custody and of all rolls and writs in his hands not wholly executed by him, with all such particulars as are necessary to explain to the incoming sheriff the several matters intended to be transferred to him, and to turn over and transfer to the incoming sheriff all such prisoners, rolls and writs, and all records, books and matters appertaining to the office of sheriff (*q*).

Duty to deliver writs and account to incoming sheriff.

The incoming sheriff must thereupon sign and give to the outgoing sheriff a duplicate of the list and account, which operates as a sufficient discharge of and from all the prisoners therein mentioned and the execution of the writs and other matters therein contained, and the incoming sheriff then stands charged with the prisoners and with the execution and care of the rolls, writs and other matters contained in the list and account (*r*).

Discharge of outgoing sheriff.

A sheriff cannot be called upon to make a return of any writ after the expiration of six months from the date at which he ceased to hold office (*s*).

Part VII.—Accounts.

1466. Every sheriff (*t*) must, within two months after the expiration of his office, or, in the case of the death of any sheriff, the under-sheriff appointed by him must, within two months after his death (*a*), transmit to the Treasury a just and true account with particulars of all sums received by the sheriff for the use of the Crown and of all sums paid or claimed by him or on his behalf (*b*),

Duty to render account to Treasury.

of assignee); *Newman v. Merriman* (1872), 26 L. T. 397 (goods of stranger seized); *Bilke v. Hawclock* (1813), 3 Camp. 374; *Lane v. Sewell* (1819), 1 Chit. 175. As to the liability of the solicitor of a creditor for fees and the cases in which the bailiff may sue for fees, see title EXECUTION, Vol. XIV., pp. 36, 37.

(*q*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 28 (1). A sheriff is not liable to an attachment for not returning a writ which has not been transferred to him by his predecessor (*Thomas v. Newnam* (1842), 2 Dowl. (N. S.) 33).

(*r*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 28 (2).

(*s*) *Ibid.*, s. 28 (3); *R. v. Jones* (1787), 2 Term Rep. 1; compare *Walker v. Davis* (1858), 3 H. & N. 374.

(*t*) Including the sheriff of a county of a city or county of a town (Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 36 (4)). It is the duty of the Secondary of the City of London to attend before the King's Remembrancer on the 31st October to render the accounts of the sheriffs of the City (see p. 796, *ante*), and give such assistance as may be necessary for passing the same (Parliamentary Reports, City and County of London Amalgamation, Vol. II., 1894 [C 7493], Appendix iii., 54).

(*a*) The under-sheriff is not personally liable in respect of any sum received by the deceased sheriff, the representatives of the deceased being answerable (Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 21 (2) (*b*)).

(*b*) Including all such sums as have been usually inserted in the bill of

PART VII.
Accounts.

and of the names and residences of all persons incurring fines, issues, amerciaments, forfeited recognisances or sums of money which he has been authorised to levy by virtue of any writ issued to him or his predecessor in office, and, if they have not been levied, the causes of their not having been levied; and the Treasury may grant a warrant for the allowance of the sums so paid or claimed in the account, or for the payment of such sum in respect thereof as is thought reasonable (c).

Audit.

1467. All accounts so transmitted must be examined and audited in such manner as the Treasury by warrant directs, and the Treasury may by warrant make such provisions as to the transmission, examination, verification, and audit of such accounts, and for ascertaining the balances due from and the discharge of the persons accounting as it thinks proper (d).

Oath verifying account.

If under any such warrant it is necessary for a sheriff or under-sheriff to take any oath to any account or matter relating thereto, the oath, unless the Treasury requires his personal examination before the auditor, may be sworn before any judge of the High Court or master of the Supreme Court or any commissioner for oaths or justice of the peace (e).

Default in rendering accounts.

1468. A sheriff or under-sheriff who neglects duly to render his accounts is liable to imprisonment as for contempt of court, but only by a warrant naming him and specifying his offence and issued by a judge of the High Court (f).

Hindering passing of accounts.

1469. Any officer, clerk, or other person concerned in the passing of the accounts who, by his wilful act or default, hinders any sheriff in passing his accounts or obtaining his *quietus*, is liable to make such satisfaction to the party aggrieved as may be ordered by the High Court or a judge thereof on complaint made in such summary manner as the court may order (g).

cravings. The allowances include all expenses properly incurred in receiving the judges of assize and election petition judges, and providing them with necessary accommodation, and, in the case of election petition judges, with a proper court (see Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), s. 28), and the costs incurred in summoning jurors by post under the provisions of the Juries Act, 1862 (25 & 26 Vict. c. 107) (see *ibid.*, s. 13). The sheriff does not now render any bill of cravings.

(c) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 21 (1).

(d) *Ibid.*, s. 22 (1). Every such warrant must be laid before both Houses of Parliament within fourteen days after the making thereof if Parliament is then sitting, or, if not, within fourteen days after the next meeting of Parliament (*ibid.*, s. 22 (2)).

(e) *Ibid.*, s. 22 (3).

(f) *Ibid.*, s. 21 (2) (a).

(g) *Ibid.*, s. 22 (4).

SHIFTING USE.

See PERPETUITIES; REAL PROPERTY AND CHATTELS REAL;
SETTLEMENTS; WILLS.

SHIP-BREAKER.

See SHIPPING AND NAVIGATION; TRADE AND TRADE UNIONS.

SHIP-BROKER.

See SHIPPING AND NAVIGATION.

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